National Native Title Tribunal

Registration test decision

Application name	Eastern Maar
Name of applicant	Kenneth Ivan ('Ivan') Couzens, Janice Austin and Maisie Davis
State/territory/region	Victoria
NNTT file no.	VC2012/1
Federal Court of Australia file no.	VID1085/12
Date application made	14 December 2012
Name of delegate	Renee Wallace

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: 20 March 2013

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Renee Wallace

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

Reasons for decision

Table of contents

Introduction

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

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

Application overview

The Registrar of the Federal Court of Australia (the Court) gave a copy of the Eastern Maar claimant application to the Native Title Registrar (the Registrar) on 17 December 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 14 December 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 s. 190B and 190C of the Act. This is commonly referred to as the registration test.

Registration test

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

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

Information considered when making the decision

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.

For the purpose of the registration test, I have had regard to the information contained in the following documents:

- Form 1, including all attachments;
- Geospatial assessment and overlap analysis dated 18 December 2012;
- the results of my own searches against the Tribunal's mapping database, including the map of the application area produced from 'ispatial view' and the overlap analysis dated 19 March 2013;
- the judgment made in *Lovett on behalf of the Gunditjmara People v State of Victoria (No 5)* [2011] FCA 932; and
- the judgment made in *Lovett on behalf of the Gunditjmara People v State of Victoria* [2007] FCA 474.

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

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

Procedural fairness steps

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

On 19 December 2012, the case manager for this matter sent a letter to the applicant indicating that any additional information in relation to the application should be provided to the Registrar by 18 January 2013. The letter also advised of a proposed decision date.

On 19 December 2012, the case manager for this matter sent a letter to the State of Victoria (the State), advising that any submissions in relation to the application should be provided to the Registrar by 18 January 2012. The letter also advised of a proposed decision date.

On 31 January 2013, the case manager for this matter sent a letter to the State advising that additional information had been provided to the Registrar by the applicant in relation to the registration testing of the claim. The letter informed the State of the details of this information, which was publicly available. The letter advised that any submissions in relation to the application and additional information should be provided to the Registrar by 15 February 2013. The letter also advised of a new proposed decision date.

On 1 February 2013, the case manager for this matter sent a letter to the applicant advising of a new proposed decision date.

No further procedural fairness steps were undertaken.

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.

Section 190C(2) is framed such that it clearly directs attention to the contents of an application. It requires the Registrar to be satisfied only 'that the application contains all details and other information..'—s. 190C(2).

Thus, in reaching my decision for the condition in s. 190C(2), I understand that this condition is essentially 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.

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

Native title claim group: s. 61(1)

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

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

The requirements of s. 61(1) and the Registrar's task at s. 190C(2)

In relation to the requirements of s. 61(1), it is well established that the Act does not permit the making of a native title determination application by a subgroup of the real native title group, nor can the grant of native title be given to a subgroup of the real group—see *Dieri People v South Australia* [2003] FCA 187 (*Dieri People*) at [55] and *Edward Landers v South Australia* [2003] FCA 264 (*Landers*) at [33] following *Ward v State of Western Australia* (1998) 159 ALR 483 at 541, *Risk v National Native Title Tribunal* [2000] FCA 1589 (*Risk*) at [60], *Tilmouth v Northern Territory of Australia* [2001] FCA 820.

The meaning of 'native title claim group' for the purpose of the Act is clear, but its identification in any particular matter will depend upon the facts. This is partly reflected in the following passage from the decision of Bennett J in *Hillig as Administrator of Worimi Local Aboriginal Land Council v Minister for Lands for the State of New South Wales (No 2)* [2006] FCA 115 at [60] to [62}, where his Honour stated:

> …the expression 'native title claim group' in s. 61(1) of the Act refers to 'the whole group of persons who hold native title over an area and cannot comprise a subgroup which accepts that it is part only of a larger group of native title holders'. A native title claim group may comprise a sub-group of a community that share a set of traditional laws and customs where that sub-group alone possesses rights and interests in the particular area (*Harrington-Smith (on behalf of the Wongatha People) v Western Australia* (2003) 197 ALR 138 at [52]–[53]). However, where a small family group or a sub-group is only part of the group who claim to hold native title it is not the group who hold the common or group rights or interests within s. 61 of the Act (*Risk* ... at [60]; *Dieri* [*People v State of South Australia* [2003] FCA 187] at [55]; *McKenzie* [*v State Government of South Australia* (2005) 214 ALR 214] at [41]; *Landers* [*v State of South Australia* [2003] FCA 264] at [32]–[33]). An exception to this principle was *Colbung v Western Australia* [2003] FCA 774 where a smaller family group was not included in the larger claim group but claimed particular rights and interests which may not have been established by the larger group. ...
>
> In *Harrington Smith* at [52]–[53], Lindgren J observed that it is conceivable that traditional laws and customs may be observed by a wider population, without that wider population being part of the claim group, because rights and interests may be conferred in relation to land covered by the application which are not conferred on the wider population. It is a matter of evidence.

Given, however, the Registrar's task at s. 190C(2) discussed above, the law elicits the limited ambit of this consideration, being that which is confined to the information contained in the application itself. Thus, this assessment does not involve the Registrar going beyond the application, nor does it require any form of merit assessment of the material to determine whether 'in reality' the native title claim group described is the correct native title group— *Doepel* at [37] and [39].

Nonetheless, whilst s. 190C(2) may be framed in a way that 'directs attention to the contents of the application' and its purpose is to ensure that the application contains all the details and information required by ss. 61 and 62, if those contents are found to be lacking, this necessarily signifies problems. Thus, at the outset it is important for the purpose of registration 'to ensure that a claim, on its face, is brought on behalf of all members of the native title claim group'— *Doepel* at at [35].

The information in the application

The application names three persons (Kenneth Couzens, Janice Austin and Maisie Davis) as comprising the applicant. The application also contains the statement that '[t]he applicant is entitled to make this application as persons authorized by all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed (the native title group).'

Schedule A of the application also contains a description of the native title claim group, being:

> The native title claim group is the Eastern Maar peoples, being those descendants, including by adoption, of the following persons, who identify as being from the eastern domain of the Maar speaking people and are recognised as being from the eastern domain by the Eastern Maar people: King of Port Fairy and Eliza, Old Jack (father of John Dawson), Charlie and [Name of Person 6 Deleted] (parents of Albert Austin), Samuel Robinson and Mary Caramut, Name of Person 3 Deleted (mother of [Name of Person 5 Deleted]), Robert and Lucy (parents of [Name of Person 6 Deleted]), Barny Minimalk, [Name of Person 10 Deleted] Whiturboin, Louisa (mother of William Rawlings).
>
> The reference to adoption [above] is a reference to a person who was reared up by members of the Eastern Maar peoples, who identifies as being an Eastern Maar person, and is recognised by the Eastern Maar peoples as being an Eastern Maar person.

Consideration

The application names the persons comprising the applicant and states that they are authorised.

The description of the native title claim group is set out in Schedule A. The description, of itself, elicits that the application is made on behalf of the Eastern Maar people, being from the 'eastern domain of the Maar speaking people.'

There is information in the application which expounds on the native title claim group description (see Schedule F), citing the Eastern Maar as comprising one domain of the Maar society and the Gunditijmara as the other domain. This information also elicits that there is some overlap in areas for these two domains of the one society within the wider region within which the claim area is situated, but also that they have distinct territories. The relevant traditional laws and customs set out in the application refer to the 'maintenance of distinctions between the two domains of the Maar society.' It is clear from this information that the claim being made is that the area the subject of this application falls solely within the territory of the Eastern Maar people —Attachment F.

Having considered the description of the native title claim group and other information in the application, it is my view that the application contains the information required by s. 61(1) for the purpose of s. 190C(2). The claim, on its face, appears to be brought on behalf of all members 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 contains the name and address for service of 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).

The nature of the task at s. 61(4) is similarly confined by the parameters of s. 190C(2) .

From the description contained in Schedule A (see my reasons above at s. 61(1)), it follows that the provisions of s. 61(4)(b) apply and that the application must contain the details/information that 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.

I am satisfied that within the application at Schedule A there is a description which appears to meet the requirements of the Act.

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 was accompanied by affidavits of the three (3) persons jointly named as comprising the applicant, being Kenneth Couzens, Janice Austin and Maisie Davis.

Each of the affidavits swears to the matters set out in s. 62(1)(a)(i)-(iii). In relation to the setting the matters in s. 62(1)(a)(iv) and (v), the affidavits contain the following statements:

> I am authorised by all the persons in the Eastern Maar People Native Title Group to make the application and to deal with matters arising in relation to it.
>
> The decision making process in authorising me, and the other named persons, to make the application and to deal with matters arising in relation to it is an agreed and adopted decision making process where each family has one vote and that vote shall be exercised by the family group representative chosen by the family group members. This decision making process is the process adopted by the full group at the full group meeting in Warrnambool on 7 December 2012.

The requirements of s. 62(1)(a)

In *Doolan v Native Title Registrar* [2007] FCA 192 (*Doolan*), Spender J held that '[a]s a matter of language (and in fact practice), the requirements of s 62 are satisfied by the filing of affidavits by each of the persons who constitute 'the applicant' deposing to the specified beliefs. The 'applicant' in s 62(1), in my view, is a reference to each of the persons who comprises 'the applicant' for the purpose of s 61 of the Act'—at [67].

Thus, the filing of separate affidavits from each of the persons jointly comprising the applicant is quite appropriate. Given that, it may be taken that each of the affidavits must be considered in conjunction.

Thus, where the deponents of each of the affidavits swear to the fact that 'I am authorised by all the persons in the Eastern Maar People Native Title Claim Group', this may be taken as the appropriate statement for the purpose of s. 62(1)(a)(iv) when all of the affidavits are considered in combination.

Alternatively, the use of the word 'I' instead of 'the applicant' may be taken as a slip in the wording of the affidavit. The effect of a slip in the wording of an affidavit of this kind was discussed by French J in *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) at [8] to [12], where similarly the use of the word 'I' instead of 'applicant' was used by the deponents. It is my view that an error in the wording required by s. 62(1)(a) for the affidavits may be treated as such unless it is indicative of the deponents having failed to turn their mind to the matters which must be established—at [12].

In relation to s. 62(1)(a)(v), I also understand that providing details of the decision-making process complied with in authorising the applicant requires that at the very least the affidavit/s identify the decision-making process complied with in accordance with s. 251B (s. 62(1)(a) includes a note to s. 251B). The affidavits identify that the decision-making process complied with is that which is provided for under s. 251B(b). The affidavits also contain other details pertaining to the authorisation of the applicant.

Having considered the wording of the affidavits of each of the deponents, it is clear to me that each turned their mind to whether the applicant was authorised by all the persons in the native title claim group and the basis for such authorisation.

I am satisfied that the applicant is accompanied by the affidavits required under s. 62(1)(a).

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

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

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

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

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

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

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

Schedule B and Attachment B of the application contains all details and other information required by s. 62(2)(a).

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).

Schedule C and Attachment C of the application contains all details and other information required by s. 62(2)(b.

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 of the application contains the statement that '[n]o searches have been carried out by the Applicant to determine the existence of any non-native title rights and interests in relation to the land or waters of the claim area.'

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

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

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

A description of the native title rights and interests claimed in relation to the application area is contained at Schedule E.

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 and Attachment F of the application contain details and other information relevant to the general description of the factual basis. Other schedules of the application may also contain relevant details and other information relating to the factual basis

I have only considered whether the information regarding the claimant's factual basis contained in the application addresses, in a general sense, each of the particular assertions at s. 62(2)(e)(i) to (iii) and have not undertaken an assessment of its sufficiency. Any 'genuine assessment' of the details/information contained in the application at s. 62(2)(e), is to be undertaken by the Registrar when assessing the applicant's factual basis for the purposes of s. 190B(5) — *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [92].

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 of the application speaks directly to the activities currently carried out by the native title claim group in relation to the area claimed.

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 of the application contains the statement that '[n]o other application that seeks a determination of native title or a determination of compensation in relation to any part of the area covered by the application.'

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

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

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

Schedule HA of the application contains the statement that '[t]he applicant is not aware of any notices under section 24MD(6B)(c) of the Act which have been given and that relate to the whole or part of the area.'

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

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

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

Schedule I of the application contains the statement that '[t]he applicant is not aware of any notices under section 29 of the Native Title Act (or under a corresponding provision of a law of Victoria), that have been given and that relates to various parts of the area covered by the application.'

I note that at the time of the making of the application there were two (2) relevant notices under s. 29 of the Act which related to part of the area covered by the application. It is my view that the application must only contain details of such notices of which the applicant is aware. Thus, given the statement in Schedule I it is apparent that the applicant was not aware of these notices.

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 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, is only triggered if the previous application meets all of the criteria in s. 190C(3)(a), (b) and (c)— see *Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

Is there a previous application?

The Tribunal's Geospatial Services prepared a geospatial assessment and overlap analysis dated 18 December 2012 (GeoTrack:2012/2386) (the geospatial assessment) . The geospatial assessment states that there are no overlapping applications on the Register of Native Title Claims or Schedule of Applications—Federal Court. I am satisfied that there were no overlapping applications at the time the application was made on 14 December 2012.

Thus, it is my view that there is no 'previous overlapping application' (as described in s. 190C(3)) which falls within the area covered by the current application.

I am satisfied that the application complies with 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.

Under s. 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

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

Schedule R of the application states that the application has been certified by an Aboriginal/Torres Strait Islander body and that a copy of the certificate is attached at Attachment R.

Thus, the applicant seeks to satisfy the Registrar that the requirements of s. 190C(4)(a) are met.

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

The nature of the task at s. 190C(4)(a)

Section 190C(4)(a) imposes upon the Registrar conditions which, according to Mansfield J in *Doepel,* are straightforward—at [72]. All that the task requires of me is that I be 'satisfied about the fact of certification by an appropriate representative body'—*Doepel* at [78], which necessarily entails:

- identifying the relevant native title representative body and being satisfied of their power under Part 11 to issue the certificate; and

- being satisfied that the certification meets the requirements of s. 203BE—*Doepel* at [80]-[81].

Identification of the representative body and their power to certify

The document at Attachment R titled 'certification' and dated 12 December 2012 is signed by the Chief Executive Officer of Native Title Services Victoria Ltd (NTSV). The certification states that NTSV is certifying the application pursuant to s. 203BE(1)(a).

The geospatial assessment identifies that NTSV is the only representative body for the area covered by the application.

Section 203BE(1) of the Act is to the effect that a representative body is empowered with certification functions, including the ability to certify (in writing) applications for determination of native title in relation to land and waters that fall wholly or partly within the areas for which that body is the representative body: see s. 203BE(1)(a). The certification states that NTSV has certified the application in accordance with ss. 203BE(2) and (4).

Having regard to the information contained in the certification and the geospatial assessment I am satisfied that, as at 12 December 2012, NTSV was the relevant representative body for the application area and that it was within its power to issue the certification.

The requirements of s. 203BE

To be satisfied about 'the fact of certification'—*Doepel* at [78], the certification must meet the requirements of s. 203BE, namely ss. 203BE(4)(a) to (c).

I note that the Registrar has no power to undertake a qualitative assessment or 'critical analysis' of the content of the certificate, beyond that which is set out in s. 203BE. That is, her task is confined to purely considering 'its compliance with the requirements of s 203BE'—*Doepel* at [81] and [82].

Subsection 203BE(4)(a)

Subsection 203BE(4)(a) requires a statement from the representative body confirming that they hold the opinion that the requirements of subsections (2)(a) and (2)(b) have been met.

That certification contains the required statement.

Subsection 203BE(4)(b)

Pursuant to s. 203BE(4)(b) the certification must also briefly set out the body's reasons for being of the opinion set out in s. 203BE(4)(a).

In that regard, the certification sets out details pertaining to the authorisation of the applicant and also the identification of the persons in the native title claim group, which include that:

- NTSV staff attended the authorisation meeting on Friday 7th December 2012 at Warrnambool, Victoria when the applicants [sic] were authorised;
- a decision was made in relation to the decision-making process to be used during the meeting and those present resolved that each family shall have one vote and that vote shall be exercised by respective family representatives;
- at the meeting the applicants [sic] were authorised after discussion and consideration by a unanimous decision of all Eastern Maar people who attended the meeting;
- on that basis, NTSV is of the opinion that the appropriate decision-making process for the purposes of authorisation pursuant to s. 251B has taken place;

- NTSV has over a number of years undertaken anthropological and genealogical research and conducted community consultation for the purpose of identifying persons who hold native title rights and interests in the application area;
- The authorisation meeting was broadly notified by NTSV (including public notification);
- NTSV is of the opinion that all persons who hold native title rights and interests in the area the subject of the application have been identified.

The certificate briefly sets out the body's reasons for being of the opinion in s. 203BE(4)(a).

Subsection 203BE(4)(c)

This subsection applies where the application area is also covered by an overlapping application for determination of native title.

Where applicable, the certificate must also set out what has been done by the representative body to meet the requirements of s. 203BE(3) in order to comply with s. 203BE(4)(c). If the area of the application being certified is covered wholly or partly by one or more applications (including proposed applications) of which the representative body is aware, s. 203BE(3) requires the representative body to make all reasonable efforts to achieve agreement between the persons involved in those overlapping applications and minimise the number of applications covering the area.

The geospatial assessment confirms that no other applications, as per the Schedule of Applications—Federal Court, currently fall within the external boundary of this application area. I accept that this assessment is accurate and current.

In my view, the requirements of s. 203BE(3) are not applicable to the area covered by this application, and therefore, it is appropriate that the certification is silent on s. 203BE(4)(c).

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).

Information which enables the boundaries of the area as defined in s. 62(2)(a)(i) to be identified

Section 62(2)(a) requires information, being a 'physical description or otherwise' to identify the area covered by the application (s. 62(2)(a)(i)) and any areas within those boundaries that are not covered by the application.

Schedule B of the application states that the area covered by the application is described in Attachment B.

Attachment B of the application contains a metes and bounds description of the external boundaries of the claim area prepared by the Tribunal's Geospatial Services. It references topographic features, river basins, native title determination applications and coordinate points.

The geospatial assessment is such that it opines that the information contained in Attachment B enables the identification of the relevant areas in s. 62(2)(a) sufficiently such that it can be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters. I agree with this assessment.

Information which enables the areas, as defined in s. 62(2)(a)(ii), within the external boundary to be identified

Schedule B of the application contains only generic exclusions to the areas within the external boundary.

The use of a general formulaic approach, as is utilised by the applicant in Schedule B, was discussed in *Daniel for the Ngaluma People & Monadee for the Injibandi People v Western Australia* [1999] FCA 686 (*Daniel*), in relation to the information required by s. 62(2)(a) and its sufficiency for the purpose of s. 190B(2). Nicholson J was of the view that such an approach 'could satisfy the requirements of the paragraphs where it was the appropriate specification of detail in those circumstances'. His Honour noted the difficulty in reconciling the need for detail as specified by s. 62(a)(i) and (ii), the requirements of the registration test at s. 190B(2) and the 'state of knowledge of the parties at different stages of the application', but formed the view that consideration of these issues was necessary in order to assess the application against these requirements—at [30] to [38].

In my view the generic exclusions that are listed in Schedule B are the appropriate specification of detail in this instance.

The information in Schedule B enables the areas within the external boundary to be identified.

A map showing the boundaries of the area mentioned in s. 62(2)(a)(i)—s. 62(2)(b)

Attachment C of the application is a map of the application area.

Attachment C contains a colour map of the Eastern Maar application area. The Eastern Maar boundary is depicted in bold red outline. Other boundaries depicted in the map include: river basin boundary (depicted in bold blue outline) and abutting native title determination applications. It also contains scalebar, northpoint, coordinate grid and location diagram.

The geospatial assessment indicates that the map at Attachment C is consistent with the description of the external boundary at Attachment B. It also suggests that the map identifies the application area with reasonable certainty. I agree with this assessment. Also, having considered the map, it is my view that it clearly identifies the external boundary of the claim area.

Decision

I am 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.

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

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

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

The nature of the task at s. 190B(3)(b)

From the description of the native title claim group contained in Schedule A it follows that the conditions of s. 190B(3)(b) are applicable to this assessment. Thus, I am required to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can ascertained whether any particular person is in that group.

The focus of the task here is to consider 'whether the application enables the reliable identification of persons in the native title claim group'—at [51]. This focus does not need to go beyond the application—at [16] and [51]: see also *Gudjala [2007]*, where Dowsett J accepted that s. 190B(3) only required the delegate to address the content of the application—at [30].

In my view the question, as it was for the Court in *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591(*WA v NTR*), is whether applying the conditions (or rules) specified in Schedule A will allow for a sufficiently clear description of the native title claim group in order to ascertain whether a particular person is in that group.

Of this, Carr J in *WA v NTR* stated 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. It is more likely to result from the effects of the

> passage of time and the movement of people from one place to another. The Act is clearly remedial in character and should be construed beneficially—at [67].

Consideration of the description

The description of the native title claim group appears in Schedule A (extracted above in my reasons).

The description essentially elicits that there are three (3) criteria of membership to the Eastern Maar People native title claim group. Upon my understanding, the primary criterion is descent (including by adoption) from one of a number of named person. Those persons must also identify as being from the eastern domain of the Maar people and be recognised as such.

Describing a claim group in reference to named ancestors is one method that has been accepted by the Court as satisfying the requirements of s. 190B(3)(b): see *WA v NTR* at [67]. I am of the view that with some factual inquiry it will be possible to identify the persons who fit the first part of the native title claim group description.

The additional criteria of identifying and being recognised as persons from the eastern domain of the Maar speaking people would also necessitate factual inquiry. Whilst these criteria are less tangible, it is my view that there is still sufficient clarity with the description. The description primarily employs an objective criterion of descent from named persons, and it is my understanding that this provides the fundamental basis of membership to the native title claim group.

In my view, the description of the native title claim group contained in the application is such that, on a practical level, it can be ascertained whether any particular person is a member of the group.

Focusing only upon the adequacy of the description of the native title claim group, I am satisfied of its sufficiency for the purpose of s. 190B(3)(b).

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).

In undertaking the task at s. 190B(4), it is for the Registrar or her delegate to exercise 'judgment upon the expression of the native title rights and interests claimed'—*Doepel* at [99].

Whilst it open to me to find, with reference to s. 223 of the Act, that some of the claimed rights and interests may not be 'understandable' as native title rights and interests (*Doepel* at [123]), I am of the view that a consideration of the rights and interests in reference to s. 223 should be the task at s. 190B(6) .

Thus, I consider that primarily at s. 190B(4) the test is one of 'identifiability', that is 'whether the claimed native title rights and interests are understandable and have meaning'—*Doepel* at [99].

The native title rights and interests claimed appear at Schedule E of the application. There is some peculiarity in the expression of native title rights and interests claimed at Schedule E, including the reference to those native title rights and interests that are 'wholly recognisable' and those native title rights and interests that are 'only partially recognisable.' I understand this to be a distinction between exclusive and non-exclusive native title rights and interests.

It is my view that the rights and interests claimed are understandable and have meaning.

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.

Combined Reasons for s. 190B(5)

There are clear principles established by the law which must guide the Registrar 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 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].

It is, however, important that the Registrar consider whether each particularised assertion outlined in s. 190B(5)(a), (b) and (c) is supported by the claimant's factual basis material. In that regard, the law provides specific content to each of the elements of the test at s. 190B(5)(a) to (c)—

see, for instance, *Gudjala [2007]* and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala [2009]*) give.[1]

It is, in my view, fundamental to the test at s. 190B(5) that the applicant describe the basis upon which the claimed native title rights and interests are alleged to exist. Accordingly, this is a reference to rights vested in the claim group and further that it is 'necessary that the alleged facts support the claim that the ***identified claim group*** [emphasis added] (and not some other group) **[**hold] the identified rights and interests (and not some other rights and interests)'—*Gudjala [2007]* at [39].

Whilst the applicant is not required to prove the truth of their claims, nonetheless there must be sufficient 'factual basis to support assertions made in the application and it is the obligation of the applicant to provide sufficient evidentiary material to form this basis'. Further, where the applicant's material is predominantly assertive 'this does not assist in building the factual basis necessary for assessing the application' — *Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal* [2012] FCA 1215 (*Anderson*) at [43] and [48].

All of the above, in my view, confirms the need for adequate specificity of particular and relevant facts within the claimant's factual basis material going to each of the assertions before the Registrar can be satisfied of its sufficiency for the purpose of s. 190B(5).

The nature of the claimant's factual basis material in support of the assertions at s. 190B(5)

The claimant's factual basis material in support of the assertion at s. 190B(5) consists of the general statements and assertions that are made at Schedule F and Attachment F of the application.

Schedule F and Attachment F also contain references to determinations of native title that have been made in favour of the Maar People, including the Eastern Maar People, over areas that are in the region of the area covered by this application. A copy of these determination decisions (consent determinations), being *Lovett on behalf of the Gunditjmara People v State of Victoria* [2007] FCA 474 and *Lovett on behalf of the Gunditjmara People v State of Victoria (No 5)* [2011] FCA 932, were provided to the Registrar in support of the factual basis for this application. Whilst these determinations are not specific to the application area, it is asserted that they provide relevant facts in relation to the nature of the society of Maar People and the native title claim group.

In addition, the application is also accompanied by three (3) statements of persons who are members of the native title claim group. Primarily, these statements provide examples of the persons' association with the application area, as well as their acknowledgement and observance of the asserted traditional laws and customs which give rise to the claimed native title rights and interests.

[1] Also note that 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)— See *Gudjala FC* [90] to [96]. His Honour, in my view, took a consonant approach in *Gudjala [2009].*

Section 190B(5)(a) - that the native title claim group have, and the predecessors of those persons had, an association with the area

The Law

The factual basis must demonstrate that the whole claim group presently have an association with the claim area and that their predecessors also had an association since sovereignty, or at least since European settlement. This, however, should not be taken to mean 'that all members must have such an association at all times' but rather that there be some 'evidence that there is an association between the whole group and the area' and a similar association of the predecessors—*Gudjala [2007]* at [52]; *Gudjala FC* at [90] to [96].

Further, I am to be informed as to the nature of the claimant's association with the application area on the basis of the information provided, but am not obliged to accept broad statements which are not geographically specific—*Martin v Native Title Registrar* [2001] FCA 16 at [26].

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

Schedule F of the application sets out that:

> At the assertion of British sovereignty, the Maar speaking peoples, who shared a system of traditional law and custom and customary practices and obligations (Maar society) wholly occupied their traditional territory, which extended from the catchment of the Glenelg in the west, to the catchment of the Leigh and the Barwon in the east and from the sea in the south to the Great Dividing Range.
>
> At sovereignty, the Maar society comprised two domains, whose peoples were the Gunditjmara and the predecessors of the native title claim group and whose territories overlapped in the vicinity of the Shaw and Eumeralla Rivers. The territory of the Gunditjmara extended to the west of the overlap area and the territory of the predecessors of the native title claim group extended to the east and covering the claim region (including the claim area).
>
> The reported birthplaces of the founding ancestors [those described in Schedule A], and their burial sites, are in the territory of the eastern domain of the Maar society in the claim region, including Camperdown, Dennington, Eumeralla, Allansford, Mortlake, Warrnambool, Tarrone Station, Framlingham, Carmut, Chatsworth, Port Fairy, Hexham, Merrange Station (near Mortlake).
>
> Many members of the native title claim group and their predecessors (including parents, grandparents and other predecessors who form a continual line to the founding ancestors) were also born in and lived for all or much of their lives within the claim region including at Framlingham Mission, Warrnambool, Allansford, Ballangeich, Camperdown, Koroit, Mortlake, Panmure, Port Fairy, Purnim, Terang, Timboon, Wangoom.

Attachment F of the application provides limited information of any specificity to the association of the predecessors with the claim area the subject of the application, but does refer to some general historical accounts of the area.

I have also considered the determination decisions which were referred to the Registrar in relation to the application. In *Lovett on behalf of the Gunditjmara People v State of Victoria (No 5)*

[2011] FCA 932 there is a general discussion of the association of the Eastern Maar in the vicinity of the application area (including reference to the association dating back to sovereignty):

> ...the State has explained in its written submissions something of the history of the Eastern Maar people. They are one of the Aboriginal societies which existed in the south-west Victoria at sovereignty. Historical materials by George Augustus Robinson, Isabella and James Dawson, Norman B Tindale and Dr Clarke bear testimony to the Aboriginal societies in that area at the time. Then, in the 1860s, missions were established at Framlingham/ Purnim, and Lake Condah. Between the dates of sovereignty until the mid 1860s the Aboriginal population declined by more than 90 per cent. The eastern people, including the Eastern Maar, tended to live at Framlingham/ Purnim, and the western people tended to live at Lake Condah. The Eastern Mar people included the families of the Abrahams, Alberts, Austin, Bert, Chatfield, Clark, Clarke, Couzens, Harradine, Lowe and Rose. The connection material provided to the State established that the Eastern Maar people exercise their rights at and have particular connections with a number of locations in the Part B area, as well as lands to the east of it. For example, the Eastern Maar fish at places like Yambuk Lake and Port Fairy. The Couzens family express a strong connection to Penshurst which is just east of the northern section of the Part B area. Those connected with [Name of Person 5 Deleted] identify with the area around the Eumeralla River and many Eastern Maar people speak of both Yambuk and Deen Maar as spiritual places from which people's spirits ascended to the sky.

This provides some context to the historical association of the Eastern Maar people with their traditional country, which includes places within the application area. The references to places which are described as being to the east of Part B [determination area] are to places within the application area. Further, the passage of the decision references placenames within the application area, such as Port Fairy and Framingham.

The statements provide some information in relation to the predecessors, including those described in Schedule A (referred to above as 'the founding ancestors').

In the statement of[Name of Person 1 Deleted], he sets out his knowledge of the predecessors and their association with the claim area:

> My maternal grandparents were [Name of Person 2 Deleted] [grandson of Name of Person 3 Deleted] and [Name of Person 4 Deleted]. I knew them. They lived on the Mish with us. I call [Name of Person 2 Deleted] "Grandfather or Grandpa [Name of Person 2 Deleted]". We call Framlingham Mission "Fram" or "the Mish".
>
> Grandfather [Name of Person 2 Deleted] parents were [Name of Person 5 Deleted] and [Name of Person 6 Deleted]. [Name of Person 5 Deleted] and [Name of Person 6 Deleted] are both named in the description of the Eastern Maar People, in the Part B determination and in our current application. [Name of Person 6 Deleted] was the daughter of Robert and Lucy, and [Name of Person 5 Deleted]was the son of [Name of Person 3 Deleted].
>
> [Name of Person 5 Deleted] was born in 1853 past the line of pines near the old Homestead, Eumeralla I. There are two Eumeralla stations. Grandfather [Name of Person 5 Deleted]was born at Eumeralla I, which was the property of [Name of Person 7 Deleted], the pastoralist. I have seen the station where he was born. [Name of Person 5 Deleted] had his stage coach run from Eumeralla to Mortlake, he travelled over our country.
>
> [Name of Person 5 Deleted]'s mother was [Name of Person 3 Deleted], fron Lake Condah.

> [Name of Person 5 Deleted] married [Name of Person 6 Deleted] in 1879. She died in 1947. Grandfather [Name of Person 5 Deleted] is buried at Framlingham cemetery.
>
> [Name of Person 4 Deleted] was born at Derrinalum. Her parents came down through the [Family name 1 deleted] and [Family name 2 deleted] line.
>
> Fram, the Eumeralla Stations, Derrinalum and Warrnambool are all within the claim region.

The statement of Kenneth Couzens also contains information relevant to the predecessors and their association with the claim area, including:

> My father was [Name of Person 8 Deleted] . He was born at Warrnambool.
>
> My father's mother, [Name of Person 9 Deleted] , was born at Camperdown and her mother, [Name of Person 10 Deleted] [a founding ancestor], was born out on the Moyne River. Later [Name of Person 10 Deleted] lived at Allansford. She is buried out at Warrnambool.
>
> My mother's mother was [Name of Person 11 Deleted]. She was from around Lake Condah and Heywood.

Association of the native title claim group with the area

Schedule F of the application sets out that:

> Many members of the native title claim group continue to live within the claim region including at Framlingham Mission, Warrnambool, Ballangeich, Terang, Purnim, Port Fairy, Bushfield.
>
> The members of the native title claim group and their predecessors have had a continuous presence in the claim region and there has been continuous conduct there by them of the activities identified in Schedule G, including their using the resources of the land and waters of the claim area for sustenance and trade and otherwise to their benefit, in pursuance of their entitlements under their traditional laws and customs.

The factual basis material in relation to the association of the native title claim group, including facts pertaining to the asserted continuity of this association, are primarily contained in the statements.

[Name of Person 12 Deleted] speaks of his association with the claim area, saying that he lived on the Fram mission until he was five years old. He says that Eastern Maar is a contemporary name, which is associated with people who come from Fram. He has always been told that he is Gunditjmara. He states that he believes that Eastern Maar country is wider than that which is being claimed and includes Colac [which is proximate but outside the application area]. As a child he would travel from Colac through to Fram and Warrnambool.

After speaking of the association of his predecessors,[Name of Person 1 Deleted] sets out details of his own association with the application area:

> In about 1952-53, we moved to the Mish and lived with [Name of Person 2 Deleted] on the hill by the river near Warrumyea Bridge.
>
> [Name of Person 2 Deleted] told me about boundaries and country and was [sic] told me about being Peek whuurong. He told me the Mish was on our land...I go by what [Name of Person 2

> Deleted] said. All we want is to be on the map. Quite a lot of the other older folks didn't speak of traditional boundaries, as such. They spoke of 'their land' and then other peoples land but not boundaries as such.
>
> I identify as Peek whuurong and I recognise that we are part of one nation. Peek whuurong, Kirrae whuurong and Chaap whurrong all relate through the Mish, because we all came together there. So that's our side, the ones that relate through Fram. Then there is the other side, the ones who come through Condah. Great Grandfather [Name of Person 5 Deleted} mother came from Lake Condah and she was [a] Gunditjmara woman. Then all those groups relate together under the one Maar nation, which can also be called the Gunditjmara Nation.

[Name of Person 1 Deleted] also speaks of places of significance to him and other Eastern Maar people, including:

> The forest, up behind the Framlingham cemetery, is a very significant place for us. Like the Hopkins River being our playground, it was the same with the Forest. [Name of Person 2 Deleted] had a hut just by the swamp where the Pretty Creek comes out to the Hopkins River, in the Forest. I've been going there since I was little, and I know it like the back of my hand. I have taken my kids and grandkids, and a lot of other kids there too.
>
> Over by the Crags, on the other side of Port Fairy heading towards Dean Maar there are camp ovens and middens and a massacre site. We knew about that massacre, when my mum used to travel back and forth to Lake Condah.
>
> At Port Fairy two or three hundred people were massacred in one go; that is one of the most significant sites.
>
> Granny [Name of Person 4 Deleted] told me that when she was travelling with Granny [Name of Person 6 Deleted], coming back from Windamara, Granny [Name of Person 6 Deleted] was identifying the country she passed through. At that time, Granny [Name of Person 6 Deleted] told her how she had been the only survivor of a massacre just up the road at a little place called Illowa just over the road here. About 12 people were killed there. That's on the claim area.
>
> There are some burials in the dunes, near the swamp runs right up to Tarrone swamp. There are midden sites on the dunes where the houses are now built. That's on the claim area.

In the statement of Kenneth Couzens he speaks to the nature of his association with the application area and that of the Eastern Maar people (including his predecessors). He was born in the claim area in 1932 and lived at Fram Mission until he was approximately 10 years old. His association to country is reflected in the following passages from the statement:

> I have always called myself Gunditjmara. We were all one Gunditjmara growing up, Fram and Condah mob. We lived in Framlingham and we called ourselves Gunditjmara. It's all Gunditjmara country from the Glenelg right through to the Hopkins River and then, when you include the people who call themselves Kirrae Whurrong, the country includes Camperdown, Timboon, Port Campbell and then east along the Otway Coast. My father called himself Kirrae Whurrong. There's also Julia [Name of Person 17 Deleted] Island, 'the Crags', down Yambuk way. Port Fairy is Gunditjmara. Warrnambool is Gunditjmara. We knew this when we were younger. While my dad called himself Kirrae Whurrong, he was still Gunditjmara. Kirrae Whurrong is part of us.

> My country is from the Moyne across to Mortlake. Up to Mount Elephant (near Derrinallum), down to Camperdown, and from there down to Port Campbell and along the Otway Coast. I am connected to Warrnambool-Panmure where I grew up.
>
> Dad showed us Tooram Rocks. We were chasing eels where the fresh water meets the salt water. It was on the same trip when we went to Childer's Cove. It's a beautiful place. That's where he pointed out where Granny [Name of Person 10 Deleted] lived and came from – across the Hopkins River. And my father's mother lived there of course. At Childer's Rocks there was an old camp site. I think he was scared about the spirit there. He said it was an important place for people to live.
>
> There's a whole lot of tracks Dad showed us along that coast which were used by our people. The tracks are along the cliffs all along where the Great Ocean Road now is.

Is the factual basis sufficient to support the assertion at s. 190B(5)(a)?

When analysing the requirements of s. 190B(5), there is a necessity for the factual basis material to elicit 'the relationship which all members claim to have in common in connection with the relevant land'. This, in my view, correlates with the prerequisite that the factual basis support the claim that it is the 'identified claim group', and not some other, which holds the rights and interests in the relevant land. Further, the fact that some members of the claim group and their relevant predecessors are, or may have been, associated with the application area, does not automatically lead to the conclusion that all members and their predecessors are associated. Thus, the factual basis should demonstrate a common association of the native title claim group with the land and waters—*Gudjala [2007]* at [39], [40] and [51].

There is some complexity to the factual basis and the information it contains in relation to the association of the native title claim group with the application area.

The Eastern Maar people are said to be one domain of the Maar society (whose people are the Gunditjmara and the Eastern Maar). However, the Eastern Maar is a contemporary name which has been created to reflect one part of that society. The claimants refer to themselves variously as the Eastern Maar, the Gunditjmara (presumably meaning 'eastern Gunditjmara' as is used in the draft order at Attachment J) or by their tribal names (including Peek whuurong, Kirrae whuurong and Chaap whuurong). They also refer to the 'Gunditjmara Nation' as encompassing all of the traditional tribes of the society. This is said to be synonymous to the 'Maar nation.'

This use of various names and explanations to identify the native title claim group creates some intricacy in understanding who the Eastern Maar people are and their relationship with the land and waters the subject of the application. However, the factual basis asserts that the founding ancestors of the native title claim group are those that have birthplaces and burial sites in this application area, being the asserted territory of the Eastern Maar people.

Under the asserted laws and customs of the Maar society it is those founding ancestors and their descendants who have rights and interests in the application area. Thus:

> The relationship the members of the native title claim group and their predecessors respectively have and have had with the land and waters of the claim region is as those who, by the laws and customs referred... are the 'right' people for, or the 'owners' of, that land and those waters—Schedule F.

In addition, each of the statements by current claimants acknowledges the common relationship that the members of the Eastern Maar people have with the application area. This is reflected in the claimants' knowledge of their founding ancestors' history with the application area, the knowledge of how different families or tribal groups who are part of the claim are associated with the area. Further, the statements elicit the knowledge that other Maar people do not share that common relationship with the area the subject of this claim. In his statement, Kenneth Couzens relays that '[t]o claim connection with the land you have to be born on the land and have lived there and be connected through your ancestors.'

There is also in my view, particularly within the statements, 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]. For instance, each of the persons in the statements speaks to their own association as well as to that of their parents and grandparents. In some of the statements, the deponents have also provided details of the association of their great grandparents with the application area.

Kenneth Couzens was born in the claim area in 1932. He speaks primarily of his association, but also sets out his knowledge of his parents and grandparents and their association (including that of the founding ancestor [Name of Person 10 Deleted]). Upon my understanding, his recounting of the history of association dates back to approximately the mid to late 1800s.

Further, I have considered whether the factual basis is sufficient to show the association 'between the whole group and the area'—*Gudjala [2007]* at [52]. In undertaking that task, it is my view that information supporting an assertion of an association between the whole group and the area can be sufficiently demonstrated through the provision of some tangible examples, originating from one or more members of the claim group, of how the whole group and its predecessors are associated with the area over the period since sovereignty.

The statements primarily focus on the association with particular areas that are of significance to the deponents. For instance, they discuss in detail the association with Framlingham and the mission. There are, however, also numerous references to many other places within the application area and the association of the native title claim group and its predecessors with such. There are details of travel over the claim area and activities that have been carried by members of the native title claim group and their predecessors. The statements refer widely to various members and family groups that are part of the Eastern Maar people.

It is my view that this kind of information within the statements provides sufficient examples and facts to support the assertion of an association between the whole group and the whole area.

Section 190B(5)(b) - that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests

Above I foreshadowed that a sufficient factual basis is one which adequately describes the basis upon which the native title claim group defined in the application (and not some other group) asserts to hold the native title rights and interests claimed—*Gudjala* at [41].

In that regard, in requiring that the factual basis describe the foundation of the native title claim group's entitlement to the claimed rights and interests, the focus of s. 190B(5)(b) is upon the

existence of traditional laws and customs acknowledged and observed and that give rise to the claimed native title rights and interests.

The expression 'traditional laws acknowledged by, and traditional customs observed by' is of a similar vein to that employed in s. 223 of the Act and, thus, the meaning to be afforded to the term 'traditional' in s. 190B(5)(b) can be derived from cases that explore s. 223—see *Gudjala [2007]*—at [26] and [62] to [66] (citing the High Court in *Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors* (2002) 214 CLR 422;[2002] HCA 58 (*Yorta Yorta*)).[2]

Given that, the expression employed in s. 190B(5)(b) may be understood as referring to:

- 'A traditional law or custom is one which has been passed from generation to generation usually by word of mouth or common practice'—*Yorta Yorta* at [46].

- '[T]he origins of the content of the law or customs concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty...'—*Yorta Yorta* at [46].

- '[T]he normative system...is a system that has had a continuous existence and vitality since sovereignty'—*Yorta Yorta* at [47].

- 'When the society whose laws and customs existed at sovereignty ceases to exist, the rights and interests in land to which these laws and customs gave rise, cease to exist'—*Yorta Yorta* at [53].

- '[D]emonstrating some change to, or adaptation of, traditional law or custom or some interruption of enjoyment or exercise of native title rights or interests in the period between the Crown asserting sovereignty and the present will not *necessarily* be fatal to a native title claim'—*Yorta Yorta* at [83].

In having regard to the above, I do not suggest that I will be considering the ability of the claimants' factual basis to make out these requirements. Rather, they may offer a guide as to the kind of factual information that is sufficient to support this assertion, such as outlining facts that show some relationship or link between an identified normative system and the traditional laws and customs of the native title claim group. In the context of the registration test (and explicitly the task at s. 190B(5)(b)), it is clear that the facts asserted, assuming that they are true, must be capable of supporting the assertion that there are 'traditional' laws and customs, acknowledged and observed by the native title claim group and that give rise to the claimed native title rights and interest—*Gudjala [2007]* at [62] and [63].

Factual basis in support of the assertion at s. 190B(5)(b)

Schedule F of the application identifies the relevant pre-sovereignty society as that of the Maar speaking peoples, who shared a system of traditional law and custom and customary practices and obligations and wholly occupied their traditional territory.

[2] This aspect of the judgment was not criticised by the Full Court, and see *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala [2009]*)—at [19] to [22].

Attachment F contains further facts in relation to the pre-sovereignty society of the Maar speaking peoples, some which have been extracted from the determination decisions (referred to above), including that:

> In broad terms, the materials advanced the theses that, at sovereignty, there was an Aboriginal society (sometimes described as the society of Maar-speaking society) whose territory included the land the subject of the Gunditjmara Part A Determination, the area of Part B was [sic] a very substantial area of land extending for [sic] to the east of Part B. The Gunditjmara and the Eastern Maar were said to form two discrete domains within this socio-geographic area. Part B was said to be the overlap area of the domains of the Gunditjmara and the Eastern Maar. Within it, each group asserted the same native title rights and interests, and recognised the coextensive rights and interests of the other.

Attachment F also asserts that:

> The ethno-historical record evidences the existence prior to and since sovereignty, of a single Aboriginal society sharing law and custom including in relation to landholding (being what is referred to in this application as the Maar society) in south-west Victoria, generally from the catchment of the Glenelg in the west, to the catchment of the Leigh and the Barwon in the east and from the sea in the south to the Great Dividing Range; and the continuation of that society in that area to the present day.
>
> The territory of the Maar society was recorded as extending from the catchment of the Glenelg in the west, to the catchment of the Leigh and the Barwon in the east and from the sea in the south to the Great Dividing Range. It includes the entirety of Part B and the claim area.
>
> Recorded by Robinson [1841-1849], the key features of the society at sovereignty were, among other things, that:
>
> (a) it comprised a large number of interacting landholding groups which held native title at sovereignty;
>
> (b) there were further internal boundaries within the society that coincided with the boundaries between the Portland Coast, Hopkins and Glenelg drainage basins;
>
> (c) there was a cross-linked mosaic of associations (through marriage, trade, ceremony) and amity between the landholding groups, across the territory associated with the society, which coalesced through the custom of holding 'great gatherings' of associated groups at resource-rich sites within the territory.
>
> Robinson's journals and other writings about the society in the Western District at this time, provide clear support for the proposition that the members of the society held title to land according to their traditional laws and customs. Significantly:
>
> (a) there was an underlying territorial association between the area and the society as a whole;
>
> (b) rights and interests in land were allocated to and held by less inclusive local landholding groups. These groups asserted ownership of particular areas of country and were recognised as owners by other members of the society;

(c) the traditional laws and customs relating to succession operated so that responsibility for vacant localised territories was transferred between members of the society. Robinson recorded in April 1841 that title to land remained within the broader society even when a local group had died out.

Ethno-historical and historical records show that as the number of landholding groups decreased between the 1840s and 1870s as a result of the decline in the population, the extent of the territory they held increased. The net effect was that no territory was lost to the society. Rather, formerly local territories merged or were succeeded to in accordance with the traditional laws and customs of the society as a whole.

The factual basis of the claim also provides some information in relation to the persons who are asserted to have acknowledged the laws and customs of the relevant society at sovereignty. These are the persons described in Schedule A and referred to throughout as the 'founding ancestors'. The bulk of the information would suggest that these persons were born in the claim area around the mid to late 1800s. The factual basis material places these persons in the domain of the Maar society.

Schedule F of the application sets out the primary laws and customs that bound the pre-sovereignty society and that remain essential to the native title claim group:

The peoples of the Maar society including the predecessors of the native title claim group at sovereignty acknowledged laws and shared and observed customs including, and the laws and customs of the native title claim group continue to include, laws and customs governing recognition of a person as possessing rights and interests in relation to land and waters. Those laws and customs included, and include that:

(a) in order to hold rights and interests in relation to the claim area, a person must be a descendant (including by adoption) of an ancestor who held rights and interests in the claim region; today such an ancestor being one of the founding ancestors;
(b) the members of the native title claim group have an entitlement to exclude and an entitlement to impose sanctions for wrongful presence on or use of land, waters or resources of the claim area by strangers; and
(c) the members of the native title claim group individually, as families and as a group have entitlements of the kind mentioned in paragraph 14 in relation to the whole of the claim area.

Further facts going to support the assertion of the existence of a pre-sovereignty society, from which the laws and customs of the native title claim group are derived, can be found in the claimant statements. They speak to the laws and customs that they have knowledge of, and which they claim are the laws and customs of the relevant pre-sovereignty society. They provide some facts in support of this claim, such as details of being taught about the laws and customs from their immediate predecessors and how those laws and customs give rise to the native title rights and interests in the area the subject of this claim.

Of his relationship with the claim area and the laws and customs that give rise to the native title rights and interests claimed Kenneth Couzens says:

My mother's mother was from around Lake Condah and Heywood. The Gunditjmara from out that way say I am one of them because my grandmother was from there; but I have never

> thought that because I was not born there and did not grow up there. My country is more the Framlingham side.
>
> To claim connection with the land you have to be born on the land and have lived there and be connected through your ancestors.
>
> There are boundaries, traditional boundaries. That's traditional law. We were always told that rivers, mountains and creeks were boundaries.

The statements also discuss various customs, such as funeral and burial rites, fishing, hunting and gathering practices. Each of the claimants outline their understanding of spiritual beliefs and sanctions, obligations to their country and the transmission of knowledge to members of the native title claim group.

Kenneth Couzens outlines that:

> [Traditional word deleted] is our creator; he is an eagle. He is the one who looks after us. He has his Cave up in the Grampians but comes down to us here. He is the creator of all of the country. I have known this since I was young. I can't remember who first told me, everyone just knows this.
>
> At the cemetery at Fram there was an eagle's nest up in the big pine tree. There were always eagles there. They don't build there anymore because it is too old but the eagles still fly around. That's [Traditional word deleted].
>
> When we were kids we never walked along the river where it passes down the hill from the cemetery. The elders reckoned if you walked past the cemetery the spirits of the old people would role stones at you. So us kids would never go past it and the old people would never go past especially at night time.

Is the factual basis sufficient to support the assertion at s. 190B(5)(b)?

The starting point in examining the sufficiency of a factual basis for the purpose of 190B(5)(b) is that it must identify the relevant pre-sovereignty society. That is, there must be some basis for my inferring that the factual basis elicits details of a pre-sovereignty society 'which had a system of laws and customs from which relevant existing laws and customs were derived and traditionally passed on to the existing claim group'. The facts set out must, in turn, sufficiently support the assertion that those laws and customs give rise to the claimed native title rights and interests of the native title claim group—*Gudjala [2007]* at [62], [66] and [81].

In making the necessary inferences and deductions for the purpose of s. 190B(5)(b), consideration of the following factors may guide the Registrar in assessing the asserted factual basis and its sufficiency, including:

- whether the factual basis demonstrates the existence of a pre-sovereignty society and identifies the persons who acknowledged and observed the laws and customs of the pre-sovereignty society— *Gudjala [2009]* at [37] and [52];

- whether, if descent from named ancestors is the basis of membership to the group, that the factual basis demonstrate some relationship between those ancestral persons and the pre-sovereignty society from which the laws and customs are derived— *Gudjala [2009]* at [40];

- whether the factual basis contains some explanation as to how the current laws and customs of the claim group can be traditional (that is laws and customs of a pre-sovereignty society relating to rights and interests in land and waters). Further, the mere assertion that current laws and customs of a native title claim group are traditional, is not a sufficient factual basis for the purposes of s. 190B(5)(b)— *Gudjala [2009]* at [52], [55] and [69]; and

- whether the factual basis contains some details of the claim group's acknowledgement and observance of those traditional laws and customs pertaining to the claim area— *Gudjala [2009]* at [74].

In that regard, the factual basis material identifies a pre-sovereignty society, being the Maar society which it is asserted gives rise to the Eastern Maar peoples' claims to hold native title rights and interests in the claim area. There are various facts put in support of that assertion, including those derived from historical and other material, which refer to the nature and extent of the society and its laws and customs.

The Eastern Maar people, it is asserted, form one domain of the Maar society. The laws and customs of the Maar society are such that whilst there was territorial association over the whole of their traditional country, within the bounds of that wider territory local landholding groups asserted ownership over internal boundaries. It was the smaller, less inclusive local landholding groups that were recognised as the owners of their country. The founding ancestors of the Eastern Maar identified in Schedule A are recognised under the traditional laws and customs of the Maar society as being the owners of the claim area.

The relationship between the identified ancestors of the native title claim group and the relevant pre-sovereignty society is also the subject of elucidation within the asserted facts. The facts elicit that the founding ancestors were born in the territory of the eastern domain of the Maar society, being the application area. The statements would suggest that some of the founding ancestors were born in the application area from around 1830 to the mid 1800s. It is not clear as to whether some of the founding ancestors were born prior to this. This is a relatively significant period after sovereignty, however other information in the factual basis supports the inference that these founding ancestors of the Eastern Maar were born into the existing Maar society. That information includes the recitation of the historical record of the Maar society in the vicinity of the claim area at sovereignty and the favourable determinations of native title over areas in close proximity to the claim area, which in effect make findings of fact in relation to the Maar society and its existence at sovereignty.

There is also some explanation of how the current laws and customs reflect those of the pre-sovereignty society. This is done in part by setting out details of the historical accounts of the relevant laws and customs. In addition, the factual basis material also contains details of the claim group's current acknowledgement and observance of asserted traditional laws and customs and how such laws and customs have been passed down from generation to generation. [Name of Person 1 Deleted], for instance, has knowledge of some of the founding ancestors and their children. He speaks of how his [Name of Person 2 Deleted] [the son of Name of Person 5 Deleted] and [Name of Person 6 Deleted]] taught him about the boundaries of country and other laws and customs in relation to the land and waters.

Overall, there does seem to be some information upon which a comparison of the current laws and customs with those that are asserted to have existed at sovereignty is possible. This is done in a relatively broad and general manner in Schedule F of the application and in the statements. Nonetheless, it is my view that there are sufficient facts to support the assertion of a similarity of laws and customs now acknowledged and observed and those that existed at sovereignty. Particularly pertinent is how the current laws and customs continue to reflect the pre-sovereignty system of sub-regional and localised level of land ownership, which in effect is asserted to give rise to the Eastern Maar (the contemporary sub-regional level) claiming the native title rights and interests on behalf of the various cognatic family (the localised level) groups who make up the native title claim group.

Given the above, it is my view that the factual basis is sufficient to support the assertion at s. 190B(5)(b).

Section 190B(5)(c) - that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

This part of the test is concerned with whether the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the native title rights and interests claimed. In my view, this assertion relates to the continued holding of native title through the continued observance of the traditional laws and customs of the group.

In addressing this aspect of the test in *Gudjala [2009]*, Dowsett J considered that where the claimant's factual basis relied upon the drawing of inferences, that:

> Clear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs may justify an inference of continuity'—at [33].

There is, in my view information within the factual basis material that goes to explaining the transmission and continuity of the native title rights and interests held in the application area in accordance with relevant traditional laws and customs. This is particularly evident in the statements. [Name of Person 1 Deleted] speaks of how he learned about the traditional laws and customs, and how he participates in the transmission of knowledge:

> Young ones need to sit back and let the old ones talk. We have got to pass on what we know, how the old people survived. The reason we are trying to get our point across is because of the old people. So I learned things from [Name of Person 2 Deleted] and Uncle [Name of Person 13 Deleted] and all those old people and now I pass it down to my kids and grandkids. I tell them about our country, how to talk to it, how to talk to the spirits and how to hunt and fish. I show them all the old places, or all the old ones we can still get to.
>
> I learnt a lot from [Name of Person 2 Deleted], Uncle [Name of Person 13 Deleted] and the other Aunts and Uncles. I learnt a lot about country and what country belonged to which people from [Name of Person 2 Deleted] .
>
> You were always with someone, learning. I learned a lot of what I know from Uncle [Name of Person 14 Deleted] and his father Uncle [Name of Person 13 Deleted]. They taught me a lot: hunting, how to identify and use tussock (basket) grass.
>
> What I know about medicines, I learned from [Name of Person 2 Deleted].

> [Name of Person 15 Deleted] ([Name of Person 16 Deleted]'s father), he was a great bush mechanic. Ivan's father too, he was a bush mechanic.
>
> I spent time with Uncle [Name of Person 13 Deleted], Uncle [Name of Person 17 Deleted], [Name of Person 15 Deleted]; we would go fishing. My old man and [Name of Person 18 Deleted] (Maisy's father), they were cutting wood together and that's where I learned. Uncle [Name of Person 15 Deleted] moved into town when we did. We would spend time together fishing.

In forming my decision in relation to this requirement I have also considered my reasons above in relation to s. 190B(5)(b), and in particular that:

- the relevant pre-sovereignty society has been clearly identified and some facts in relation to that society have been set out;
- there is some information pertaining to the acknowledgement and observance of laws and customs by previous generations of Eastern Maar people in relation to the application area —see Attachment F and statements;
- examples of the claim group's current acknowledgement and observance of laws and customs in relation to the claim area have been provided —see Attachment F and statements.

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

Subsection 190B(6)
Prima facie case

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

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

The nature of the task at s. 190B(6)

The pertinent point in considering the application against the requirements of this section is that the test is prima facie. Thus, '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]. Nonetheless, it does involve 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 this section is one that permits consideration of material that is beyond the parameters of the application and requires the Registrar to:

> [C]onsider whether 'prima facie' some at least of the native title rights and interests claimed in the application can be established. By clear inference, the claim may be accepted for registration even if only some of the native title rights and interests claimed get over the prima facie proof hurdle—*Doepel* at [16].

Native title rights and interests

In undertaking the task at s. 190B(6), I must have regard to the relevant law as to what is a native title right and interest, specifically the definition of native title rights and interests contained in s. 223(1) of the Act. That is, I must examine each individual right and interest claimed in the application to determine if I consider, prima facie, that they:

- exist under traditional law and custom in relation to any of the land or waters in the application area;
- are native title rights and interests in relation to land or waters: see chapeau to s. 223(1); and
- have not been extinguished over the whole of the application area.

The 'critical threshold question' for recognition of a native title right or interest under the Act 'is whether it is a right or interest' in relation to land or waters'—*Western Australia v Ward* [2002] HCA 28 (*Ward HC*), Kirby J at [577]; remembering '[t]hat the words 'in relation to 'are of wide import'—(*Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group* [2005] FCAFC 135 (*Alyawarr FC*)).

Having examined each of the native title rights and interests set out in the application at Schedule E, it is my view that, prima facie, each is a right or interest 'in relation to land or waters.'

As to the other requirements for native title rights and interests, this was put succinctly by the majority in *Yorta Yorta* (referring primarily to s. 223(1)(c) but alluding to the requirements of s. 223(1)(a)):

> Native title ***owes its existence and incidents to traditional laws and customs*** [emphasis added], not the common law. The role of the common law is limited to the recognition and protection of native title. That recognition and protection ***depends on native title not having been extinguished*** [emphasis added]and its not having incidents that are repugnant to the common laws... requires examination of whether the common law is inconsistent with the continued existence of the rights and interests that owe their origin to Aboriginal law or custom—at [110].

Further, whilst the exercise of native title rights and interests 'may constitute powerful evidence' of both the existence and content of those rights and interests, the statutory scheme (including s. 223(1)(a)) is directed towards their possession pursuant to the traditional laws and customs (not their exercise) and 'continuity of the chain of possession' may be relevant—*Yorta Yorta* at [84] to [85].

It should be noted that the way in which the applicant has framed the rights and interests claimed in relation to the application area (see Schedule B) sufficiently addresses any issue of extinguishment, for the purpose of the test at s. 190B(6).

I now consider each of the rights and interests as claimed. I note that my reasons at s. 190B(6) should be considered in conjunction, and in addition to, my reasons and the material outlined at s. 190B(5).

I note that the rights claimed, as set out below, are subject to a number of qualifications, which are contained in Schedule E of the application, and where appropriate those qualifications will be placed on the Register.

Native title where traditional rights are wholly recognised

Where this paragraph applies the native title rights possessed under traditional law and customs and recognised by the common law of Australia is the right of possession, occupation, use and enjoyment of land and waters as against all others

In *Western Australia v Ward* [2002] HCA 28 (*Ward HC*), the majority 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].

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:

> [T]he question whether the native title right 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 the consideration of what the evidence discloses about their content under traditional law and custom*** [emphasis added]—at [71].

Further, the Full Court in *Griffiths FC* was of the view that control of access to country could flow from 'spiritual necessity', due to the harm that would be inflicted upon those that entered country unauthorised—at [127].

Consideration

The above paragraphs point to the nature and features of this right in land and waters. In examining whether the applicant's material prima facie establishes its existence, it is my understanding that this right materialises from traditional laws and customs that permit the native title claim group to exhibit control over all others in relation to access to the land and waters.

The recitation of the historical record (see reasons at s. 190B(5)(b)) in the factual basis is such that it is asserted that at sovereignty there existed an 'underlying territorial association' between the Maar society and its land and waters. Further, under the laws and customs of this society, ownership in land resided in smaller 'less inclusive local landholding groups' and it is those who were recognised as the owners of particular parts of country.

The factual basis material recites that:

- Within the Maar society, there is a distinction between two domains (one being the Eastern Maar) and their territories and peoples;
- There has been a continuous existence and acknowledgement and observance of laws and customs of the Maar society of the ownership of country and its resources;
- Current claimants of the Eastern Maar maintain an extensive knowledge of their country and entitlements; and

- The members of the Eastern Maar people, in relation to their territory, have an entitlement to exclude and impose sanctions for wrongful presence or use of land and waters.

In his statement, Name of Person 1 Deleted says that:

> I think people can choose which bloodline they go under. My mother was born in Peek Whuurong country. I also have Kirrae Wurrong [sic], and Chaap whuurong in my line but I wouldn't have the cheek to speak on behalf of them, I have the right to speak for my mother's and grandfather's country.
>
> When I went to Mt. Gambier, I called [Name of Person 19 Deleted], who is a Gunditjmara man and was CEO of the Gunditj Mirring Aboriginal Corporation, and asked permission to go there, out of respect for what they fought for and gained. That's also how you do things. Because that's their side and their country. We might be one nation but that is theirs so we have to ask for permission.
>
> I prefer to talk to the 'Old People' (the spirits) rather than contemporary people. I speak to those old people for permission from them. I do that through spiritual means. Even when we are travelling and we leave our own country I know the old people wish us well and dance for joy when we come back to the country.
>
> It's always a good feeling when you're crossing back into your own country. Peek whuurong boundary starts at the mouth of the Hopkins and goes up to East Framlingham (the white settlement). Part of the Allansford town on the other side of the Hopkins is Peek whuurong land, halfway between Allansford and the Kraft factory and then up the Hopkins River. Framlingham Cemetery on the Mish is on Peek whuurong land. At Bushfield, we cross the Merri, but we're still on Peek whuurong land. We'd have our school sports at Bushfield. From Fram we head towards the west, diverts with creeks and nooks and crannies, about a kilometre on the western side of Woodford, then inland and diverts around to Newerella and up the Coast, back to the mouth of the Hopkins. It includes the bend in the Hopkins River, where the Tooram Stones is at. Creeks and nooks and crannies and hills identify where boundaries lie. The Peek whuurong boundary goes from the Eumeralla River starts at the sea and goes up inland towards, Maccarthur and Bessiebell. Purnim Creek is the creek where the Merri River starts. It divides Peek whuurong from Chaap whuurong.

It is my view of the factual basis material that current claimants maintain an extensive knowledge of their country and that they make a clear distinction between their own country and that which they cannot exert any control over. Current claimants' knowledge of the laws and customs elicits that they and others continue to recognise the Eastern Maar people at the sub-regional level, representing one domain of the Maar society. Further, the more localised level of cognatic family groups continues to pervade symbolic ownership of particular country within the domain of the Eastern Maar. This symbolic ownership encompasses the right to speak for country and the right to exclude.

Outcome: prima facie established.

Native title where traditional rights are only partially recognisable

Where this paragraph applies, the native title rights possessed under traditional law and customs are the rights to:

(a) have access to, remain on and use for any purpose the land and waters;

There is within the factual basis material information supporting the continued presence of the Eastern Maar within the claim area. This includes the birth of the founding ancestors, other predecessors and current claimants within the claim area.

The history of access and use of the claim area by the Eastern Maar, in accordance with traditional laws and customs, is reflected in the statements. In his statement, Kenneth Couzens (a claimant born in the claim area in 1932) states that:

> My father was [Name of Person 8 Deleted]. He was born at Warrnambool.
>
> My father's mother, [Name of Person 9 Deleted], was born at Camperdown and her mother, [Name of Person 10 Deleted] , was born out on the Moyne River. Later [Name of Person 10 Deleted] lived at Allansford. She is buried out at Warrnambool.
>
> I lived at Fram Mission from when I was born until I was about 10 years old. Only Aboriginal people lived at Fram.
>
> The families at Fram when I was younger were the [Family name 3 deleted], [Family name 4 deleted], [Family name 5 deleted], [Family name 6 deleted], and [Name of Person 20 Deleted]'s family, [Family name 7 deleted], and [Family name 8 deleted].

[Name of Person 1 Deleted] and [Name of Person 12 Deleted] both speak of their history of association and their use of the claim area, as well as referring to other families of the Eastern Maar who live on, access and use the application area in accordance with traditional laws and customs.

Outcome: prima facie established.

(b) access and take for any purpose the resources of the land and waters

[Name of Person 1 Deleted] speaks to the native title claim group's use of resources within the application area:

> Mum and the aunts taught us how to hunt rabbits and hares, and so on, out there. How to survive. On both sides of the road at the Trust, that was our hunting grounds. We'd get a junk load of rabbits. We used to get hares; they are stronger tasting but leaner. We'd hunt them with waddies or bundies.
>
> Goose lagoon was a big hunting area. There was swans and ducks and magpie geese, a lot of bird life. Kangaroos and koalas were very scarce. Mainly rabbits and snakes then.
>
> The bushes, with the yellowish colour, that looks like pine: they're used for smoking bad spirits out. And those scrubby bushes with yellow flowers, they're used for medicine for sores or to make a drink for sore throats. We call them Kickabushes. The bark is good for string, for making dilly bags, tying a hut together. But the best stuff for sore throats is black wattle sap.
>
> We eat the shoots of bracken ferns. You can also pull it up and eat the white strands inside the base. It's a good source of moisture and food. The young growth is not as good as the mature growth.
>
> We'd get boomerangs off black wattle trees. There are six different grains, all with a red streak through it. Blackwood has four different grains. We make boomerangs out of Blackwood. A

> traditional boomerang is not made from limbs, or the trunk because they break, but at the root of the tree is where you make them from.

[Name of Person 12 Deleted] and Kenneth Couzens also speak to their own use of resources within the claim area. They also refer to how certain customs and practices in relation to resource use was taught to them by their immediate predecessors.

There is scant, if any, information going to the use of resources by the native title claim group's founding ancestors. However, given the physical nature of the association that the founding ancestors had with the claim area it may be said to be palpable that they had the right to use the resources of the claim area. It is implicit in the information that current claimants believe that their use of resources arises under the traditional laws and customs.

Taking account of all of the factual basis material, it is my view that it prima facie establishes that this right is possessed pursuant to the traditional laws and customs of the native title claim group.

Outcome: prima facie established.

(c) protect places and resources on the land and waters

Schedule F states that '[u]nder the laws and customs acknowledged and observed by the members of the native title claim group and their predecessors, the claim region is regarded as their homeland and as having a sentience that requires them to behave appropriately toward their country.' This is said to include caring for country.

In his statement, [Name of Person 12 Deleted] speaks about certain places of significance and the need for protection. He states that:

> Deen Maar Island, that's what was called Lady [Name of Person 17 Deleted] Island. It has to do with burial. They say that the heads would have to be pointed towards the island. I believe Deen Maar Island should be a prescribed area. It should be heritage listed. It's a special place. It belongs to all of us, both Condah and Fram.

In the statement of Ivan Couzens, he says that:

> Dad took us to Peterborough and Port Campbell, past Princetown and then to Moonlight Head, where we camped. A lot of boats were wrecked there. It's very beautiful there. He showed us sites where our people would camp and fish. He would drive use down all around that area to look at our country. It's important to see your country, to see it and look at it and make sure it's ok.

In the statement of [Name of Person 1 Deleted], he says that:

> There is a big midden site embedded in the lava at the mouth of the Hopkins. You can see the black and shells. Part of it is about to fall into the water. There is a crack in it that has got much bigger. I'm trying to get something done about that. That's our history, our heritage. I'm told it is over 60,000 years old. I have tried to show as many people as I can. Our old people used to tell us to keep our culture and history to ourselves, we went along with that until about the 1950's and 1960's, but then we started telling non-indigenous people so sites get preserved.

Within the statements there is also some discussion of significant places within the application area, although limited details are given in relation to the protection of these places. I could not identify any information within the statements about the protection of resources.

It is my view that the above information in relation to this claimed right, even considered in conjunction with all of the factual basis material, is scant and relatively vague. Whilst some rights and interests may be thought to be incidental to others, I do consider that s. 190B(6) requires sufficient information of specificity to the claimed right and how it is possessed under the traditional laws and customs. There are primarily only general assertions within the information of how this right arises under the traditional laws and customs of the Maar society.

I consider, however, that favourable inferences are available from the information provided. Under the traditional laws and customs of the Maar society it is asserted that the Eastern Maar are the 'right people for, or the owners of' the land and waters covered by the application. The material sets out facts in support of this assertion. From this and other information within the application it may be inferred that the Eastern Marr are considered, under the traditional laws and customs of the Marr society, as the custodians of the land and waters covered by the application, and that reasonably may be understood to carry a responsibility to protect places and resources.

These favourable assumptions taken with the other information in the application may be said to constitute an arguable claim to this right.

Outcome: prima facie established.

Subsection 190B(7)
Traditional physical connection

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

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

This section requires that the evidentiary material be capable of satisfying the Registrar of a particular fact(s), specifically that at least one member of the claim group 'has or had a traditional physical connection' with any part of the claim area. While the focus is necessarily confined, as it is not commensurate with that of the Court in making a determination, it 'is upon the relationship of at least one member of the native title claim group with some part of the claim area'—*Doepel* at [18].

I also hold the understanding that the term 'traditional,' as used in this context, should be interpreted in accordance with the approach taken in *Yorta Yorta—Gudjala [2007]* at [89]. In interpreting connection in the 'traditional' sense as required by s. 223 of the Act, the members of the joint judgment in *Yorta Yorta* felt that:

> [T]he connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs … "traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty—at [86].

I refer to the information above in relation to s. 190B(5)(b) of these reasons, which provide a sufficient factual basis supporting the assertion that the Eastern Maar people acknowledge and observe the traditional laws and customs of the Maar society.

I also refer to the statements of the claimants. In [Name of Person 1 Deleted]'s statement he says that:

> In March 2009, I walked our traditional Peek whuurong boundary area; it took seven days and we camped out. We had a traditional dance and smoking at the massacre site at Orford to recognise the ancestors and their short lives. We walked to the Eumeralla River – you could really feel the old people there. You could really feel Grandfather [Name of Person 5 Deleted] there. No matter where you walked there were old people present.
>
> The forest, up behind the Framlingham cemetery, is a very significant place for us. Like the Hopkins River being our playground, it was the same with the Forest. [Name of Person 2 Deleted] had a hut just by the swamp where the Pretty Creek comes out to the Hopkins River, in the Forest. I've been going there since I was little, and I know it like the back of my hand. I have taken my kids and grandkids, and a lot of other kids there too.

Given the above, and also considering all of the information provided with the application, I am satisfied that at least one member of the claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application.

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

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

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

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

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

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

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

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

Reasons for s. 61A(1)

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

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

The geospatial assessment states that as at 18 December 2012 no determinations of native title fall within the area the subject of the application. I have also undertaken a search of the Tribunal's mapping database and have produced an overlap analysis of the area.

On 19 March 2012 I produced an overlap analysis from the Tribunal's mapping database. I note that it identifies two determinations of native title over the application area. However, the data in the overlap analysis does not suggest any real overlap. On 19 March 2013, I emailed the relevant geospatial officer for the matter and queried whether the overlaps were only of a technical nature (ie that they do not overlap on the ground). The geospatial officer confirmed that the geospatial assessment of 18 December 2012 is accurate and that the determinations identified in the overlap analysis reflect what are technical overlaps only.

I am of the view that the application does not offend the provisions of s. 61A(1).

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).

The application area is defined to exclude any area in relation to which a previous exclusive possession act (as defined by s. 23B and relevant State legislative provisions) was done—see Schedule B.

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 E of the application sets out the native title rights and interests which are claimed, including the right to possession, occupation, use and enjoyment to the exclusion of all others. This right, however, is only claimed in areas that are not covered by a previous act that is inconsistent with such a right—see Schedule E at [11].

This statement, in my view, is sufficient for the purpose of s. 61A(3) as it would exclude from the claim to possession, occupation, use and enjoyment (to the exclusion of all others) any areas where a previous non-exclusive possession act was done.

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

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

The application **satisfies** the condition of s. 190B(9), because it **meets** all of the three 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 states that '[t]he applicant makes no claim to any minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth or State of Victoria.'

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

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

Schedule P states that '[n]o claim of exclusive possession is made in relation to any offshore place.'

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

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

Schedule B describes the areas over which no native title rights and interests are claimed, namely the areas that are excluded within the external boundaries covered by the application. This

includes any areas where native title rights and interests have been wholly extinguished—see Schedule B at (b), (c), (d) and (e).

The application does not disclose, and I am not otherwise aware, that the native title rights and interests claimed have otherwise been extinguished.

[End of reasons]