National Native Title Tribunal

Registration test decision

Application name	Gkuthaarn and Kukatji People
Name of applicant	Marlene Logan, Francine George, James Logan, Phillip George, Richie Bee and Cathy Snow
State/territory/region	Queensland
NNTT file no.	QC2012/019
Federal Court of Australia file no.	QUD685/2012
Date application made	26 November 2012

Name of delegate Lisa Jowett

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

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

Date of decision: 22 March 2013

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Lisa Jowett

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 Gkuthaarn and Kukatji People claimant 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.

Registration test

The Registrar of the Federal Court of Australia (the Court) gave a copy of the Gkuthaarn and Kukatj People claimant application to the Native Title Registrar (the Registrar) on 29 November 2012 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 26 November 2012 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.

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 satisfies all of the conditions in ss. 190B and 190C. A summary of the result for each condition is provided at Attachment A.

Application overview

The area of this application covers land and waters on the Gulf of Carpentaria between the towns of Normanton and Burketown and is bounded by the Leichhardt River to the west and the Norman River to the east.

The Gkuthaarn and Kukatj People have made previous native title claims in the area, all of which have been either been withdrawn or discontinued.

On 17 December 2012, I provided the applicant with a preliminary assessment of the application which identified areas where the application may fail to meet certain conditions of the registration test. I extended to the applicant the opportunity to submit additional information or material in support of the application by 24 December 2012. Two requests were made by the applicant to extend the timeframe in which to provide any additional information. An extension of time was granted to 15 February 2013.

Information considered when making the decision

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

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

In response to my provision of the preliminary assessment, on 15 February 2013 the applicant provided submissions and additional material, including a confidential report, relevant to certain conditions of the registration test. Attachment B of these reasons lists all of the information and documents that I have considered in reaching my decision, including the detail of this additional 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' (see s. 136A of the Act). Further, mediation is private as between the parties and is also generally confidential (see also ss. 136E and 136F).

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.

In my view, the State of Queensland (the state government) is a person to whom procedural fairness is owed if it appears that the application may be accepted for registration—see *Western Australia v Native Title Registrar and Belotti* (1999) 95 FCR 93; [1999] FCA 1591 (*WA v Registrar*) at [29], [31] to [38]. The state government's right to procedural fairness is also supported by provisions of the Act, particularly s. 190A(3)(c), which requires the Registrar to have regard to information supplied by the state/territory government to the extent it is reasonably practicable to do so.

On 30 November 2012, the state government was informed of the proposed registration decision timeframe and provided an opportunity to make a submission in relation to the registration of

the claim. The state government did not make any submissions or comment in relation to the application.

On 28 February 2013, the state government confirmed via email that it did not require to view the additional material submitted by the applicant and did not intend to make any submissions in relation to the registration testing of the application. The material was therefore not provided to the state government.

As such no further steps were required to be followed.

Procedural and other conditions: s. 190C

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

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

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

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

It is also my view that I need only consider those parts of ss. 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s. 190C(2)). I therefore do not consider the requirements of s. 61(2), as it imposes no obligations of this nature in relation to the application. I am also of the view that I do not need to consider the requirements of s. 61(5). The matters in 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.

Below I address 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).

The nature of the task at s. 190C(2) is limited to a consideration of whether the application sets out the native title claim group in the terms required by s. 61(1) and as such, the task does not require me to look beyond the contents of the application itself. In assessing the Gkuthaarn and

Kukatj application and whether it contains the details and information required by s. 61(1), I am not entitled to undertake a merit assessment to determine if I am satisfied whether the native title claim group described in the application before me is the correct native title claim group. That said, in seeking to verify that an application contains all the details and information required by ss. 61 and 62, I do ensure that a claim 'on its face, is brought on behalf of all members of the native title claim group' as that term is defined in s. 61(1)—*Doepel* at [35] to [37], [39] and [47].

Part A of the application contains the information regarding persons authorised to make this application, listing the names of the applicants, and providing details regarding their authorisation by the native title claim group. Schedule A of the application contains a description of the native title claim group as comprising the descendents of 10 persons (the named apical ancestors).

There is nothing on the face of the application that leads me to conclude that the description of the native title claim group may exclude any persons from the group. The description does not otherwise indicate that this may be a subgroup of the native title claim group.

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).

Part B of the application states on page 11 the name and address for service of the persons who are the applicant.

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).

Schedule A provides a description of the persons in the group.

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 affidavits from each of the six persons who comprise the applicant. The affidavits are signed by each deponent and witnessed and, in my view, make all the statements required of this section.

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).

Attachment B to the application contains a description of the external boundaries of the area covered by the application. Schedule B contains a description of those areas not covered by the area of the application.

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).

Attachment C to the application is a map showing the boundary of the area covered by 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 provides the statement that no additional searches have been carried out by the applicant in relation to the area covered by the application.

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).

A description of the native title rights and interests claimed in relation to the area covered by the application is contained in Schedule E. This description (included as an excerpt within my reasoning at s. 190B(4)) consists of more than a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that may not have been extinguished, at law.

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

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

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

Schedule F of the application contains information comprising a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and addresses the criteria set out in subsections 62(2)(e)(i) to (iii). The schedule refers to Attachment F which provides further information and the application includes statements made in affidavit form by some members of the native title claim group which pertain to the factual basis of the claim.

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).

Schedule G lists the activities the claim group currently carries out in relation to the area covered by the application.

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

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

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

Schedule H provides the statement that no other applications cover the area of this application and lists previous now discontinued applications made by Gkuthaarn and Kukatj people.

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 provides the statement that the applicant is not aware of any such notices.

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

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

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

Schedule I sets out the details of the relevant notice of which the applicant is aware.

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).

The requirement that the Registrar be satisfied in the terms set out in s. 190C(3) is only triggered if all of the conditions found in ss. 190C(3)(a), (b) and (c) are satisfied—see *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*)—at [9]. Section 190C(3) relates to ensuring there are no common native title claim group members between the application currently being considered for registration ('the current application') and any overlapping 'previous application'.

The Tribunal's Geospatial Services conducted a geospatial assessment and overlap analysis of the area covered by the application on 4 December 2012 (the geospatial report) which identifies that no native title determination applications fall within the external boundaries of the current application. I conducted by own overlap analysis as of the date of this decision which confirms that this situation remains the same.

As the Gkuthaarn and Kukatj People application is not overlapped by any other applications in the sense discussed in s. 190C(3)(a) to (c), there is no requirement that I consider the issue of common claim group membership.

I am therefore satisfied that the current application meets the requirements of s. 190C(3).

Subsection 190C(4) Authorisation/certification

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

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

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

Section 251B provides that for the purposes of this Act, all the persons in a native title claim group authorise a person or persons to make a native title determination application . . . and to deal with matters arising in relation to it, if:
a) where there is a process of decision–making that, under the traditional laws and customs of the persons in the native title claim group, must be complied with in relation to authorising things of that kind—the persons in the native title claim group . . . authorise the person or persons to make the application and to deal with the matters in accordance with that process; or
b) where there is no such process—the persons in the native title claim group . . . authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision–making agreed to and adopted, by the persons in the native title claim group . . . in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.

Under s. 190C(5), if the application has not been certified as mentioned in s. 190C 4(a), the Registrar cannot be satisfied that the condition in s. 190C(4) has been satisfied unless the application:
(a) includes a statement to the effect that the requirement in s. 190C(4)(b) above has been met, and
(b) briefly sets out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

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

I must be satisfied that the requirements set out in either ss. 190C(4)(a) or (b) are met, in order for the condition of s. 190C(4) to be satisfied. As the application is not certified pursuant to s. 190C(4)(a), it is necessary to consider if the application meets the condition in s. 190C(4)(b): that the applicant is a member of the native title claim group and is authorised by all other persons in the claim group to make the application and deal with matters arising in relation to it.

Additionally, in my consideration of the authorisation condition at s. 190C(4)(b) I must also consider the requirements as set out in s. 190C(5), the terms of which are set out above.

Information considered

In my consideration of the authorisation of the applicant to make the Gkuthaarn and Kukatj People application and to deal with matters arising in relation to it, I have had regard to material contained at Attachment R:

- Affidavit of **[Applicants Legal Representative 1 – name deleted]**, solicitor retained by the applicant, sworn 21 November 2012, including annexures—

- CF1, letter of 12 September 2012 from CLC inviting Gkuthaarn and Kukatj people to meetings on 24 and 26 September 2012 regarding the proposed native title claim and attached notice of meetings; and
- CF2, letter of 15 October 2012CLC inviting Gkuthaarn and Kukatj people to meeting of 8 November 2012 to authorise the filing of a native title claim and attached notice of meeting;

I have also had regard to additional material provided to me by the applicant on 15 February 2013:

- Submissions on behalf of the Applicant in response to the preliminary assessment (17 December 2012) of the application;
- Affidavit of **[Chief Executive Officer – name deleted]**, CEO of CLC, dated 14 February 2013, including annexures—
  - HT1, copy of record of 24 September 2012 meeting notice,
  - HT2, copy of Agenda for 24 September 2012 meeting,
  - HT3, copy of notice sent to Gkuthaarn and Kukatj people for meeting of 8 November 2012
  - HT4, copy of Agenda for 8 November 2012 meeting

The Carpentaria Land Council Aboriginal Corporation (CLCAC) provided administrative and logistical assistance to convene a series of meetings. These were held on 13 August, 24 September and 8 November 2012 for the purposes of discussing a proposed claim and authorising an applicant to make and deal with the application. The application before me provides information in relation to two meetings that were held for the purposes of authorising the applicant to make and deal with the Gkuthaarn and Kukatj application—24 September and 8 November 2012. For the purposes of this condition I consider (and this was confirmed by the applicant in its additional material) that authorisation of the applicant was purported to have occurred at the September meeting, with the November meeting held to authorise the filing of the proposed native title claim and confirm the previous authorisation of the applicant.

The requirements of s. 190C(5)

For the purposes of s. 190C(5)(a), the application must contain a statement to the effect that the requirement set out in paragraph (4)(b) has been met. My consideration is confined to information contained in the application and its attachments which, in my view, provides the relevant information. Schedule R states that each of the persons comprising the applicant is a member of the native title claim group and is authorised by all the other members of the group to make the application and deal with matters arising in relation to it. The grounds for this statement can be found in the affidavit of **[Applicants Legal Representative 1 – name deleted]** and those affidavits made by the persons comprising the applicant for the purposes of s. 62(1)(a).

I am satisfied that the application meets the requirements of s. 190C(5).

How the native title claim group was notified and informed of the authorisation meeting

[Applicants Legal Representative 1 – name deleted] attests in her affidavit that the CLCAC sent a letter to Gkuthaarn and Kukatj persons listed on 'the CLCAC claim group members' database',

enclosing a notice detailing the holding of meetings on 24 and 26 September 2012. Copies of both the letter and notice are annexed to her affidavit. The notice refers to two native title claim group meetings and states the purpose of each. The meeting relevant to the Gkuthaarn and Kukatj people to be held on 24 September 2012:

- calls for attendance by people 'identifying as Gkuthaarn and Kukatj who, according to their traditional laws and customs, hold the common or group rights and interests over the land and waters they regard as belonging to Gkuthaarn and Kukatj People;
- the purpose of the meeting is for Gkuthaarn and Kukatj People to consider, make decisions and provide instruction on the filing of a native title claim over land and waters over which the Gkuthaarn and Kukatj People asserts rights and interests;
- broadly describes the area proposed to be claimed.

The same steps were followed in relation to informing Gkuthaarn and Kukatj people that a meeting was to be held on 8 November 2012. **[Applicants Legal Representative 1 – name deleted]** provides some further detail stating that the notice was published in editions of the North West Star and the Gulf Chronicle during the week of 22 October 2012 and displayed on community noticeboards in Normanton from that week to the day of the meeting. The notice contains the following information:

- it proposes a Gkuthaarn and Kukatj People Native Title Claim Group authorisation meeting;
- invites persons to attend who identify and are indentified by others as Gkuthaarn of Kukatj, describing these persons as the descendents of 10 people (ancestors);
- broadly defines the area proposed to be claimed; and
- includes contact details for further information.

On the basis of my preliminary assessment that information in relation to authorisation of the applicant was not wholly sufficient, the applicant provided the following further information in **[Chief Executive Officer – name deleted]** affidavit in relation to the public notification of these meetings:

- the CLCAC maintains a database of Gkuthaarn and Kukatj people derived from their three earlier native title claims, which, in being refined and kept up to date, provides a comprehensive list of those people who identify as Gkuthaarn and Kukatj—at [3] to [6];
- the Gkuthaarn and Kukatj people were thus widely notified by mail of the three meetings (in August, September and November) held in Normanton—[7];
- notices were displayed on community noticeboards in Normanton (being the population centre for the Gkuthaarn and Kukatj people)—[7]; and
- CLCAC assisted with the distribution of notices throughout the Normanton community and in relation to transport for people to attend the meetings, as well as in the facilitation of the meetings—[8].

The applicant submits that the thoroughness and breadth of the notification process ensured that all Gkuthaarn and Kukatj people were provided with sufficient notice of the purpose and details

of the meetings and allowed for those persons who could not be present to have their views known and represented in their absence—at [36] and [37].

Having regard to the above information, I am satisfied that the September and November 2012 meetings were sufficiently notified to allow every opportunity for members of the Gkuthaarn and Kukatj native title claim group to attend and participate in decisions about the proposed claim and to authorise an applicant to make and deal with an application.

How the meetings were attended and conducted

The affidavits of **[Applicants Legal Representative 1 – name deleted]** and **[Chief Executive Officer – name deleted]** deal with the conduct of the September and November 2012 meetings.

[Applicants Legal Representative 1 – name deleted] did not attend the September meeting but attests to having perused the records of it held by CLCAC and understands that the following resolutions were 'moved, seconded and unanimously carried:

- authorisation of individuals comprising the applicant;
- confirmation that no mandatory traditional decision-making process existed; and
- the process of decision-making in relation to their native title claim agreed to and adopted.

[Applicants Legal Representative 1 – name deleted] provides a copy of the notice of the meeting (Annexure CF1), but makes no comment in her affidavit in relation to the representativeness of the claim group at that meeting. **[Chief Executive Officer – name deleted]** affidavit assists regarding these matters:

- it is her experience and her direction that meetings convened by the CLCAC such as this one, do not start until there is proper and sufficient attendance—at [12];
- resolution 01 was unanimously carried confirming that the people attending were sufficiently representative of the Gkuthaarn and Kukatj people and were able to make decisions, that persons unable to attend had been consulted and were represented at the meeting, that sufficient notice was given to people to make authoritative decisions—at [14];
- although **[Applicants Legal Representative 1 – name deleted]** did not include resolution 01 in her affidavit, the resolutions 03 and 05 that were included were also moved, seconded and carried unanimously by the meeting attendees—at [16]; and
- that together these resolutions 'reflect the authoritative and representative nature of the decisions made and the decision-making process used to authorise the Applicant at that meeting—at [16].

[Applicants Legal Representative 1 – name deleted] sets out in her affidavit the decision-making process resolved to be employed in relation to important native title decisions (resolution 03) and that Marlene Logan, Francine George, James Logan, Phillip George, Richie Bee and Cathy Snow were authorised to be the applicant for the claim (resolution 05)—at [7]. Although it is not specifically stated in any of the material before, in my view, it is possible to infer that the applicant was authorised in accordance with this agreed and adopted process as it is defined in

resolution 03 in **[Applicants Legal Representative 1 – name deleted]** affidavit and set out in the s. 62(1)(a) affidavits.

[Applicants Legal Representative 1 – name deleted] did attend the meeting of 8 November 2012 and states that the meeting was well attended and that claim group members confirmed the decisions made at the September meeting in relation to the decision-making process and authorisation of the applicant—at [10]. One of the resolutions carried by those attending the 8 November 2012 meeting was to confirm that sufficient notice was given of the meeting; that sufficient members of Gkuthaarn and Kukatj families were present to make decisions; that those unable to attend were represented by others in attendance and that the meeting was to be conducted in accordance with the decision-making process agreed to and adopted at the previous August and September meetings—at [11].

Specifically, the authority of the applicant given by members of the claim group was confirmed at this meeting with a resolution unanimously carried that 'in accordance with the agreed and adopted decision-making process the Gkuthaarn and Kukatj people confirm the authorisation of Marlene Logan, Francine George, James Logan, Phillip George, Richie Bee and Cathy Snow'—at [12].

By way of further explanation, **[Chief Executive Officer – name deleted]** attests in her affidavit:

> [18] The 8 November 2012 meeting was described as an "Authorisation Meeting" in the letter and notice of the meeting provided to Gkuthaarn and Kukatj people because it was the meeting convened by CLCAC to present to them the Form 1 that had been prepared on the basis of the resolutions passed and the instructions given to CLCAC at the previous Gkuthaarn and Kukatj meetings. The 8 November meeting was provided by CLCAC as the opportunity for any Gkuthaarn and Kukatj person who had not previously attended a meeting, or who wished to raise any queries regarding the contents of the Form 1, to do so.
>
> [19] From my perusal of the records of the 8 November meetings and the resolution deposed to by **[Applicants Legal Representative 1 – name deleted]** in her affidavit at paragraph [12], I can see that the applicants who had been authorised at the 24 September meeting were, on 8 November authorised by the Gkuthaarn and Kukatj people to file the Form 1 that had been reviewed by the meeting.

[Chief Executive Officer – name deleted] has attached to her affidavit (Annexure HT4) the agenda for the meeting which reveals at Item 4 that resolutions were proposed to be made in relation to the new Gkuthaarn and Kukatj claim, including 'confirmation of the nominated applicants'. The applicant's submission is that I should be satisfied based on the information before me 'that the meeting of 24 September 2012 is the meeting at which the 6 individuals comprising the Applicant were authorised to make the application and deal with matters arising in relation to it'—at [45].

I am satisfied that the native title claim group was provided sufficient opportunity to participate in the process to authorise an applicant to make and deal with the application. There are resolutions supporting that proposition that the claim group was sufficiently represented at both meetings and that the group agreed to and adopted a process to make decisions which was utilised to authorise persons to comprise an applicant. Based on the information in the application and the clarifying statements provided by the applicant in its additional material, it is clear to me that authorisation of the applicant occurred at the September meeting and that

confirmation of this authorisation took place at the November meeting along with resolutions to proceed to file the application.

Decision-making process to authorise

The process of decision-making utilised by the claim group at the August, September and November 2012 meetings is variously set out in the information before me. The process is consistently described as:

a. A decision to be made will be set out as a written resolution;
b. The resolution will be read out to the meeting;
c. The proposed resolution will be moved and seconded by members of the group present at the meetings;
d. The decision will then be made by people present at the meeting through a show of hands;
e. If the chairperson of the meeting thinks it necessary a secret ballot can be called;
f. A decision of the majority in relation to the resolution shall be the decision of the meeting.

The resolution that carried the above described process also included a statement to confirm that when making decisions in relation to a native title claim there is no particular process under their traditional laws and customs with which Gkuthaarn and Kukatj people must comply.

I am satisfied that by the above process, members of the claim group in attendance at the September meeting authorised Marlene Logan, Francine George, James Logan, Phillip George, Richie Bee and Cathy Snow to be the persons comprising the applicant for the purposes of making the Gkuthaarn and Kukatj application and dealing with matters arising in relation to it. This decision was then later confirmed at the November meeting, in accordance with the group's agreed and adopted decision-making process.

Conclusion

In accordance with s. 190C(4)(b), I am required to be satisfied that the applicant is a member of the native title claim group and is authorised by all the other persons in that group.

Firstly, it is clear that each of the persons comprising the applicant is a member of the native title claim group because each affirms this to be the case in their s. 62(1)(a) affidavit—at [1].

Secondly, the Court has considered in various instances what may be required to satisfy the Registrar that an applicant has been authorised by all the persons in the native title claim group, in accordance with s. 251B(b). It is well settled in law, that the word 'all' in the context of authorisation pursuant to s. 251B(b), has 'a more limited meaning than it might otherwise have.' In *Lawson v Minister for Land and Water Conservation* (NSW) [2002] FCA 1517 (*Lawson*), Stone J held in relation to s. 251B(b) that it is not necessary for each and every member of the native title claim group to authorise the making of an application, but rather '[i]t is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process'—*Lawson* at [25].

I have no information before me contesting the representation of the native title claim group at the September and November authorisation meetings, nor the extending of every reasonable opportunity to the persons in the native title claim group to attend and participate in the processes of authorisation.

Based on the information before me, summarised above, I am satisfied that the applicant is authorised to make and deal with the application because:

- **[Applicants Legal Representative 1 – name deleted]** and **[Chief Executive Officer – name deleted]** affidavits record resolutions that the persons in attendance were satisfied that they were sufficiently representative of the native title claim group and that sufficient notice of the meeting was given to the claim group;
- a decision-making process agreed to and adopted by the claim group was followed in the same form at both meetings that involved decisions about the claim group, the area claimed and the applicant;
- there is no information before me that would bring into doubt the veracity of the resolution of the native title claim group and its unanimous decision to authorise the applicant comprising the six persons who have brought this application.

I am therefore satisfied that all reasonable steps have been taken for all of the persons of the native title claim group to be provided a reasonable opportunity to participate in the decision-making process and I am satisfied that all the material before me demonstrates that the applicant is duly authorised in accordance with s. 251B(b) to make this application and to deal with matters arising in relation to it.

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 assessing the current application against s. 190B(2), I am required to be satisfied that the information provided by the applicant for the purposes of ss. 62(2)(a) and 62(2)(b) is sufficient for the particular land and waters, over which native title rights and interests are claimed, to be identified with reasonable certainty. Whilst I may have regard to information beyond the application where clarification is necessary, it is to the terms of the application itself that I am primarily to direct my attention in reaching the required level of satisfaction—*Doepel* at [16] and [122].

Attachment B is titled 'Gkuthaarn and Kukatj Native Title Determination Application – External Boundary Description' (prepared by the Tribunal's Geospatial Services, dated 02 November 2012) and describes the application area by metes and bounds referencing the centrelines and banks of rivers, native title determination boundaries, the Lowest Astronomical Tide, the Territorial Sea Baseline, the High Water Mark and coordinate points (referencing the Geocentric Datum of Australia 1994 (GDA94) shown to 6 decimal places).

Those areas not covered by the application are described in Schedule B by a list of general exclusions at paragraphs 1 to 4.

Schedule C refers to Attachment C which is a monochrome copy of an A1 a map titled "Native Title Determination Application – Gkuthaarn and Kukatj" prepared by Geospatial Services (dated 25/10/2012) and includes the following:

- the application area depicted as a bold dark blue outline with buffered shading;
- roads, rivers, railways and labelled towns, homesteads and mines provided as a topographic image by Geoscience Australia (2008); and
- scalebar and northpoint.

Section 190B(2) requires that the information in the application describing the areas covered by the application must be sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters. For the Registrar to be satisfied, it is my view that the written description and map should be sufficiently consistent with each other and the reader should be able to discern the location of the area covered by the application on the surface of the earth with reasonable certainty.

The geospatial report of 4 December 2012, confirms that the description and map are consistent and identify the application area with reasonable certainty.

Having regard to this assessment, and to the identification of the external boundary in Attachment B and the map showing the external boundary, I am satisfied that the external boundaries of the application area have been described such that the location of it on the earth's surface can be identified with reasonable certainty.

In respect of those areas not covered by the application and described by general exclusion statements, a generic or class formula to describe the internal boundaries of an application is acceptable if the applicant has only a limited state of knowledge about any particular areas that would so fall within the generic description provided — see *Daniels & Ors v State of Western Australia* [1999] FCA 686—at [32]. For the purposes of meeting the requirements of this section the general exclusion statements are, in my view, sufficient to offer an objective mechanism by which to identify areas that would fall within the categories described.

Based on the information provided in both the written description of the application area at Schedule B and Attachment B, and the map in Attachment C, I agree with the geospatial assessment and am satisfied that, for the purposes of ss. 62(2)(a) and (b), it can 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).

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).

Under this condition, I am required to be satisfied that one of either s. 190B(3)(a) or (b) has been met. The application does not name the persons in the native title claim group but contains a description, and it is therefore necessary for me to consider whether the application satisfies the requirements of s. 190B(3)(b).

I note the comments of Mansfield J in *Doepel* at [51] and [37], respectively, that the focus of s. 190B(3)(b) is:

- whether the application enables the reliable identification of persons in the native title claim group; and
- not on 'the correctness of the description . . . but upon its adequacy so that the members[sic] of any particular person in the identified native title claim group can be ascertained'.

Schedule A of the application contains the following description of the persons in the native title claim group:

> The members of the native title claim group on whose behalf the application is made are all the descendants of the following apical ancestors including those who have been adopted by

them and their descendants in accordance with Gkuthaarn and Kukatj traditional law and custom:

a. Sisters **[Ancestor 1 – name deleted], [Ancestor 2 – name deleted]**, **[Ancestor 3 – name deleted]** and **[Ancestor 4 – name deleted]**;

b. **[Ancestor 5 – name deleted]** and **[Ancestor 6 – name deleted]**;

c. **[Ancestor 7 – name deleted]**;

d. **[Ancestor 8 – name deleted]**; and

e. **[Ancestor 9 – name deleted]**; and **[Ancestor 10 – name deleted]**.

Therefore, membership of the native title claim group is essentially defined by descent from one or more of the named ancestors. Members of the claim group may also have been persons adopted by those ancestors or their descendants in accordance with Gkuthaarn and Kukatj traditional law and custom.

In my view, the description of the native title claim group is one that is primarily reliant on a set of rules or principles that provide an objective mechanism by which to identify members of the claim group. The application does not explain the content of the traditional law and custom that provides for recruitment by adoption according to Gkuthaarn and Kukatj traditional law and custom.

A number of the statements made by members of the claim group refer to the 'adoption' of children. For example, **[Claim Group Member 1 – name deleted]** 'grew up' her son's children—'I taught them the things I taught my own kids just the way I had been shown'—at [36]. Some of the statements reveal that the claim group includes descendents of the adopted daughter of one of the named apical ancestors, **[Ancestor 8 – name deleted]**. As such, it is clear to me that there is an established acceptance of the principle of adoption by Gkuthaarn and Kukatj people (under their traditional law and custom) through which people become members of the native title claim group.

In this regard, I note that Carr J in *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93 (*Western Australia v Native Title Registrar*) accepted a less specific description which included 'persons adopted by the named people and by the biological descendants of the named people', without any qualification indicating whether the adoption was according to traditional laws and customs, Australian law or otherwise. In that decision, Carr J was of the view that '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'—at [67].

In my view, the principle of engaging in some factual enquiry is relevant to the description of the Gkuthaarn and Kukatj native title claim group and as such does not mean that the claim group has not been described sufficiently clearly.

I am satisfied that the native title claim group has been sufficiently described.

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).

Section 190B(4) requires the Registrar to be satisfied that the description of the claimed native title rights and interests contained in the application is sufficient to allow the rights and interests to be identified—*Doepel* at [92]. In *Doepel*, Mansfield J refers to the Registrar's consideration:

> The Registrar referred to s. 223(1) and to the decision in *Ward*. He recognised that some claimed rights and interests may not be native title rights and interests as defined. He identified the test of identifiability as being whether the claimed native title rights and interests are understandable and have meaning. There is no criticism of him in that regard—at [99].

On this basis, for a description to be sufficient to allow the claimed native title rights and interests to be readily identified, it must describe what is claimed in a clear and easily understood manner.

Schedule E describes the native title rights and interests claimed in relation to the application area, as required by s. 62(2)(d):

> 1. Over areas where a claim to exclusive possession can be recognised (including areas where there has been no prior extinguishment of native title and where section 238 and/or sections 47, 47A and 47B apply), Gkuthaarn and Kukatj People claim the right to possess, occupy, use and enjoy the lands and waters of the application area to the exclusion of all others.
> 2. Over areas where a claim to exclusive possession cannot be recognised, the following rights and interests are claimed:
> a. the right to access, camp on and move about the application area;
> b. the right to erect non-permanent shelters on the application area;
> c. the right to live (but not permanently reside) on the application area;
> d. the right to hold meetings on the application area;
> e. the right to hunt and fish in the application area;
> f. the right to cook on the application area;
> g. the right to use the water resources of the application area;
> h. the right to gather and use the natural resources of the application area (including food, medicinal plants, timber, stone, ochre and resin);
> i. the right to conduct ceremonies on the application area;
> j. the right to participate in cultural activities on the application area;
> k. the right to maintain and protect places of importance in the application area;
> l. the right to conduct burials on the application area;
> m. the right to speak for the application area;
> n. the right to make decisions about the use and enjoyment of the area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged and observed by the native title holders;
> o. the right to teach and transmit the cultural heritage of the native title claim group including knowledge of particular sites;
> p. the right to take, use, share and exchange the natural resources of the application area.

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

In reading the rights and interests listed in Schedule E, together with and subject to the qualifications provided at Schedule B, I am of the view that the native title rights and interests claimed can be 'properly understood', and that there is 'no inherent or explicit contradiction' in the description which prevents me from reaching the level of satisfaction required by s. 190B(4)—*Doepel* at [123].

I am therefore satisfied that the description contained in the application is sufficient to allow the native title rights and interests to be readily identified and meet 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 my view, the Court has established clear principles by which the Registrar must be guided when assessing the sufficiency of a claimant's factual basis. They are:

- the applicant is not required 'to provide anything more than a general description of the factual basis'—*Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [92].
- the nature of the material provided need not be of the type that would prove the asserted facts—*Gudjala FC* at [92].
- the Registrar is not to consider or deliberate upon the accuracy of the information/facts asserted—*Doepel* at [47].
- the Registrar is to assume that the facts asserted are true, and to consider only whether they are capable of supporting the claimed rights and interests. That is, is the factual basis sufficient to support each of the assertions at s. 190B(5)(a) to (c)—*Doepel* at [17].

Mansfield J was quite specific in *Doepel* (which was approved by the Full Court in *Gudjala FC* at [82] to [85]), when he stated:

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

Nonetheless, it is important that each particularised assertion outlined in s. 190B(5)(a), (b) and (c) be supported by the claimant's factual basis material.

In that regard, the decisions of Dowsett J in *Gudjala [2007]* and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala [2009]*) give specific content to each of the elements of the test at s. 190B(5)(a) to (c). The Full Court in *Gudjala FC,* did not criticise generally the approach that Dowsett J took in relation to these elements in *Gudjala [2007]*[1], including his Honour's assessment of what was required within the factual basis to support each of the assertions at s. 190B(5). His Honour, in my view, took a consonant approach in *Gudjala [2009]*. Thus, while it is appropriate that I approach the task at s. 190B(5) in line with the general principles articulated above, I will pay particular regard to the matters outlined in both *Gudjala [2007] and Gudjala [2009]* in examining the sufficiency of the claimant's factual basis to support each of the assertions at s. 190B(5)(a)-(c).

In my consideration of the factual basis for the claim made in this application, I am also guided by principles outlined in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; (2002) 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*):

- traditional laws and customs are ones that a society passes on from one generation to another;
- laws and customs arise out of, and go to define, a particular society, that is a body of persons united in, and by, its acknowledgement and observance of a body of laws and customs;
- traditional laws or customs are derived from a body of norms or normative system that existed before sovereignty;
- rights and interests are rooted in pre-sovereignty traditional laws and customs; and
- it must be shown that the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout the period since sovereignty was asserted as a body united by its acknowledgement and observance of the laws and customs.

That these principles from *Yorta Yorta* guide consideration of the condition in s. 190B(5) was discussed by Dowsett J in *Gudjala 2007*—at [26]. I note that the review of that decision by the Full

[1] See *Gudjala FC* [90] to [96].

Court in *Gudjala FC* did not criticise this approach. I also note that the later decision by Dowsett J in *Gudjala 2009* again points to the *Yorta Yorta* principles as guiding the Registrar's consideration of the condition in s. 190B(5).

Information considered

Schedule F and Attachment F provide details in relation to the continuing existence since first European contact of the claim group's traditional laws and customs. It provides information in respect of each of the requirements of s. 190B(5). However, in my view the information is limited to general assertions and statements that are neither particular nor specific to the Guthaarn and Kukatj people.

Schedule G lists a number of activities in which members of the claim group are involved – visiting and camping, hunting and fishing on the claim area, speaking for the claim area and associated cultural heritage work.

Signed and witnessed statements made by nine members of the claim group (three of whom are persons comprising the applicant) also accompany the application and these go further to demonstrating and illustrating some of the assertions made in Schedule F and Attachment F. Each of the deponents trace their descent from an apical ancestor listed at Schedule A and describe activities their predecessors have carried out, and which they continue to carry out, on the lands and waters of the area covered by the application. They describe some of the traditional laws and customs from which the group's rights and interests are derived which have been handed down to them and which they now pass onto the younger generation.

On 17 December 2012, I provided the applicant with a preliminary assessment setting out potential deficiencies in the application's factual basis material. In response, on 15 February 2013, the applicant provided me with a confidential report authored by **[Anthropologist – name deleted]** which is an Anthropologist's Overview of both the historical literature relevant to the association of the Gkuthaarn and Kukatj people and their predecessors with the claim area and his field work in the claim area between 2007 and 2010 (the overview report). **[Anthropologist – name deleted]** includes an extensive list of the references cited in the overview report and his curriculum vitae which expands some 40 years of research and work in the field of Aboriginal anthropology. The overview report is an overview of research he has conducted to date regarding the Gkuthaarn and Kukatj people and appears to have been compiled specifically for the purposes of the registration test of this application.

I note, **[Anthropologist – name deleted]** sets out the variations in the naming of 'Gkuthaarn' and 'Kukatj' (by claimants and researchers) and concludes to employ Kukatj for Kukatj and Kutharn for Gkuthaarn (Kuthant appears to be interchangeable with Kutharn). I have adopted Dr Sackett's rendering of the names throughout my discussion of the material and its support of the factual basis for the claim.

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).

This subsection requires me to be satisfied that the factual material provided in relation to the application is sufficient to support the assertion that the native title claim group has, and its

predecessors had, an association with the area of the application. While it is not necessary for the factual basis to support an assertion that *all* members of the native title claim group have an association with the area *all* of the time, it is necessary to show that the claim group *as a whole* has an association with the area—*Gudjala 2007* at [51] and [52].

Association of the predecessors of the native title claim group with the application area

Schedule F and Attachment F contains general statements in relation to the association of the claim group's predecessors with the area of the application:

- prior to 1788 ancestors of the Gkuthaarn and Kukatj people (the native title claim group) occupied the land and waters covered by the application;
- the ancestors of the native title claim group exercised a system of traditional law and custom 'inextricably connected to the topographic, ecological, cultural and religion values' of the area covered by the application and had rights and interests in the area;
- archaeological evidence of this occupation in the area covered by the application exists in the form of artefacts, fragments and traditional occupancy sites.

The overview report summarises the findings of researchers in relation to groups located on the coastal lands between the Norman and Leichhardt Rivers – from the early ethnographic and historical observations of people in the region through to recent anthropological findings showing historical habitation, use and occupation of the land and its resources by Aboriginal people. 'Kukatj' and 'Kutharn' have been identified in variant forms by observers and researchers since 1882 through to 1995.

Most of the information details the tribes identified as associated with particular areas of the Gulf region – along the rivers, the pastoral stations, coastal land and sea waters and the inland regions south of the Gulf coast. The report maps (Breen) the Kukatj roughly between the Leichhardt and Flinders Rivers and the Kuthant roughly between the Flinders or Bynoe and the Norman Rivers—at [81]. The report's analysis and opinion is that Kukatj/Kutharn people, 'whether speakers of the Kukatj/Kutharn languages or descendants of such speakers, have been long and relatively consistently associated with the general area covered by the Gkuthaarn Kukatj Claim'—at [26].

The overview report places the birth of two of the named apical ancestors in the area covered by the application at Invereligh and on the Bynoe River and surmises that 'Kukatj/Kutharn families ...stretch back to the era of sovereignty itself—at [196]. The report presumes that birth dates of the previous generation are likely to be between 1839 and 1854.

In the claimant's statements, the deponents trace their descent from at least one of the named apical ancestors, and refer to their grandparents' and parents' association with the application area – where they lived and worked, what they taught the younger generations of the claim group and through them how it was that they learnt the extent of Kuthant and Kukatj country. For example, **[Claim Group Member 2 – name deleted]** speaks of her mother **[Claim Group Member 3 – name deleted]** (the adopted daughter of apical **[Ancestor 8 – name deleted]**.) who was born on Magowra which is 'more of less the heart of Gkuthaarn country, near the Flinders River'; her father was a Kukatj man from Inverleigh—at [3]. **[Claim Group Member 4 – name deleted]** mother was apical **[Ancestor 4 – name deleted]**.), her family from Inverleigh

and Magowra, Augusta Downs and Donors Hill—at [21]. **[Ancestor 4 – name deleted]**.) and her daughter **[Claim Group Member 5 – name deleted]** were both known and recorded on Inverleigh Station in the 1890s and later—**[Claim Group Member 6 – name deleted]** at [3]. All of these places fall within the area covered by the application.

Some of the statements speak of childhoods spent living in the camps and reserves around Normanton, their parents and grandparents working on Magowra and Inverleigh stations and hunting and gathering 'bush tucker' with their elders around the rivers and the coast.

Current association of the native title claim group with the application area

Attachment F's general statements assert that the native title claim group has maintained its occupancy of the area covered by the application since 1788 and have done so in accordance with traditional laws acknowledged and customs observed by the Gkuthaarn and Kukatj people. Schedule G lists the activities the claim group currently carries out on the area covered by the application.

The overview report contends a consistent identification by members of the claim group with the land and waters and coastal areas between the Leichhardt and Norman Rivers. The report refers to social researchers' findings that the town of Normanton is situated on a boundary area (the river) between the Kukatj to the south and west and the Kuthant to the north and that it is people of Kukatj/Kuthant descent who can today be regarded as the traditional owners of the land in and around Normanton—at [92].

All of the persons who have affirmed statements speak of being born and living on the claim area, on the pastoral stations of Magowra and Inverleigh, travelling through country with their families as children, hunting, fishing and camping. They have been taught the boundaries of their country by their elders; knowledge of language and ceremony is still held by the older members; and people speak of learning Gkuthaarn and Kukatj stories through being on country with their elders and families. Some of the statements describe being removed as children from the claim area to other parts of Queensland, but people returned to live around Normanton and work on the pastoral stations in the claim area.

Magowra Station in the north eastern reaches of the claim area, closest to Normanton is of particular significance to members of the claim group. Many were born there and lived in the camps on the station with their families. Generations of members of the claim group have worked on the station. The statements refer to sites of significance to be found on the station and the importance of the Flinders and Bynoe river systems that pass through the region, flowing out to the coast. Knowledge of their traditional laws and customs for many of the claimants was gained through active association with the land and waters of Magowra Station.

Consideration

In *Gudjala 2007* Justice Dowsett considered the requirements of s. 190B(5) generally and, in particular, the necessity for the Registrar to address 'the relationship which all the members claim to have in common in connection with the relevant land'—at [40]. This should be considered in conjunction with his Honour's statement that the facts alleged must 'support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)'—at [39]. These principles are pertinent to examining the sufficiency of the claimant's factual basis for the purpose of the assertion at s. 190B(5)(a) as they

elicit the need for the factual basis material to provide information pertaining to the identity of the native title claim group, the predecessors of the group and the nature of the association with the area of the application.

There is, in my view, a factual basis that goes to showing the history of the association that those members of the claim group have, and that their predecessors had, with the application area—see *Gudjala 2007* at [51]. To this extent, the material before me demonstrates that a link exists between the current claim group and its predecessors' and their association with the application area. The information is sufficient to support the claim group's asserted association with the land and waters of the application area and this appears to have its origins in the preceding generations' association with the area. I am therefore satisfied that the factual basis is sufficient to support the assertion that the native title claim group has and its predecessors had an association with the area.

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).

This subsection requires that I be satisfied that the material before me provides a sufficient factual basis for the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group and that these give rise to the native title rights and interests it claims.

When Justice Dowsett considered the requirements of s. 190B(5) again in *Gudjala 2009*, he addressed the adequacy of the factual basis underlying an applicant's claim. He makes statements about the assessment of the adequacy of a general description of the factual basis of the claim at [29], which in summary mean that:

- assertions should not merely restate the claim, and
- there must be at least an outline of the facts of the case.

Relevant to assessing the application's assertions in relation to s. 190B(5)(b), in Dowsett J's view, there is a requirement for factual details concerning the pre-sovereignty society and its laws and customs relating to land and waters—at [29]. Therefore, the factual basis for the claim is required to address whether or not the relevant traditional laws and customs that give rise to the claim to native title rights and interests have their origin in a pre-sovereignty, normative system with a substantially continuous existence and vitality since sovereignty. In *Gudjala 2007,* which was not criticised by the Full Court in *Gudjala FC*—at [71], [72] and [96], Dowsett J considered that the factual basis materials for this assertion must demonstrate:

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

Kukatj and Kutharn society/ies

The overview report provides an analysis of 'the group that asserts traditional rights and interests' in the area covered by the application. There would appear to be some complexity in relation to the distinctness or otherwise of the two named groups:

- members of the claim group assert either Kukatj or Kutharn identity or dual Kukatj/Kutharn identity through reference to different ancestors—at [28];
- people asserting rights in the area between the Leichhardt and Norman Rivers 'identify variously as Kukatj, as Kukatj-Kutharn or Kutharn-Kukatj—at [33]; and
- Kukatj and Kutharn mutually recognise the existence of each other—at [43].

In considering 'the principles that define the group' the opinion expressed in the report is that:

- there is evidence to support the idea that areas of land that people said were Kukatj and Kutharn traditionally were comprised of or divided into smaller, clan estates. These, in turn, were held primarily by patrilineal descent groups—at [124];
- this later shifted to a situation in which Kukatj/Kutharn land tenure was organised in a non-lineal form in which people took their country from any ancestor, not only from their fathers—at [139]; and
- in this regard, they have moved to becoming members of language groups or tribes and, by extension, joint owners of language group or tribal areas … claiming Kukatj/Kutharn membership and ownership of Kukatj/Kutharn country—at [140].

In my view, the analysis and opinions expressed in the overview report are somewhat equivocal, and this makes it difficult to identify with any clarity the Kutharn/Kukatj society that existed at sovereignty, or as it now defines the current claim group. However, in my view, it is not for me, in my consideration of the claim and whether it meets the requirements of the registration test, to come to a view about such complex anthropological matters. In this instance it is sufficient for me be satisfied that there is a factual basis (presented in summary in the overview report and through the statements of members of the claim group) to support the claim that identified claim group (named in this application as Gkuthaarn and Kukatj) hold the identified rights and interests (and not some other rights and interests).

The report's literature review of the research in the area since the late 1800s fails to reach any decisive conclusions, however it is clear that the presence of Kukatj and Kutharn people, also known by various other names, have been acknowledged by commentators and researchers since that time. In this regard, the report is largely provisional, identifying discrepancies in the recording of the extent of Kukatj and Kutharn country and the uncertainty as to whether the two groups had distinct boundaries or had 'intervening shared areas'—that is, it was possible that 'the Kukatj and Kutharn each had lands that might be mapped as theirs and lands that they shared with their neighbours'—at [41]. The report raises 'the distinct possibility that the areas of the language groups or tribes shifted over time', with places once identified as Kutharn, now identified as Kukatj.

The statements of the members of the claim group do not particularly assist to clarify the status of intersection between the Kutharn and Kukatj groups. However, it would appear that there is a close relationship between the two with some people identifying as one but acknowledging the links (through language, country, descent) that bind them also to the other.

The pre sovereignty society and the link of the claim group to its ancestors

The overview report infers the date of effective sovereignty in the area covered by this application to be around 1867 when 'William Landsborough named the Norman River and selected the site of the future township of Normanton (Anonymous 1968:5)'. Matthew Flinders is said to have "made landfall in the vicinity…in 1802 and Bourke and Wills moved through the more south-westerly portions of the proposed claim area in 1861—at [195].

The opinion that the report appears to finally rest on is that it is likely the Kukatj and Kutharn were the largest group of peoples associated with the area covered by the application. In this sense it was likely that there existed at the time of sovereignty an overarching named language group or tribe comprised of named local groups, with the extent of country defined by the combined areas of the local groups. In any event, 'there were people and country recognized as Kukatj and people and country recognized as Kutharn'—at [115].

Based on this premise, the report's contention is that the apical ancestors used to describe the current claim group were present in the area and likely formed the pre-sovereignty society of the Kutharn and Kukatj people, united in and by their acknowledgement and observance of a body of laws and customs. Together the report and the statements of members of the claim group identify three of the five ancestral lines from which the claim group claims its descent:

- the descendants of **[Ancestor 8 – name deleted]** (b. 1864) identify as Kuthant,
- descendents of **[Ancestor 4 – name deleted]** identify as Kukatj,
- descendants of **[Ancestor 5 – name deleted]** & **[Ancestor 6 – name deleted]** identify as Kukatj

Each of the persons who make a statement set out their descent from an apical ancestor and whether they identify as Kuthant/Gkuthaarn or Kukatj. The overview report surmises that the successive generations held to be Kukatj/Kutharn families stretch back to the era of sovereignty:

- the eldest sibling of Kukatj ancestor **[Ancestor 4 – name deleted]**, [**Ancestor 1 – name deleted]** was born on Inverleigh in 1874,
    - [**Ancestor 1 – name deleted**] mother was likely to have been born c1859 or before, and her father likely to have been born c1849-1854 or before; and
- Kutharn ancestor **[Ancestor 8 – name deleted]** was born c1864 on or around the Bynoe River,
    - **[Ancestor 8 – name deleted]** mother was likely to have been born c1849 or before, and his father likely to have been born c1839-1844.

[Claim Group Member 3 – name deleted] is the adopted daughter of **[Ancestor 8 – name deleted]** —three of the persons who make statements are daughters of **[Claim Group Member 3 – name deleted]**; **[Ancestor 4 – name deleted]** is the great, great grandmother,

grandmother, or mother of four of those persons, **[Ancestor 5 – name deleted]** and **[Ancestor 6 – name deleted]** are the grandparents or great grandparents of two of the persons who make statements. In my view these facts point to the existence of a pre-sovereignty society in that they identify the persons who acknowledged and observed the laws and customs of that pre-sovereignty society—*Gudjala [2009]* at [37] and [52].

However, for the purposes of identifying the relevant society, in my view, the material before me, does not definitively assert or indicate the presence of one normative system in existence at the time of sovereignty. It may be that the Kutharn and Kukatj possibly maintained separate group identities. This aspect of the claimant's factual basis requires some consideration in examining its sufficiency for the purpose of s. 190B(5)(b).

In undertaking this consideration I am of the view that the Court has taken neither a fixed nor inflexible approach to the concept of society as expounded by the High Court in *Yorta Yorta*. In *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 (*Alyawarr*), the Full Court discussed the notion of society, which 'does not require arcane construction' or initiate 'technical, jurisprudential or social scientific criteria for the classification of groups or aggregations of people as 'societies''. In that regard, the Full Court proceeded to explore the various connotations and features of society evident in particular native title determinations, along with the applicable legal principles, including that:

- It is unnecessary for a native title claim group to constitute a society or community in its own right, but rather it may form part of a cultural bloc 'whose members are dispersed in groups' over large areas as was found in *De Rose v State of South Australia (No 2)* [2005] FCAFC 110—*Alyawarr* at [80];
- Multiple groups 'which were territorially adjacent and shared economic and social links, could be regarded as a composite community with shared interests' even though individual members only held rights and interests in particular estate areas, as they were found to in *Western Australia v Ward* [2000] FCA 191—*Alyawarr* at [81];
- It may be ultimately sufficient to make a finding that the native title claim group are persons in 'whom native title resides' as opposed to deciding whether claimants are 'a coalition or not', as was held in *Daniel v State of Western Australia* [2003] FCA 666—*Alyawarr* at [85];
- It may be appropriate to make a determination that native title rights and interests are held severally by individual groups as was done in *Lardil Peoples v State of Queensland* [2004] FCA 298—*Alyawarr* at [86].

In *Sampi on behalf of the Bardi and Jawi People v State of Western Australia* [2010] FCAFC 26, the Full Court felt it notable 'that the Court has found in a number of cases that a native title claim group which adhered to an overarching set of fundamental beliefs constituted a society, notwithstanding that the group was composed of people from different language groups or groups linked to specific areas within the larger territory which was the subject of the application'—at [71].

In my view, the material before me does not confirm that the Kutharn and Kukatj people formed one common body of persons at the time of sovereignty. Neither is it explicit that they formed two separate and distinct groups of people. There is scant support for either contention in the

statements of the members of the claim group and as I have noted earlier, the analysis and opinions expressed in the overview report are not unequivocal.

What I am prepared to accept, however, is that the factual basis material elicits details of a likely commonality of traditional law and custom that goes to defining the Gkuthaarn and Kukatj Peoples' rights and interests in the area covered by the application. In my view, this is largely borne out through the discussion in the overview report of the research findings in respect of other and neighbouring groups and peoples to the Kutharn and Kukatj. That is, there are some relevant and particular facts set out upon which it appears arguable that the structure of the pre sovereignty societies in this region exhibited some congruence. In addition, there is sufficient information to link the current claim group by descent with persons who lived in the area covered by the application prior to sovereignty, in accordance with traditional laws and customs. In my view, this is sufficient factual basis to support the assertion that there was a relevant pre-sovereignty society that acknowledged and observed laws and customs.

Traditional laws and customs

In my view, the general statements at Schedule F and Attachment F provide very limited and generalised information to address the assertion of s. 190B(5)(b) and do not refer specifically or directly to the traditional laws and customs said to be acknowledged and observed by the Gkuthaarn and Kukatj native title claim group. The statements of members of the claim group, whilst illustrating the rights and interests held by the group under their traditional laws and customs, do not in my view provide much substantive information in respect of the content of those laws and customs.

The overview report provides formal information in relation to the content of some of these traditional laws and customs to the extent that I can be satisfied that there exists traditional laws and customs of the Gkuthaarn and Kukatj native title claim group that give rise to the rights and interests claimed in the application.

In summary the combined information before me demonstrates that traditional laws and customs exist in relation to identity and recognised membership of the group:

- the group's cognatic system of descent has its roots in a traditional system – descent defined the traditional system and continues to define the contemporary system of the claim group for group membership and acquiring rights and interests in land and waters;
- membership and identity is inherited or taken up through language group identities from or through their ancestors;
- members of the claim group know they are a Kutharn or Kukatj person because they have been told that this is so by their parents, grandparents, aunties and uncles, who were told the same themselves by their predecessors; and
- people are bound to their identity through their responsibilities to and occupation of the claim area, and that connection to Kukatj/Kutharn country is by descent and through the physical and the spiritual.

Traditional laws and customs have been transmitted through the generations. They are asserted to exist in relation to the claim group's spiritual life:

- strangers to country must smoked to be successful at fishing and members of the claim group speak with the spirits when they fish because that is what they were taught by the old people and it is the Law;
- spirits could and did affect the outcome of fishing activities and sharing with the spirits and with others is a responsibility;
- claimants acknowledge and observe laws and customs as they relate to fishing and ancestral spirits and dreaming;
- spirits to which claimants speak to and interact with are said to be spirits of Kukatj and Kutharn ancestors, some are held to give protection to their descendents and to the country;
- dreamings and totems are represented by natural species and acquired through descent (from a parent or grandparent), and
- there exist particular practises and customs in relation to burying the dead.

They are asserted to exist in relation to the claim group's use of natural resources and access to country:

- use of natural resources in the area – hunting, fishing and collection of resources are regulated; there are certain places where it is not appropriate to gather resources, hunt or fish; avoidance of areas at certain times of the day or night; avoidance rules in relation to eating and hunting totemic animals; the proper harvesting and medicinal qualities of native species;
- access to country and the following of particular protocols and the regulation of restricted areas; and
- an obligation to ensure the well-being of the land, maintaining and protecting the land, respecting the land and its spirits and ancestors who have passed away.

The statements by the members of the claim group provide some information to demonstrate the above traditional laws and customs:

- stating that their ancestors were born and lived on Kukatj or Kutharn country, and that they were told by significant elders that they are Kukatj or Kutharn;
- identifying people of recent preceding generations and their knowledge of stories, sites and places of significance;
- identifying the pastoral stations on country of particular importance to Kukatj or Kutharn on which they and their parents and grandparents have worked and resided on; and
- stating their continuing connection to Kukatj or Kutharn country and the form this takes, for example involvement in heritage protection and the passing on of traditions and customs.

The right to right to possess, occupy, use and enjoy the lands and waters of the application area to the exclusion of all others

The material before me indicates that in accordance with traditional law and customs, it has always been the case that claimants can freely access and exploit their respective lands and

waters, whereas others must seek their permission to do so. That is, non-Kukatj/Kutharn persons require Kukatj/Kutharn permission to access and exploit the resources of Kukatj/Kutharn country. If permission protocols are not followed, such conduct is deemed disrespectful and 'trouble' will follow as a consequence. There are a number of statements made by claimants attesting to the practice of permission protocols and the claim group's right to speak for their country in relation to the way it is accessed and its resources exploited.

Consideration

The overview report provides some evidence of the society as it existed at the time of sovereignty in the claim area. The statements made by members of the claim group demonstrate how the claim group has handed down its laws and customs from generation to generation, in the sense defined in *Yorta Yorta*. They provide examples of the continuing exercise of rights and interests by the claim group, the practice of which has been passed down to members of the claim group by their elders. These examples illustrate aspects of the groups' traditional law and custom, in respect of the area of the application, by relaying information pertaining to family and ancestors, rules in relation to land and belonging to an area, special places and stories, spirits, hunting, fishing and foraging and the passing on of traditional and cultural knowledge.

As I have noted above, much of the anthropology in the overview report is provisional and inconclusive, but it is my view, that it is not the purpose of the registration test to come to definitive conclusions about what in fact was the society at sovereignty, only whether the factual basis can support the assertion that the society at sovereignty has continued a vital existence (largely uninterrupted) since that time to the present. In my view the material I have considered is sufficient to support this. For example, the statements of Marlene Logan, Philip George and **[Claim Group Member 2 – name deleted]** show an inter-generational transmission of traditional law and custom from the predecessors of the claim group.

The statements of members of the claim group and other factual material contain information to provide the link between some of the named apical ancestors and the area covered by the application and identifies those predecessors of the native title claim group who, at the time of European settlement, acknowledged and observed the laws and customs of Kutharn and Kukatj society. This is, in my view, along with what is said about their continuing association with the area of the Kutharn and Kukatj application, sufficient, for an 'inference of continuity' that the society in which they existed was the same as that which prevailed at first European contact (in the mid 1800s). In this sense I refer to *Gudjala 2009*:

> . . . that the claim group is a modern manifestation of a pre-sovereignty society, and that its laws and customs have been derived from that earlier society. Such an inference may be available notwithstanding the absence of any recorded history of the society and the way in which it has continued since the earlier "snapshot" of the society—at [31].
> . . . the necessary link between the pre-European contact society and its laws and customs, and the claim group and its laws and customs, may be inferred primarily from continuity, without necessarily resorting to a close examination of the societies and their laws and customs. The evidence of actual events will demonstrate continuity. Even if the history commences shortly after first European contact, it may be reasonable to assume that such a stable society was

unlikely to have arisen in the period between contact and the commencement of historical records—at [32].

Members of the claim group have articulated that they possess rights and interests under their traditional laws and customs by virtue of those laws and customs being handed down to them by their predecessors. The material before me supports the assertion that there was a society at sovereignty in respect of the area covered by the application, defined by recognition of laws and customs, and from which the claim group's current traditional laws and customs are derived (*Gudjala 2007* at—[66]).

In my view, the application and additional material provide a sufficient factual basis for the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group and that these give rise to the native title rights and interests it claims.

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).

This subsection requires that I be satisfied that there is sufficient factual basis to support the assertion that the native title claim group continues to hold native title in accordance with its traditional laws and customs.

Schedule F and Attachment F includes information about how it is that Gkuthaarn and Kukatj people have managed to continue to acknowledge and observe their traditional laws and customs. Continued acknowledgement and observance of traditional law and custom has been possible because the members of the claim group and their predecessors have continued to live, work and travel through the area covered by the application despite the impacts of European settlement. They have continued to practise their traditional laws and customs and adhere to the processes that regulate their association with and responsibilities to their country (the area of the application).

Reference is made in both the statements and in the overview report to people's removal from their country to places like Palm Island or Yarabah. However, such disruption to their society appears to have been mitigated by:

- Gkuthaarn and Kukatj people maintaining contact with their country through work on the pastoral stations located within the current claim area; people travelled, worked and resided in and around Normanton and continued to regularly access the coastal areas between the Norman and Leichhardt Rivers;
- People who moved away from Gkuthaarn and Kukatj country were taught by their parents and grandparents about the boundaries of their country, their language and their ancestors;
- Despite living away from their country, Gkuthaarn and Kukatj people still felt a strong spiritual connection to their traditional lands, believing they held rights in their country passed down from their ancestors;
- Laws and customs relating to country, important sites and ceremonies, stories, hunting and gathering, fishing and bush tucker were passed down by significant people to the younger generations and continue to be passed on today.

It is the opinion of the author of the overview report that 'the available evidence points to Kukatj/Kutharn peoples maintaining rights and interests in lands and waters on the lands in the area of the Gkuthaarn Kukatj Claim, and laws and customs from which the rights and interests derive, from the time of effective sovereignty through to the present'—at [199]. Claimants held that the laws and customs acknowledged today are those they received from their ancestors—they are held to be the laws and customs of the old people and are for all time, now being passed onto their descendants.

The statements and overview report illustrate and, in my view, demonstrate that these laws and customs have been passed from generation to generation and continue to be acknowledged and observed today among the current generations of the claim group.

There is sufficient information before me to support the assertion that the native title claim group continues to hold native title in accordance with its traditional laws and customs.

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.

Under s. 190B(6) I must be satisfied that at least one of the native title rights and interests claimed by the native title group can be established, prima facie. I refer to the comments made by Mansfield J in *Doepel* about the nature of the test at s. 190B(6):

- It is a prima facie test and 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'—*Doepel* at [135].
- It involves some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed'—*Doepel* at [126], [127] and [132].

I note that, in my view, as set out above at s. 190B(5), the application provides a sufficient factual basis to support the assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claimed native title rights and interests.

In my view, the facts contained in the statements of the claimants are sufficient to further demonstrate that some of the rights and interests can be established, prima facie, because they illustrate the practical effect of the existence of those rights and interests claimed.

A. Exclusive rights

Over areas where a claim to exclusive possession can be recognised (including areas where there has been no prior extinguishment of native title and where section 238 and/or sections 47, 47A and 47B apply), Gkuthaarn and Kukatj People claim the right to possess, occupy, use and enjoy the lands and waters of the application area to the exclusion of all others.

Established

The majority decision of the High Court in *Western Australia v Ward* (2002) 191 ALR 1 (*Ward HC*) considered that '[t]he expression "possession, occupation, use and enjoyment ... to the exclusion of all others" is a composite expression directed to describing a particular measure of ***control over access to land***' [emphasis added]. Further, that expression (as an aggregate) conveys 'the assertion of rights of control over the land' which necessarily flow 'from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country'—at [89] and [93]. *Ward HC* is authority that, subject to the satisfaction of other requirements, a claim to exclusive possession, occupation, use and enjoyment of lands and waters can be established, prima facie.

In *Griffiths v Northern Territory of Australia* [2007] FCAFC 178 (*Griffiths FC*) the Full Court explored the relevant requirements to proving that such exclusive rights are vested in a native title claim group, stating:

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

The Full Court stressed that it is also:

> important to bear in mind that *traditional law and custom*, so far as it bore upon relationships with persons outside the relevant community *at the time of sovereignty,* would have been framed by reference to relations with indigenous people—at [127] (*emphasis added).*

As set out in relation to the factual basis for the claim, the overview report refers to the claim group's system of acquisition of rights and interests in the land and waters of the claim area and that this allows members of the group, under their traditional law and custom, free access to and exploitation of the area covered by the application. Inherent in this right is the obligation of those who are not Kutharn or Kukatj to seek permission to access the area.

The statements of **[Claim Group Member 1 – name deleted]** and **[Claim Group Member 4 – name deleted]** speak of being asked by people from 'another country' permission to enter country and fish—EG at [23]; and that someone coming from outside our country should come and see the elders …and get permissions—DS at [21]. Marlene Logan speaks of being able to go fishing on her country without having to ask anyone's permission because it is where she belongs—at [32].

In my view, together with the analysis and opinions provided in the overview report, the statements support the assertion that the right to exclusive possession exists (where it can be recognised) under the traditional laws and customs of the native title claim group.

I consider this right can be established, prima facie.

B. Non-exclusive rights

a. the right to access, camp on and move about the application area;

b. the right to erect non-permanent shelters on the application area;

c. the right to live (but not permanently reside) on the application area;

d. the right to hold meetings on the application area;

Established

These rights are evidenced in the statements, suggesting the rights exist under the traditional laws and customs of the native title claim group. Much of the material that evidences that these rights can be established prima facie, is cited above under my consideration of the factual basis of the claim. The native title claim group's connection and continuing association with the area of the application is contingent on activities in exercise of these rights. For example, members of the claim group continue to reside, work, use and look after their traditional country of the claim area. All the persons in the statements speak of camping, meeting and participating in cultural activities on the claim area and having been involved in such activities throughout their lives and together with their parents and grandparents.

I consider that these rights can be established, prima facie.

e. the right to hunt and fish in the application area;

f. the right to cook on the application area;

g. the right to use the water resources of the application area;

h. the right to gather and use the natural resources of the application area (including food, medicinal plants, timber, stone, ochre and resin);

p. the right to take, use, share and exchange the natural resources of the application area.

Established

These rights are evidenced in the statements of members of the claim group, suggesting the rights exist under the traditional laws and customs of the native title claim group. Much of the material that evidences that these rights are established prima facie, is cited above under my consideration of the factual basis of the claim. Claimants provide many accounts in their statemetns in relation to the existence of these rights:

- hunting knowledge comes from the elders and is passed on to successive generations and includes the customs associated with access to country—Phillip George at [14];
- hunting in the claim area throughout their lives—**[Claim Group Member 4 – name deleted]** at [6] to [12];
- preparing and cooking food and rules in relation to who is able to eat what and fishing in the Norman River—**[Claim Group Member 2 – name deleted]** at [11] to [14];

Sourcing food from nature, hunting game, collecting bush tucker, plants and fruit; fishing in the rivers and sea were all and continue to be activities associated with camping on the claim area. Rules and customs pertaining to these rights exist in accordance with Kuthan and Kukatj traditional law and custom which were passed down to members of the claim group by their elders which they now continue to pass onto their children and grandchildren.

Skills and practices, customs and rules and obligations as they pertain to hunting, gathering, fishing, utilisation of resources are attested to in all of the affidavits of the members of the claim

group. Claimants speak of digging for water turtle, mussels and oysters, fishing, gathering water lilies, conker berries and other bush foods. Claimants have learnt these skills and customs from their parents and elders and now pass them onto their children and grandchildren. Resources are shared and exchanged between members of the claim group

I consider that these rights can be established, prima facie.

i. the right to conduct ceremonies on the application area;

j. the right to participate in cultural activities on the application area;

k. the right to maintain and protect places of importance in the application area;

l. the right to conduct burials on the application area;

o. the right to teach and transmit the cultural heritage of the native title claim group including knowledge of particular sites;

Established

These rights are evidenced in the statements suggesting the rights exist under the traditional laws and customs of the native title claim group.

Knowledge and stories of ceremonial life are within living memory of members of the claim group:

- **[Claim Group Member 4 – name deleted]** remembers the dances and ceremonies of her childhood in the camp on the river at Normanton—at [10];
- Marlene Logan remembers the old people on the Reserve painting themselves and showing the children how to do a corroboree—at [16];
- smoking ceremonies were, and continue to be performed, when people pass away;
- traditional burials and their sites are within the knowledge of the group.

Members of the claim group speak of gaining their knowledge and understanding of Kukatj or Kutharn through their parents and grandparents—being shown the right way to do things, being told of their identity and the boundaries of their country and learning the rules of hunting, fishing, eating. In turn, this knowledge is now transmitted to the younger generations of the claim group. **[Claim Group Member 4 – name deleted]** attests to the old people teaching younger generations how to catch and prepare fish and bush foods such as conkerberry, water lily, fresh water turtle and she in turn now teaches her children and grandchildren.

I consider these rights can be established, prima facie.

m. the right to speak for the application area;

Established

This right is evidenced in the statements of members of the claim group suggesting the right exists under the traditional laws and customs of the native title claim group.

I note that by the reasoning of the majority judgement in *Ward HC*, it is not clear how this right can be understood as 'non-exclusive': that is, the 'right to speak for country' would seem to be synonymous with the common law expression of the 'right to possess, occupy and enjoy'—see

[15], [88]- [90]. However, the consent determination in *Wandarang, Alawa, Marra and Ngalakan Peoples v Northern Territory of Australia* [2004] FCAFC 187, which did not confer exclusive possession on the common law holders, allowed 'the right to speak for the determination area'—[para 3(b)].

There is information in the statements and overview report that supports the claimants' right to speak for country, and that in accordance with their traditional laws and customs, permission is expected to be sought from neighbouring groups to travel to areas within the application area. The statements illustrate that members of the claim group have a specific knowledge of being Kukatj or Kutharn and this knowledge has been passed down to them by their predecessors. Based on the statements, the right to speak for your country is evidenced in the group's right to look after country, to be involved in heritage protection (**[Claim Group Member 6 – name deleted]** at [23]) and to represent the claim group in relation to matters of country (Phillip George at [24] and [27]).

I consider this right can be established, prima facie.

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

Not Established

In my view, this right is not evidenced in the material before me sufficient to suggest that the right exists under the traditional laws and customs of the native title claim group.

The Court has recognised this or a similarly expressed right in a number of consent determinations. It has also commented on the difficulty of recognising this right in circumstances where it is unclear as to how other Aboriginal people would be bound by the laws and customs of another native title claim group.

The overview report addresses rights and interests derived from Gkuthaarn and Kukatj traditional laws and customs in relation to permission protocols for access and exploitation of their lands ([169] to [177]). The report only provides an opinion in relation to the protocols that exist as between Kukatj/Kutharn and non- Kukatj/Kutharn people. That is, non- Kukatj/Kutharn are expected to request permission to access and exploit Kukatj/Kutharn country and failing to do so would likely result in damaging consequences. The statements of members of the claim group also speak of those instances were permissions should be sought by persons wishing to access Kukatj/Kutharn country and I have referred to them earlier in these reasons.

In my view, neither the overview report nor the statements of members of the claim group discuss the use and enjoyment of the area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs of the Kukatj/Kutharn people. Relevant information that evidences such a right might reveal that the Kukatj/Kutharn native title claim group were a subset of a wider society and they can bind other subsets within that society.

As I have discussed earlier in relation to the relevant pre sovereignty society, the material before me is neither explicit nor conclusive about the operation of that society. In my view, no definitive opinion is reached or expressed in the report that makes it clear to me that there exist landholding groups in the region of the application that would be governed by Kukatj/Kutharn laws and

customs that pertain to a traditional practice of exercising the right as it is claimed. That is, there are no examples in the material before me that show how this right has operated in relation to other Aboriginal persons who consider themselves governed by the traditional laws and customs of the Kikatj/Kutharn.

This is not to say that the right is not possessed under the traditional laws and customs of the Kukatj/Kutharn people, only that there is not sufficient or probative material or information before me that suggests that this is the case.

Therefore, I consider that this right cannot be established, prima facie.

Conclusion

I have considered the rights claimed in the application against existing law in relation to whether or not they are capable of being recognised and whether the application provides sufficient information to establish, prima facie, their existence. I am satisfied, having considered the information before me, that some of the rights claimed in this application can be established prima facie. Therefore the rights to be registered on the Register of Native Title Claims are as follows:

1. Over areas where a claim to exclusive possession can be recognised (including areas where there has been no prior extinguishment of native title and where section 238 and/or sections 47, 47A and 47B apply), Gkuthaarn and Kukatj People claim the right to possess, occupy, use and enjoy the lands and waters of the application area to the exclusion of all others.
2. Over areas where a claim to exclusive possession cannot be recognised, the following rights and interests are claimed:
a. the right to access, camp on and move about the application area;
b. the right to erect non-permanent shelters on the application area;
c. the right to live (but not permanently reside) on the application area;
d. the right to hold meetings on the application area;
e. the right to hunt and fish in the application area;
f. the right to cook on the application area;
g. the right to use the water resources of the application area;
h. the right to gather and use the natural resources of the application area (including food, medicinal plants, timber, stone, ochre and resin);
i. the right to conduct ceremonies on the application area;
j. the right to participate in cultural activities on the application area;
k. the right to maintain and protect places of importance in the application area;
l. the right to conduct burials on the application area;
m. the right to speak for the application area;
o. the right to teach and transmit the cultural heritage of the native title claim group including knowledge of particular sites;
p. the right to take, use, share and exchange the natural resources of the application area.

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).

Under s. 190B(7), I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application. This condition 'can be seen as requiring some measure of substantive (as distinct from procedural) quality control upon the application'—*Gudjala FC* at [84].

In *Doepel*, Mansfield J also considers the nature of the Registrar's task at s. 190B(7):

> 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].

Sufficient material is provided in the statements of members of the native title claim group to show that the native title claim group has a traditional physical connection with the land and waters of the application area. The material is referred to and quoted extensively in my consideration for both ss. 190B(5) and 190B(6), above.

The overview report finds that that evidence points to the 'claimants, as descendants of earlier owners of the claim area countryside, having descent based connections to the land and waters. At the same time, many claimants and their ancestors had maintained strong and ongoing physical connections to the lands and waters of the claim area'—at [189].

The statements of members of the claim group demonstrate that the traditional connection people have with the area covered by the application. Marlene Logan and Philip George have lived and worked throughout their lives in the area covered by the application. They acknowledge and observe Gkuthaarn and Kukatj traditional laws and customs passed down to them by their parents and grandparents. They continue to practice and exercise the rights and interests that arise under their traditional law and custom and pass their knowledge onto succeeding generations.

I am satisfied that at least one member of the claim group currently has a traditional physical connection with parts of the application area.

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

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

Section 61A provides:

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

(2) If :

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

(b) either:

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

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

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

(3) If:

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

(b) either:

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

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

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

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

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

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

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

Reasons for s. 61A(1)

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

In my view the application **does not** offend the provisions of s. 61A(1). The geospatial report dated 4 December 2012 and a search that I made of the Tribunal's geospatial databases on the day of my decision reveals that there are no approved determinations of native title over the application area.

Reasons for s. 61A(2)

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

In my view the application **does not** offend the provisions of s. 61A(2). Schedule B at paragraph 1 excludes from the application area any land or waters that is or has been covered by previous exclusive possession acts as they are defined in the NTA.

Reasons for s. 61A(3)

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

In my view, the application **does not** offend the provisions of s. 61A(3). Schedule B contains a statement at paragraph 2 that exclusive possession is not claimed over areas which are subject valid previous non-exclusive possession acts.

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 contains the statement that 'the native title claim group does not claim ownership of minerals, petroleum or gas that are wholly owned by the Crown'.

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

The application **satisfies** the subcondition of s. 190B(9)(b). Schedule P contains the statement that the native title claim group does not claim exclusive possession of any off-shore places.

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

The application **satisfies** the subcondition of s. 190B(9)(c). Schedule B at paragraph 4 contains the statement that the application excludes land or waters where the native title rights and interests claimed have been otherwise extinguished.

[End of reasons]

Attachment A
Summary of registration test result

Application name	**Gkuthaarn and Kukatj People**
NNTT file no.	**QC2012/019**
Federal Court of Australia file no.	**QUD685/12**
Date of registration test decision	**22 March 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)		N/A
	s. 190C(4)(b)		Met

Section 190B conditions

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

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

Attachment B
Documents and information considered

The following lists **all** documents and other information that I have considered in coming to my decision about whether or not to accept the application for registration.

- Gkuthaarn and Kukatj People native title determination application, as filed in the Court on 26 November 2012;
- The Tribunal's Geospatial Services 'Geospatial Assessment and Overlap Analysis' (the geospatial report) for 4 December 2012, being an expert analysis of the external and internal boundary descriptions and mapping of the application area and an overlap analysis against the Register, Schedule of Applications, determinations, agreements and s. 29 notices and equivalent;
- Correspondence from the applicant dated 19 December 2012 and 15 January 2013 requesting an extension of time in the application of the registration test;
- Additional material provided by the applicant, 15 February 2013:
    - Submissions on behalf of the Applicant in response to the preliminary assessment (17 December 2012) of the application;
    - Affidavit of **[Chief Executive Officer – name deleted]**, CEO of CLC, dated 14 February 2013, including annexures HT1—HT4;
    - Gkuthaarn and Kukatj People: Anthropologist's Overview, prepared by **[Anthropologist – name deleted]**, dated February 2013 (confidential report).

[End of document]