National Native Title Tribunal

Registration test decision

Application name	Kabi Kabi First Nation
Name of applicant	Mr Alex Davidson, Ms Bianca Beetson, Mr Tony Dalton, Mr John Gundy, Mr Les Muckan
State/territory/region	Queensland
NNTT file no.	QC2013/003
Federal Court of Australia file no.	QUD280/2013
Date application made	31 May 2013
Name of delegate	Heidi Evans

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

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

Date of decision: 7 August 2013

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Heidi Evans

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

Reasons for decision

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Introduction

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

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

Application overview

The Registrar of the Federal Court of Australia (the Court) gave a copy of the Kabi Kabi First Nation claimant application to the Native Title Registrar (the Registrar) on 4 June 2013 pursuant to s. 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

Given that the claimant application was made on 31 May 2013 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

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

I note that the application is affected by a s. 29 notice, being EPM19625, which has a notification date of 10 April 2013. Consequently, I have used my best endeavours to apply the conditions of the registration test by 10 August 2013.

Registration test

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

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

Information considered when making the decision

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

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

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

- QC2013/003—Kabi Kabi First Nation—QUD280/2013 native title determination application;
- additional material comprising of a revised Attachment 'F & M' (20 pages), and a report, entitled 'Sunshine Coast Region (Kabi Kabi) Native Title Connection Report, by ***[name removed]*** dated September 2012 (329 pages);
- geospatial assessment and overlap analysis dated 14 June 2013 (GeoTrack: 2013/0981);
- letters dated 4 June 2013 from the case manager to the State of Queensland (the State), and the relevant representative body, Queensland South Native Title Services (QSNTS), pursuant to ss. 66(2) and 66(2A);
- confidentiality agreement from the case manager to the State, dated 26 June 2013, setting out the terms to be imposed by the Tribunal regarding the State's use of additional material provided by the applicant;
- email from the State to the case manager dated 28 June 2013, confirming that the State would not be making any comments on the application, and do not wish to view or comment on the additional material.

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

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

Procedural fairness steps

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

On 4 June 2013 pursuant to s. 66(2A), the case manager wrote to the representative body for the area covered by the application, being Queensland South Native Title Services Limited (QSNTS), advising that a copy of the application had been received.

Also on 4 June 2013, the case manager wrote to the State, providing a copy of the application pursuant to s. 66(2). The State was given until 21 June 2013 to provide any comments or submissions in relation to the application, however no correspondence from the State was received within this time.

Following the provision of additional material by the applicant on 24 June 2013, on 26 June 2013 the case manager again wrote to the State, seeking the State's agreement to certain confidentiality conditions being imposed upon the State's use of the addition material, prior to being provided with a copy of that material for comment. The State replied by email on 28 June 2013, stating that they did not wish to view or comment on the additional material.

Procedural and other conditions: s. 190C

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

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

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

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

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

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

Native title claim group: s. 61(1)

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

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

In *Doepel*, Mansfield J held that it is only where the description of the native title claim group within the application indicates that not all persons in the native title group are included, or that it is in fact a sub-group of the native title claim group, that the relevant requirement of s. 190C(2)

will not be met – at [36]. In undertaking the task at s. 61(1) for the purposes of s. 190C(2), His Honour found that the Registrar was to consider only the terms of the application – at [39].

A description of the native title claim group appears at Schedule A of the application. I have turned my mind to that description and am satisfied that, on the face of it, there are no persons excluded, nor is there any other thing within that description that indicates that the group described is part only of the native title claim group.

The application meets the requirements of s. 61(1) for the purposes of s. 190C(2).

Name and address for service: s. 61(3)

> The application must state the name and address for service of the person who is, or persons who are, the applicant.

The application contains all details and other information required by s. 61(3).

The names of the persons comprising the applicant appear on page 2 of the Form 1. The applicant's address for service is provided at Part B of the application.

Native title claim group named/described: s. 61(4)

> The application must:
> (a) name the persons in the native title claim group, or
> (b) otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

The application contains all details and other information required by s. 61(4).

It is my view that the task of the Registrar's delegate at s. 61(4) for the purposes of s. 190C(2) does not involve any merit assessment of the description of the native title claim group provided, nor does it require me to consider whether that description is 'sufficiently clear' – see *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [31] and [32]. The task is confined to a consideration only of whether the application contains information as to the identification of the members of the native title claim group, in the form prescribed by either subsection (a) or (b) of s. 61(4) – see *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 (*Wakaman*) at [34].

A description of the native title claim group, pursuant to s. 61(4)(b), appears at Schedule A. The application meets the requirements of this condition for the purposes of s. 190C(2).

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

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

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

The application is accompanied by affidavits sworn by each of the five persons comprising the applicant. Paragraphs [2] to [12] of those affidavits are identical in their terms, and in my view, contain statements to the effect of those required by subsections (i) to (v) of s. 62(1)(a). Each of the affidavits is signed by the deponent, dated, and competently witnessed.

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 of the application refers to Attachment B as containing a written description of the external boundaries of the application area. The written description contained at Attachment B states that the application area specifically excludes the land and waters covered by a number of native title determination applications, and the area subject to a particular native title determination. In addition to this, Schedule B lists a number of general exclusion clauses, that is, areas within the external boundary of the application area that are not covered by the application.

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

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

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

Schedule C refers to Attachment C as containing a map showing the external boundaries of the application area.

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).

The application provides, at Schedule D, that no such tenure searches have been carried out by the applicant.

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

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

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

A description of the native title rights and interests claimed by the native title claim group in relation to the land and waters of the application area is contained at Schedule E of the application. I am of the view that this description is more than a statement to the effect that the native title rights and interests claimed are all those that may exist, or that have not been extinguished, at law.

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

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

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

Schedule F of the application refers to 'Attachment F and M' as containing information relevant to a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist. Attachment F and M is titled 'General Description of Native Title Rights and Interests Claims [*sic*]; Traditional Physical Connection', and is a referenced 19 page report pertaining to these matters.

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 lists those activities currently being carried out by the native title claim group in relation to the land and waters of the application area.

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).

The application states, at Schedule H, that at the time it was filed, there were no other native title applications in relation to the application area.

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

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

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

Schedule HA provides that the applicant is not aware of any notifications under paragraph 24MD(6B)(c) of the Act that relate to the whole or part of the area covered by the application.

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 refers to two s. 29 notices affecting the application area of which the applicant is aware. The earliest of these, EPM19625, has a notification date of 10 April 2013.

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

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

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

In undertaking the task at s. 190C(3), it is my understanding that it is only where there is a previous application meeting all three criteria set out in subsections (a) to (c) of that provision, that the requirement for me to be satisfied regarding common members between native title claim groups for the previous application and the current application is triggered – see *Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

I have referred to the geospatial assessment and overlap analysis (geospatial assessment) prepared by the Tribunal's Geospatial Services, dated 14 June 2013 (GeoTrack: 2013/0981). That geospatial assessment provides that as at the date it was prepared, there are no applications overlapping the whole or part of the area covered by the current application. I have since referred to the Tribunal's iSpatial database, and produced an overlap analysis of the current application from that database, which confirms that this situation is unchanged at the date of making this decision.

For this reason, I have not considered the requirements of s. 190C(3) any further and am satisfied that the application meets the condition.

Subsection 190C(4) Authorisation/certification

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

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

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

Mansfield J, in *Doepel*, discussed the two alternative limbs of the condition at s. 190C(4) in the following way:

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

The application before me is accompanied by a certificate from QSNTS in the form of that described by s. 190C(4)(a). Noting Mansfield J's comments above, it is my view that my consideration of the application pursuant to s. 190C(4)(a) is restricted to a consideration of firstly, whether there is an appropriate representative body able to certify the application, and secondly, whether the certificate itself meets the requirements of a valid certification, set out in s. 203BE(4).

Is there an appropriate representative body that can certify?

As stated, the certificate has been provided by QSNTS. The document is titled 'Certification of Native Title Determination Application Kabi Kabi First Nation Traditional Owners' and has been signed and dated by the Chief Executive Officer of QSNTS on behalf of the representative body.

The geospatial assessment confirms that the area covered by the application falls entirely within the region for which QSNTS carries out the functions of a representative body, such that I can be satisfied that it is the only body required to certify in accordance with s. 190C(4)(a).

The certificate contains certain information pertaining to the status of QSNTS as a native title service provider, namely that it is a body funded under s. 203FE(1) 'for the purpose of performing the functions of a representative body'. It is therefore my understanding that QSNTS is not a recognised Aboriginal and Torres Strait Islander body pursuant to s. 203AD(1), but is a body funded to perform the functions of a representative body pursuant to s. 203FE(1). In reaching this conclusion, I have also had reference to the map maintained by the Tribunal showing the representative Aboriginal and Torres Strait Islander body areas across Australia. It verifies that there is no recognised body for the Southern and Western region of Queensland, but that QSNTS is funded to perform these functions for that region.

Regarding whether the funding provided to QSNTS pursuant to s. 203FE(1) extends to allow for the body to perform the specific function of certification, the certificate further states that the Chief Executive Officer of QSNTS 'is a duly appointed executive officer of the representative body' who has been 'delegated the function given to QSNTS under the Act to certify the Kabi Kabi First Nation Traditional Owners Native Title Determination Application'.

Having nothing before me indicating that these statements are incorrect or false, I have formed the view that QSNTS is an appropriate representative body able to certify the application.

Does the certificate comply with the requirements of a valid certification?

Section 203BE(4) sets out the requirements of a valid certification. It provides:

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

In relation to subsection (a) above, I am of the view that the certificate contains, at paragraphs [2] and [3], statements in the form prescribed, namely statements regarding the representative body's opinion on matters of authorisation and the application identifying all of the persons in the native title claim group.

In relation to subsection (b) above, I note that the requirement is only that the certificate 'briefly set out' the body's reasons for being of the opinion stated. Paragraph [4] of the certificate describes the authorisation meeting convened by QSNTS, the notification process undertaken for the purposes of that meeting, and the outcomes and records made of the events that took place throughout the course of the meeting. In my view, this is sufficient in the certificate briefly setting out QSNTS's reasons for being of the opinion stated.

Finally, in relation to subsection (c), the certificate is silent, and the requirements of subsection (3) of s. 203BE have not been addressed. Subsection (3) refers to the representative body making all reasonable efforts to reduce the number of overlapping applications in relation to the application area. I note that s. 203BE(4)(c) is prefaced by the phrase 'where applicable'. Schedule H of the application contains a statement from the applicant that at the time of making the application,

there are no such overlapping applications. The truth of this statement is verified by the geospatial assessment, prepared as at 14 June 2013.

For this reason, it is my understanding that the applicant has not considered the requirement at s. 203BE(3) applicable and for that reason, has not addressed subsection (c) of s. 203BE(4) within the certificate. In my view, such an approach is acceptable in meeting the requirements of a valid certification pursuant to s. 203BE(4).

I am satisfied, therefore, that the certificate accompanying the application meets the requirements of a valid certification, and consequently, that the application satisfies the condition at s. 190C(4)(a).

Merit conditions: s. 190B

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

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

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

Noting that the wording of the condition directs my attention to the information and map contained in the application pursuant to ss. 62(2)(a) and (b), it is to that written description and map of the external boundaries of the application area appearing at Attachments B and C of the application respectively to which I have turned my mind in assessing the application for the purposes of s. 190B(2).

Attachment B to Schedule B of the application states that 'the application area includes all of the land and waters within the external boundary described below and including Mudjimba Island'. This is followed by a metes and bounds description of the boundaries, referencing Berries Road, Oaky Creek, native title applications and determination, Pumicestone Channel, Birdie Island, Sandstone Point, Ningi Creek, Elimbah Creek and coordinate points (referenced to Geocentric Datum of Australia 1994).

Attachment B also lists four native title determination application areas and the Jinibara People determination area as being excluded from the application area. I note that the written description has been prepared by the Tribunal's Geospatial Services and is dated 12 December 2012.

Schedule B of the application further describes those areas falling within the external boundary of the application area but that are excluded from the area by way of listing a number of general exclusion clauses.

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).

For the purposes of applying the condition at s. 190B(3), it is my view that the focus of my attention is to be primarily upon the description of the native title claim group contained in the application pursuant to s. 61(4) – see *Doepel* at [16] and [51]. A description of the persons

comprising the native title claim group is contained at Schedule A of the application. That description appears as follows:

> In accordance with traditional law and custom acknowledged by them, the Kabi Kabi First Nation Traditional Owners Native Title Claim Group consists of the people known as the Kabi Kabi People, being those Aboriginal people whose traditional land and waters are situated generally in the region of the Sunshine Coast in the State of Queensland.
>
> Membership is based on the principles of cognatic descent (i.e. descent traced through either mother or father).
>
> The native title claim group is comprised of all the persons descended from the following ancestors and who identify as Kabi Kabi People:
>
> [list of 21 apical ancestor individuals and 4 apical ancestor couples]

In *Doepel*, Mansfield J provided some guidance regarding the task of the Registrar's delegate at s. 190B(3). His Honour held that the focus is 'whether the application enables the reliable identification of the persons in the native title claim group', and not upon the correctness of the group described, 'but upon its adequacy so that the members of any particular person in the identified native title claim group can be ascertained' – at [37].

Kiefel J, in *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 (*Wakaman*), referred to these findings in *Doepel* and approved such an approach – at [34]. Similarly, in *Gudjala 2007*, uncontested on appeal, Dowsett J found that s. 190B(3) 'requires only that the members of the claim group be identified, not that there be any cogent explanation of the basis upon which they qualify for such identification' – at [33].

Having turned my mind to the description at Schedule A (excerpted above), it is my understanding that the group is described by way of the application of three criteria. The first criterion appears in paragraph [1] of the description, which provides that the Kabi Kabi People can be described as 'those Aboriginal People whose traditional land and waters are situated generally in the region of the Sunshine Coast' in Queensland. I consider, therefore, that any person who identifies as Kabi Kabi, understands their traditional land and waters as being situated in that particular area.

The second criterion, I consider to appear within paragraphs [2] and [3] of the description, and that is that persons seeking to identify as Kabi Kabi must be descended, through either their mother or their father, from one of the apical ancestor individuals or apical ancestor couples listed. The final criterion I consider also appears at paragraph [3] of the description and that is that members of the group includes those 'who identify as Kabi Kabi People'.

In relation to the third and final criterion, it is my view that self-identification does little to provide any clarity regarding those persons within the group. Without an external and objective reference point, self-identification means that membership of the group relies primarily on the personal opinion of an individual. I do not consider that there is any way that this method of identification, therefore, can provide the sufficient clarity required at s. 190B(3).

In the same way, regarding the first criterion, namely whether a person's traditional land and waters is within the region of the Sunshine Coast in Queensland, I do not consider that this criterion provides the sufficient clarity required, as it too relies primarily on the opinion and view of the individual person approached.

The fact that the identification of persons within the group may entail some factual inquiry, is not, of itself, problematic in meeting the requirements of the condition at s. 190B(3). Carr J, in *Western Australia v Native Title Registrar* [1999] FCA 1591 (*WA v NTR*), held the following in relation to a method of group identification relying on the application of 'Three Rules':

> The question is whether the application of the Three Rules describes the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is in that group. In my view it does. The starting point is a particular person. It is then necessary to ask whether that particular person, as a matter of fact, sits within one or other of the three descriptions in the Three Rules. I think that the native title claim group is described sufficiently clearly. In some cases the application of the three rules may be easy. In other cases it may be more difficult... It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently clearly... The Act is clearly remedial in character and should be construed beneficially... – at [67].

I note that the Three Rules considered by Carr J in that case differed somewhat to those before me, and the content of those descriptors was largely focussed on matters of descent from ancestor persons and adoption. Despite this, however, I consider His Honour's findings in relation to the need for factual inquiry in applying criteria or 'rules' in ascertaining the members of the group remain applicable.

Noting my view that the first and third criteria provided within the description of the Kabi Kabi First Nation native title claim group are, of themselves, unable to provide the sufficient clarity required at s. 190B(3), it is to the second and remaining criterion that I now turn my attention. In providing an objective and external reference point by which group members can be identified, namely that the persons within the group are all persons descended (where descent is through the individual's mother or father) from the apical ancestors named, I am of the view that this criterion, when read in conjunction with the criteria discussed above, provides the description with the requisite clarity. It is also my understanding of the wording of the description that descent from the named persons is, in fact, at the core of the rules surrounding group membership.

Biological descent from the named persons, in my view, provides a clear and definitive starting point as to who those persons within the group are. A factual inquiry regarding whether those persons firstly, consider their traditional land and waters to be within the Sunshine Coast region of Queensland, and secondly, whether they self-identify as Kabi Kabi People, can then be undertaken, by approaching those descendants and making the appropriate inquiries.

I note that the description does not specify whether descent is by biological means, or whether it also encompasses descent by adoption, however as there is no reference within the description to adoption, I have presumed that persons must be biological descendants of the named ancestors in order to identify as members of the claim group.

In light of the above discussion, therefore, I am satisfied that the description of the native title claim group is sufficiently clear such that it can be ascertained whether any particular person is a member of the group.

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

Subsection 190B(4)
Native title rights and interests identifiable

> The Registrar must be satisfied that the description contained in the application as required by s. 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.

The application **satisfies** the condition of s. 190B(4).

The description of the native title rights and interests claimed in relation to the application area, contained in the application pursuant to s. 62(2)(d), appears at Schedule E.

Mansfield J in *Doepel*, discussed the task of the Registrar's delegate at s. 190B(4), and found that the 'test of identifiability' was whether the claimed native title rights and interests are 'understandable and have meaning' – at [99]. Further to this, His Honour held that 'it was open to the Registrar to read the contents of Schedule E together so that properly understood there was no inherent or explicit contradiction' – at [123].

In my assessment of whether the rights and interests described in the application are 'understandable and have meaning', it is my understanding that such an assessment is to be undertaken with reference to the definition of the term 'native title rights and interests' at s. 223(1). In this way, I consider that those rights and interests claimed must be able to be understood as 'native title rights and interests' – see *Doepel* at [99] and [123]. I have not, however, at this condition of the registration test, turned my mind to each of the individual rights and interests claimed to satisfy myself that they in fact meet the requirements of that definition. I consider this to be the task at s. 190B(6) and have subsequently addressed that issue in my reasons below.

I have turned my mind to the contents of the description at Schedule E. It includes a claim to a right of exclusive possession (paragraph [1]), and a list of 17 non-exclusive rights and interests (paragraph [2]). The list of rights and interests is followed by a number of qualifications in paragraph [3], including that the rights and interests claimed are subject to the valid laws of the State and the Commonwealth, and that there is no claim to ownership of any minerals, petroleum or gas owned by the Crown.

Having considered the nature of the claimed rights and interests listed, it is my view that those rights and interests can be understood as 'native title rights or interests', and that they are clearly expressed. When the whole of the description, including the stated qualifications, is read together, I do not consider that there are any apparent contradictions within that description. I note that the case law has confirmed that a broad claim to exclusive possession as against the whole world does not offend the requirements of s. 190B(4) – see *Strickland* at [60].

Consequently, I am satisfied that the description at Schedule E of the application is sufficient to enable the rights and interests claimed to be readily identified.

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

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

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

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

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

The task at s. 190B(5)

It is my understanding of the task of the Registrar's delegate at s. 190B(5) that there is a correlation that exists between the information required to be contained within the application pursuant to s. 62(2)(e), and the requirements of s. 190B(5), such that an application which 'fully and comprehensively' addresses all of the matters in s. 62, may 'provide sufficient information to enable the Registrar to be satisfied about all matters referred to in s. 190B' – *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala 2008*) at [90] to [92]. Where an application fails to 'fully and comprehensively' furnish the information required by s. 62, I note that the power given to the Registrar by s. 190A(3), allowing her to have regard to information provided separately by the applicant where the factual basis contained in the application is insufficient, means the application may nonetheless meet the requirements of s. 190B(5) – *Gudjala 2008* at [90].

While I am not limited in my consideration at s. 190B(5) to the information contained in the application, I note that I am not obliged or required to 'search out' additional material to supplement the applicant's factual basis in support of the claim – *Martin* at [23].

It is my view that my consideration at s. 190B(5) is limited to whether the asserted facts, assuming they are true, can support the claimed conclusions, and that I am not permitted to assess the strength of the evidence in support of the asserted facts, as in a hearing – *Doepel* at [17]. In assuming the asserted facts are true, I understand that I am able to rely on the statements contained within the s. 62(1)(a) affidavits that the applicant believes that all of the statements made in the application are true – *Gudjala 2008* at [91] to [92].

Section 62(2)(e) requires only a 'general description' of the factual basis. Despite this, in order for the application and accompanying material to satisfy the requirements of s. 190B(5), the Full Court in *Gudjala 2008* held that 'the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality' – at [92]. Similarly, I understand that

the factual basis must possess a certain level of particularity to the claim, such that the information contained in the factual basis has relevance to the particular native title claimed by the particular group over the particular land and waters of the application area – see for example *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [39].

In *Gudjala 2007*, in a part of his judgement not criticised on appeal by the Full Federal Court, Dowsett J found that the factual basis was required to address certain questions prescribed by s. 190B, and gave considerable guidance as to the nature and content of those matters. These I have discussed in relation to each of the three assertions at s. 190B(5) in further detail below. Similarly, regarding the task at s. 190B(5), Mansfield J in *Doepel* concluded that the Registrar was to focus primarily upon the requirements of the condition, and that that was the way in which the Act 'directs [her] attention' – at [132]. His Honour indicated that the Registrar's approach to the task was to involve a 'careful and detailed analysis of the particular information available to address, and make findings about, the particular matters to which s. 190B(5) refers' – at [130].

The applicant's factual basis material

The factual basis material provided by the applicant consists of Attachment F/M, a fully referenced 20-page report addressing each of the assertions at subsections (a), (b) and (c) of s. 190B(5), and various rights and interests claimed by the native title claim group in relation to the application area. Schedule G of the application sets out the activities currently undertaken by members of the claim group on the application area. Schedule M of the application provides general assertions relating to the ongoing connection of the claim group with the application area.

The applicant also submitted as additional material, a referenced 329-page report entitled, 'Sunshine Coast Region (Kabi Kabi) Native Title Connection Report', dated September 2012 and prepared by ***[name removed]*** (the connection report). Annexed to this report as Appendix A is a further report, titled 'Draft Anthropological Report Sunshine Coast Region: Apical Data Summary', also dated September 2012 and prepared by ***[name removed]*** (the anthropological report).

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

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

In my consideration of the application at s. 190B(5)(a), it is my understanding that the factual basis material must speak to an association between the group and their predecessors with the whole of the area claimed – *Martin* at [26]. Similarly, I am of the view that the material must contain information with geographical particularity to the lands and waters of the claim area, and that in some way addresses the nature of the association asserted, be it spiritual or physical – *Martin* at [26].

The nature of the material required for the purposes of s. 190B(5)(a) was further discussed by Dowsett J in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*), where His Honour held that the assertion may require information addressing the following:

- that the claim group as a whole presently has an association with the area, although it is not a requirement that all members must have such an association at all times;

- that there has been an association between the predecessors of the whole group and the area over the period since sovereignty – at [52].

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

I have summarised various information from the application which I consider to be relevant to the assertion at s. 190B(5)(a), that the native title claim group have, and their predecessors had, an association with the area.

Attachment F/M provides the following information:

- European settlement of the application area occurred in approximately the 1840s, with the establishment of pastoral stations north of Brisbane in the Caboolture and Woodford regions – at [4];
- early historical and ethnographic sources identified a localised constituent body of Aboriginal people living in the area at this time with territorial interests confined to the application area, who were part of a broader society comprised of a number of groups referred to as the 'Dippil Nation' – at [6] and [7];
- this localised constituent group could be identified by their language name 'Kabi Kabi' – at [6];
- early historical sources define traditional Kabi Kabi country as 'the eastward draining catchments from Bribie Island/Elimbah Creek in the south, to the Gregory River and Fraser Island in the north' – at [6] and [10];
- many members of the various family groups of the Kabi Kabi people continue to live within the application area or nearby in centres such as Cherbourg, Brisbane, Hervey Bay and Bundaberg – at [12];
- claimants continue to regularly visit the application area to exercise traditional rights and maintain a spiritual connection with the area – at [12];
- claimants' parents and grandparents were often able to maintain connection with and residence on Kabi Kabi traditional country through employment in the rail and timber industries – at [29];
- claimants continue to transmit spiritual knowledge of their country through stories, art and ceremony – at [30];
- ethnohistorical sources discuss a set of beliefs held by the claimants, in common with neighbouring groups, regarding the power of the Rainbow Serpent and related beings, who are inherent in the cosmology of the landscape of the region – at [39];
- the claimants understand that their country is occupied by spirits of their ancestors, and by other spiritual beings – at [44];
- respect for and fear of spiritual forces within the landscape results in strict adherence by claim group members to customary rules and behaviours – at [42] and [44];
- members of the Kabi Kabi people assert associations with and rights in defined areas of country, on the basis of relevant knowledge that they gained from their predecessors – at [10] and [41];
- country is identified by reference to named places and geographical referents within that country and at its margins – at [21];

- the external boundary of the application area is therefore defined by the aggregation of the territorial domains of all families and descent groups identifying as Kabi Kabi – at [41];
- the apical ancestors from whom the Kabi Kabi people are descended were born on, or firmly associated with the application area around the time of European settlement – at [23];
- the rights and interests of the claim group in the application area are maintained by way of their continued physical and spiritual connections with the area – at [27];
- rights, responsibilities, and interests in the land and waters of the application area are held by the claimants under their traditional laws and customs, these laws and customs having been passed down to them through preceding generations by traditional teaching – at [40].

Attachment F/M also sets out information pertaining to each of the named apical ancestors for the claim group, including their dates and places of birth, descendants, marriages and other geneaological information. The identified birthplaces of the listed apical ancestors (or places with which these persons are recorded as being associated) include Gympie, Yandina, Bribie Island, Maryborough, Mooloolah, Bli Bli, Burnett, Kenilworth, Cooran, Kilkivan, Barambah, Caloundrah, Duckhole, Beerwah, Beerburrum, Buderim, Nambour, Fraser Island, Moreton Bay, Pialba, Stoney Creek, Wanmuran, Noosa, Weyba, Cootharba, Tinbeerwah, Lake Doonella, Cedar Creek, Cherbourg, and Woodford.

Attachment F/M provides that descendants of each apical ancestor or family group were interviewed for the purposes of the connection report. A statement provided by one claimant in relation to his descent from apical person ***[name removed]*** is included at paragraph [25] of Attachment F/M:

> My father, ***[name removed]***, was born in Nambour. ***[name removed]*** took my father's father's mother, ***[name removed]***, in at Yandina after she had been taken to a dormitory in Brisbane by the government. My grandfather's brother, ***[name removed]***, still lives in Nambour and has been around the Sunshine Coast all his life. All my family lived around Buderim.

Schedule M provides that members of the claim group were born on the application area, that they continue to live, camp, hunt, fish, cook, and gather resources on the land and waters of the area in accordance with their traditional laws and customs. Schedule M also asserts that the group continue to exercise their native title rights and interests in relation to the area by passing on knowledge of country and special sites to younger Kabi Kabi Traditional Owners.

The connection report contains material of a detailed nature which goes to, and further supports, the statements contained in Attachment F/M. A detailed account of the ethnohistorical sources pertaining to the application area, and a thorough analysis and description of the Kabi Kabi society at the time of European settlement is provided. In addition to this, the connection report contains numerous excerpts from interviews with members of the claim group, in which they share their knowledge of Kabi Kabi country, and the way in which they and their predecessors have continued to physically and spiritually associate with the land and waters of the area, exercising rights and interests passed down to them in accordance with their traditional laws and customs.

I have set out below a number of statements made by claimants during these interviews that I consider relevant to the assertion at s. 190B(5)(a):

> When we lived in Yandina, my mother told me that my great grandmother went from there to Gympie. Mum's sister, ***[name removed]***, got married in Nambour. Her grandson lives in Gympie even now. Me and my mother went a lot to Buderim Mountain to visit the ***[name removed]***... ***[name removed]***'s grandfather, ***[name removed]***, was living there. They had a house there. He had all his children, ***[name removed]***'s father and brother and sisters. One of them married the ***[name removed]*** family who lived in the same area. When I was about 10 years of age we used to go to Buderim. We'd fish in the Maroochy and Mooloolah rivers with my cousin ***[name removed]***, who was much older. We'd then go by train to Nambour with my Mum – at [661].

And also:

> Kabi country runs from Buderim, Gympie, Yandina down to Maleny that way...People using our country without permission will cause a row but so many people are related it doesn't happen really because people respect that sort of thing – at [694].

And:

> Dad talked a lot about Kabi country...His uncle, ***[name removed]***, used to say his mother from the Yandina area. His uncle took him down to a lot of place...and showed him certain landmarks...Dad used to say he was from Yandina and that's where we feel that sense of belonging – at [695].

And:

> Kabi Kabi and Gurang Gurang boundary. Burrum River, Cherwell. So you can go back into the Isis up that way, because we used to fish off our country there and Isis. And you look at Cherwell. The mouth of the Cherwell that comes off Burrum, the very head of it was an old tribal dance grounds – at [695].

And:

> We grew up in Caloundra and Bli Bli where Dad was working. The ***[name removed]*** and ***[name removed]*** and ***[name removed]*** families were also living there at the time. We spent time with them at Duckhole on the north side of Caloundra. Sandy Bend on the north side of the Maroochy River is where we and the ***[name removed]*** lived... we mixed in with the ***[name removed]*** down there... We hunted and fished right through this area especially at Bli Bli, Maroochy River, Old Woman Island, Rainbow Beach and Tin Can Bay. The back country we used for kangaroo and porcupine hunting and went to Traveston and Imbil area for freshwater turtle. At Tiaro and Woolooga we went for Boney Bream and visited the areas around Skyring Creek and Coolum right through the 1970s, 80s and 90s. ***[name removed]*** is buried in Beerwah and ***[name removed]*** is buried on Buderim Mountain – at [754].

And:

> I was born in Maryborough and our Mum and Dad lived in Buderim. When Dad died we moved back and forth between Maryborough and Buderim. All our brothers were born in Nambour. ***[name removed]*** and my other brother always fished around there, Bli Bli, Maroochy River and surf fishing at Mudjimba and north shore. All our uncles fished and collected pippi shells, hooking

> crabs... Mum walked between Buderim and Mooloolah living off the land...My uncles placentas were buried on Buderim Mountain because they were born at home – at [754].

And:

> Mum's born in the Mary Valley. And we've got ***[name removed]***, and the Yandina mob, the Yandina mob from up this end. One of my grandmothers, a young girl getting about, his family was the last people to be living a traditional lifestyle in the Sunshine Coast. They were the last people walking around there. They came across Maleny there, there's records of them coming through Woombye. Back down to the coast and back around. So they were still doing their seasons, you know? – at [754].

One claimant shares his knowledge of a story regarding the cosmology or spirituality of the application area in the following way:

> It was the time of the big dry. Everything was drying up. The waterholes and even the river itself were just a trickle. All our tucker from the bush was finished up. A big mob from the Kabi Kabi clan gathered around Noosa Head here, were together to do the rain dance and to sing to make the clouds come in. The Great Spirit came across the water to where the people were gathered around a big deep hole. This one here. There were plenty of fish but the hole was too deep for the people to get the fish out. This Great Spirit stand there on the rock and he bend down and pick up a handful of the fishes and threw them on the rock, all around here see? He left his mark here on the rock. He put his... and made his mark here on the rock at Noosa Head.
>
> His footprints are still there on the rock and the fish are still there on the rocks all around this Noosa. All of the people has plenty of fish to eat and soon after the rains came. So he leave his footprint there in Noosa and he walk across the land and he leave his mark here at the top of the rock of Tikilberan and that's the rock that goes straight up like that and there is a circle in that rock. Take it out and put it on the bottom of the rock. At Tikilberan, round about where Caloundra cross at Orara Creek where you go across to Kolonga. Kolonga Station straight across south, just one big rock like that. Just standing there on its own. Big circle on that rock. He came up and filled it with water then he went to Colson Lake over here, bring that water from the ground. That's what we call Ban Ban Springs. All the tribe around there use that water there. Then he go across to the mountains at Blackall Gap near Miriam Vale and he leave his mark up there. A big circle of white rock. That's where he walked. Just north of the gap that's his mark there. There's his footprints where he went right back, he's a spirit – at [638].

My consideration – s. 190B(5)(a)

For the reasons set out below, I have formed the view that I am satisfied that the factual basis is sufficient to support an assertion that the native title claim group have, and their predecessors had, an association with the land and waters of the application area.

Firstly, it is my view that the material contains the requisite geographical particularity, such that the association asserted is shown to be with the whole of the application area. Both the information contained in Attachment F/M, and the statements made by claimants set out in the connection report include references to numerous placenames and locations. Using the Tribunal's iSpatial database, I have mapped these locations in relation to the application area and have found that the majority of the places named fall within, or in close proximity to, the boundaries of

the area. The places referred to within the material, as mapped, I consider to be spread across the entirety of the application area, such that I am satisfied that the material speaks to an association of the group with the whole of the area.

Secondly, I am satisfied that the material particularises the type of association held by the claimants and their predecessors with the area, and that it is shown to be an association that is both physical and spiritual. The information contained in Attachment F/M speaks to the way in which claimants believe the land and waters of their traditional country to be occupied by the spirits of their ancestors, and by other spiritual forces. Similarly, claimants have a strong knowledge of the way in which the landscape of the application area was formed by spiritual 'creation' beings, such as the Rainbow Serpent. The belief in such spiritual forces is asserted as underpinning the laws and customs of the group and the way in which they relate to the land and waters of the application area.

A physical association is, in my view, clearly asserted in the information in Attachment F/M, namely in information relating to claim group members and their predecessors, back to the apical ancestors, being born on, and carrying out various activities consistent with their native title, on the application area. Attachment F/M also provides that many of the claim group members continue to live on the application area. This physical association I consider to be further demonstrated in claimants' statements in the connection report regarding the way in which they, their parents, grandparents, and other Kabi Kabi families were, for example, born on, or lived on, or worked on, or spent time travelling across, or camped, hunted or fished on, the lands and waters of the application area.

The relatively large number of claimants discussed in the material, and statements from whom are included within the connection report, in addition to the number of Kabi Kabi families referred to by the claimants as being associated with the area, allows me to be satisfied that the material is sufficient to support an assertion of an association of the claim group as whole with the land and waters of the application area.

Regarding whether the material is sufficient to support an assertion of an association between the predecessors of the whole group and the area since sovereignty, I have formed the view that it is. Attachment F/M provides that early ethnohistorical sources identify the body of Aboriginal persons inhabiting the application area at the time of European settlement in the area as the Kabi Kabi language group, and that this group were part of a wider society, yet had localised territorial interests in the specific lands and waters of the application area. This information is supported by the detailed analysis of such sources contained in the connection report.

Attachment F/M states that European settlement in the region encompassing the application area took place in approximately the 1940s, with the establishment of a number of pastoral stations. Noting the birth dates of the apical ancestors, ranging from 1830 to 1898, and the assertion that the Kabi Kabi apical ancestors were born on, or firmly associated with the area at the time of European settlement or shortly after, I am satisfied that the material allows me to consider that the apical ancestor persons were part of the Kabi Kabi group observed at the time of European settlement in the application area.

There is a significant period of time between these historical records of the Kabi Kabi group inhabiting the area, and sovereignty in 1788, however, it is my view that the material indicates that the Kabi Kabi people have inhabited the area since prior to sovereignty, namely in the assertion that Kabi Kabi ancestors and spirits played a primary role in the formation of the landscape itself. I note that prior to the arrival of European settlers, there would have been little interruption to the Kabi Kabi group's enjoyment of their native title on the land and waters of the application area.

Many of the claimants' statements within the connection report include references to the lives of their parents, grandparents and other Kabi Kabi predecessors, inhabiting and enjoying the application area. Claimants share their knowledge of the birth and burial places of their predecessors, and the places and stations within the application area at which their parents and grandparents worked so that they could continue to live on their traditional country. The statements made by claimants, in my view, also indicate that they have a clear knowledge of the apical ancestor from whom they and their family are descended, and some details of the life of that apical ancestor, in particular, the specific area or country that they were associated with.

The material asserts that this knowledge has been passed down to the claimants through the generations preceding the present one, in accordance with traditional methods of teaching. In my view, the material of this nature is sufficient to support an assertion that the claimants' predecessors, back to the Kabi Kabi apical ancestors, have had an association with the application area.

For these reasons, I have formed the view that I am satisfied that the factual basis is sufficient to support an assertion that the members of the claim group have, and their predecessors had, an association with the land and waters of the application area.

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

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

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

The reference within the assertion at s. 190B(5)(b) to 'native title rights and interests', in my view, requires that my approach involve me turning my mind to the definition of that term at s. 223(1). Section 223(1) provides that:

> (1) The expression native title or native title rights and interests means the communal, group, or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights or interests are possessed under the traditional laws acknowledged and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders;
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters;
>
> (c) the rights and interests are recognised by the common law of Australia.

Noting the similarity in terminology between subsection (a) above, and the assertion at s. 190B(5)(b), it is my view that the leading authority in relation to s. 223(1), namely the decision of the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (*Yorta Yorta*), can provide guidance to the task of the Registrar's delegate at this condition of the registration test.

In *Yorta Yorta*, the High Court held that the term 'traditional laws and customs' was to be understood as comprising of two distinct elements: firstly, that the origins of the content of the laws and customs concerned were to be found in the normative rules of the Aboriginal society that existed prior to sovereignty, and, secondly, that the acknowledgement and observance of those laws and customs must have continued substantially uninterrupted since sovereignty – at [46], [47], [86] and [87].

The task at s. 190B(5)(b), and the extent to which the findings in *Yorta Yorta* can guide the delegate's approach at the condition, were addressed in some detail by Dowsett J in *Gudjala 2007*. His Honour sought to summarise the principles enunciated in *Yorta Yorta*, before applying them to the factual basis material in the Gudjala application. This approach was not criticised by the Full Court on appeal.

Following the appeal to the Full Federal Court, Dowsett J again discussed the requirements of the condition in *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*). I have set out below His Honour's findings from both cases regarding the nature of the material required to address the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests:

- that there existed at the time of European settlement in the area a society of people living according to a system of identifiable laws and customs, and that the factual basis identifies the persons who acknowledged and observed the laws and customs of the relevant pre-sovereignty society – *Gudjala 2007* at [63] and [66]; *Gudjala 2009* at [37] and [52];
- that the factual basis contain some explanation as to how the current laws and customs of the claim group can be said to be traditional (that is, the laws and customs of a pre-sovereignty society relating to rights and interests in land and waters), being more than merely an assertion that those laws and customs are traditional – *Gudjala 2009* at [52], [72] and [74];
- that explains the link between the claim group described in the application and the area covered by the application, which process may involve identifying some relationship between those ancestral persons and the society existing at sovereignty from which the laws and customs are said to derive - *Gudjala 2007* at [66] and [81]; *Gudjala 2009* at [40];
- that the factual basis contain some details of the claim group's acknowledgement and observance of those traditional laws and customs pertaining to the land and waters of the claim area – *Gudjala 2009* at [69], [70], and [74].

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

I have summarised below the factual basis material that I consider relevant to the assertion at s. 190B(5)(b), namely 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.

Attachment F/M and the connection report provide the following information regarding the nature of the Kabi Kabi People at European settlement occupying the application area:

- the Kabi Kabi ancestors occupied the application area from prior to sovereignty in 1788, right through exploration and sustained settlement of the area, which occurred around the mid 1800s – Attachment F/M at [2];
- the Kabi Kabi People at European settlement were a localised constituent part of a broader regional society referred to in ethnographic sources as the 'Dippil Nation' – Attachment F/M at [7];
- the Kabi Kabi People were a distinct language group within the regional society with territorial interests in the particular land and waters of the application area – Attachment F/M at [6];
- the Kabi Kabi People interacted with other neighbouring groups comprising the Dippil Nation for cultural and social purposes. Examples of these interactions were observed by early explorers and settlers in the area, who recorded regional gatherings such as the harvesting of the fruits of the bunya nut forests in the Great Dividing Range, corroborees, initiation ceremonies, bora councils, the conduct of organised battles to resolve disputes, and participation in fishing during the winter mullet runs along coastal areas. These interactions are asserted as serving to uphold common laws and customs between groups regarding the reciprocal sharing of resources, while also confirming the local 'host' group's ownership and authority over the gathering site and its resources – see Attachment F/M at [16], [17], [19], [20]; the connection report at [83], [86], [88], and [459] to [461];
- the Kabi Kabi People shared a common cosmology with neighbouring groups, involving a core belief in the Rainbow Serpent and certain High or Sky-Gods – see Attachment F/M at [18] and [39]; the connection report at [104] to [107];
- two of the apical ancestors named in Schedule A were observed during early settlement of the area wearing metal breastplates with the title 'King' inscribed on them, indicating that these men held particular positions of influence and authority within the Kabi Kabi People during their lifetimes – Attachment F/M at [25].
- Certain apical ancestors and family groups were recorded and observed as being associated with, and having authority for, particular tracts of country within Kabi Kabi traditional country – see Attachment F/M at [21] and [25]; the connection report at [338] to [345].

Regarding the laws and customs acknowledged and observed by the native title claim group, the connection report contains various statements from interviews with claimants pertaining to the normative system under which members of the group assert to hold native title in the application area. I have reproduced a number of those statements below.

One claimant talks of the participation of her parents and grandparents in the regional gatherings for the Bunya nut harvesting, at which weddings would also be held:

> When ***[name removed]*** was born, they stayed then. And every year before then, before she was born. Every year they used to do the Bunyas down there. Down that way. Out there to Bli Bli, up to Mapleton, there. They, how they [got] up at Kingaroy, what do they have, Bunya Festival? And they marry 'em up then. When granddad married they come across country, went to the Bunya festival there at Maidenwell and got married – at [634].

Another claimant speaks of his father fishing with other old Kabi Kabi and Batjala men at Hervey Bay (adjacent to the application area):

> I believe we're part Kabi Kabi, and Batjala are all one mob there. Me personally, even Dad, fishing with them old Batjala people. Yep, the old people. See you go back to the 1930s, Dad used to fish all through this area. With old ***[name removed]*** and all them old fellas. ***[name removed]*** and all them mob. They used to fish here [Hervey Bay] – at [635].

Another claimant explains the restrictions that members of the group adhere to regarding marrying persons too closely related:

> Mum and ***[name removed]*** always warned us off about not going with someone too close. ***[name removed]*** took me under her wing and told me who was who, older people steered me in right direction in our family. Mum and Dad always told us not to go with someone too close. Even now young people ask us if so and so is too closely related...I tell my grannies the same, "find out who the grandmother or grandfather is". I'm married to Wakka, that's a correct marriage. You don't marry your own blood. You marry next door neighbours, that's Jinibara for us. Woka-Kabi would be right marriage for the northern mob – at [669].

Another claimant speaks of the way in which resources were used in a sustainable manner, and shared around amongst other members of the claim group and persons in neighbouring groups:

> We are careful to only take as much as we can eat, always thinking about next season. We share it. When someone has a big catch, everyone knows about it. People come around and ask for a bit. And not only that, when we were growing up then, like if people caught too much, they handed it out to people that couldn't go fishing or hunting, you know? – at [680].

Another claimant describes the pathways across their traditional country and into neighbouring regions travelled by the Kabi Kabi 'old people' or ancestors, that claimants continue to follow today. The journey similarly involves numerous gatherings and celebrations:

> There's lots of pathways. And there. They corroboree there if they come down here for the fish or whtever else was coming up, you know? Might be going that way for the bunyas. Then they'd go to the next mob and stop there and have a big corroboree there and tell each other what's going on. And they loved to see a new corroboree too, and then they'd all eventually end up down here. Yeah. For the big one. That lasts as long as the food source lasts, the mullet and all that stuff... You know mullet season. Round about ANZAC time. Yeah. That's when you'd know they were coming. They make the fires, you could see the fires. Lots of people would come from different places down here for it, around here. That's why there's so many clans there. You know, the tribe, the clans, the localities in the clans. That's why there's so many. Food plenty from here. Lots of it. If the mob from here, there's places for people that are close by coming in, down for the holiday, wherever they come from... They have a really big one and then, yeah. They couldn't handle it here, well they've even got the Yugambe mob there. And the Yuggera mob here and the Gabi mob up there... – at [683].

Another claimant describes the positions of authority held by senior members of the group in regards to decision-making and withholding important cultural knowledge:

> It's called respect for the elders and our way. We don't say you're an elder and you've got your Aunty or an Uncle or something living...That's why I go and tell these young people today. I said, youse are not seeing, that's a sign. We want to see for people, youse getting signs from the elderly. Our ancestors – at [685].

Another claimant speaks to the way in which knowledge of Kabi Kabi country and its resources is passed down to the younger generations by Kabi Kabi women:

> The women would teach the kids everything. They would teach you to cook things in the ground, the marks on the trees, the flowers, the birds. What to eat, what not to eat, where to go, where not to go. Teach the girls and all that. Teach the boys. The men would be up there somewhere doing whatever they do. If they get a certain size then the women take the boys for 4 days or a couple of days. But they'd bring them back until they're old enough till they get to the kick off part. Then they don't come back to the women. So, and the reason for that was the survival of the tribe, of the clan – at [686].

One female claim group member speaks of rules surrounding initiation and explains the way in which knowledge of avoidance sites and spirits was passed to her as a child by her elders:

> I don't think they would have had initiation like the men did, but I think they had to learn certain rules. They would have to learn certain rules to obey most of their lives. Even now, a lot of the things that they speak about now are very new to me, like sacred sites. We never heard them when we were children but when you remember back you would hear your grandmother or someone telling you that's a bad place you must not go there and I'd say, "Why?" and they'd say, "Merlong was there" and we knew that would be a bad spirit, they're called a 'Merlong'. Well that then of course if you thought back you would realise that that must have been a place where certain events took place, initiation or even ceremonial killing, things like that. We kept right away from places like that – at [719].

Another claimant shares their knowledge of the Rainbow Serpent spirit and the behaviours that resulted from a belief in its presence in Kabi Kabi country:

> The Rainbow stays in the waterhole but also in the sky. Mum transferred knowledge about Ban Ban hole but we weren't allowed near it because of the Mundagarra. ***[name removed]*** cracked it when we took a canoe on that waterhole. If the Rainbow smelled blood he would come up and kill them. Women always camped downstream from the main waterhole and never went to the deep places... Taggan di-Bunda is the Rainbow Serpent. Bunda is promised by marriage or in-law. That old fella and two wives used to come and visit the property up there [Lowmead] and he also used to also visit Deebung Creek and go up and visit ***[name removed]*** and ***[name removed]***. He would never come inside but he always had two women with him when he came. Rainbow travelled and put all the freshwater holes in the country – at [724].

And another claimant describes the way in which her grandmother shared stories of Kabi Kabi laws and customs and culture with her as a young child:

> And old ***[name removed]***. I remember her sitting around telling us stories, you know? We used to sit around while they were telling us stories, like remember in our days no TVs, stuff like that. No computer games. The best we could do was listen to a radio. Well one of them old fellas wanted to come over and start telling yarns, they'd get a crowd and listen to all the stories – at [727].

My consideration – s. 190B(5)(b)

Noting that the starting point for any consideration of a native title determination application at s. 190B(5)(b) is the identification of the existence, at European settlement, of ' a society of people, living according to identifiable laws and customs having a normative content' (see *Gudjala 2007* at [66] and *Gudjala 2009* at [72]), having turned my mind to the material before me, I am of the view that the factual basis is sufficient in supporting an assertion of such a society.

Attachment F/M and the connection report provide considerable detail on the nature of, and the common acknowledgment and observance of laws and customs binding the Kabi Kabi People occupying the application area at around the time of European settlement in the area. Various

historical and ethnographic sources are referenced, and a number of these date back to the time at which the material asserts European settlement of the area was taking place, namely in the mid to late 1800s. For example, the connection report refers to early settler Tom Petrie, who arrived in the area as a child in 1835 and made detailed observations of the laws and customs of the groups of the region on an expedition throughout the area with his father in 1842 – the connection report at [85] and [86].

Regarding the nature of the group of indigenous persons occupying the area at this time, the material asserts these persons to be the Kabi Kabi People, a localised constituent part of a broader society known as the 'Dippil Nation', whose territorial interests were confined to the land and waters of the application area. The material provides that the Kabi Kabi People shared certain laws, customs and mythologies with the neighbouring groups comprising the Dippil Nation, and interacted with these groups for social and cultural purposes, however the Kabi Kabi People were a distinct language group who, according to their own laws and customs, were the only persons able to exercise authority in relation to, and enjoy the resources of, the application area. The material further provides that families within the Kabi Kabi People were understood as being associated with particular tracts of land within Kabi Kabi traditional country. Ethnohistorical sources discussed within the connection report provide further detail on these aspects of the laws and customs of the Kabi Kabi People at European settlement asserted by the material.

I note that European settlement in the area occurred a significant period of time after the assertion of sovereignty by the British in 1788. In relying on the statement in Attachment F/M, that '[t]he traditional country of the claim group was occupied by the Kabi Kabi ancestors from before 1788 and during exploration and sustained settlement of the Application Area by Europeans, which occurred during the mid to later decades of the 19th century' (at [2]), however, and my general understanding from the material that the Kabi Kabi ancestors and spirits were involved in the creation and formation of the landscape such that the Kabi Kabi People have, since time immemorial, owned and occupied the area, I consider that I am able to infer that the Kabi Kabi 'society' at sovereignty was relatively unchanged from the Kabi Kabi People as observed at European settlement.

Regarding an asserted link between the apical ancestors named in Schedule A and the Kabi Kabi society at European settlement, I have already discussed above at s. 190B(5)(a) my reasons for considering that the factual basis is sufficient to support such a link. In particular, I formed the view that the material supported an assertion that the apical ancestor persons named were all born into, or formed part of, the Kabi Kabi People at the time European settlement of the area was taking place. An example of such relevant material includes observations made by an early settler in 1870 of one of the apical ancestors, tracking and netting mullet and flathead with his sons in the application area, as recorded in a historical source referred to – see Attachment F/M at [25]; the connection report at [609].

My understanding of the task at s. 190B(5)(b), as discussed above, is that the material must also address how the laws and customs of the native title claim group can be said to be traditional, that is, the laws and customs of a pre-sovereignty society, as they relate to the lands and waters of the application area. For the following reasons, I am of the view that the material is sufficient to support an assertion of traditional laws and customs.

Considerable detail regarding the laws and customs currently acknowledged and observed by the members of the claim group is given within the material. The statements made by claimants excerpted above, are an example of this material. In my view, these statements reveal that there has been little change in the laws and customs acknowledged and observed by the Kabi Kabi People at European settlement, and those acknowledged and observed by the Kabi Kabi Nation native title claim group.

For example, claimants' statements show that regional gatherings and social interactions such as corroborees and fishing during the mullet runs are activities that certain claimants and their predecessors have engaged in, and continue to do so, in the same way that the Kabi Kabi People were observed as doing in early settlement times. There is also an indication within certain statements that routes and seasons of travel throughout the region followed by the claimants and their predecessors intentionally mirror those taken by the Kabi Kabi ancestors.

Another example of material that allows me to infer that there has been little change to the laws and customs of the group as acknowledged and observed at European settlement, is the fact that the current laws and customs appear to be inextricably linked to an underlying belief in the cosmology and mythology of the application area. There are two aspects of this cosmology, each of which results in and demands specific normative behaviour amongst members of the claim group. The first aspect asserted is that the spirits of the Kabi Kabi ancestors continue to occupy the application area, resulting in a strong sense of obligation felt by claimants to protect, care for and maintain the lands and waters of the application area, in respect for, and reverence of their 'old people'. The second aspect asserted is revealed in claimants sharing their beliefs in certain creation and other spirits that inhabit the landscape. A fear of these powers in the area, in my view, is shown to greatly dictate the behaviour of claimants, and result in strict adherence to certain normative rules.

Noting that these mythological stories involve both the Kabi Kabi ancestors, and the creation of the landscape of the application area, both of which relate to a time period prior to European settlement in the area, I am of the view that I am able to infer that as these beliefs underpin the system of laws and customs acknowledged and observed today, they similarly underpinned the system of laws and customs acknowledged and observed by the Kabi Kabi People at European settlement.

This is further supported, in my view, in the factual basis material that speaks to the way in which knowledge of the group's laws and customs has been passed down through the generations preceding the present one to the claim group today. Numerous statements made by claimants, some of which have been excerpted above, speak to their grandparents and other significant elders, telling stories and sharing knowledge of Kabi Kabi country and Kabi Kabi laws and customs, at various stages of their lives as they were considered old enough to possess such knowledge. In this way, I consider that the material asserts there to be rules around the way in which knowledge was to be disseminated to younger persons, and that it was only certain elders accepted by the rest of the Kabi Kabi People as possessing the full extent of cultural knowledge who had the authority to, and were charged with the responsibility for, ensuring younger Kabi Kabi persons were taught Kabi Kabi laws and customs in relation to their country. In my view, there is considerable factual basis material which supports the existence of these authority structures within the Kabi Kabi People at European settlement, and similarly, within the claim group today.

In summary, therefore, I consider that the factual basis is sufficient to support firstly, an assertion that there was, at the time of European settlement in the area, a 'society' of indigenous persons inhabiting the application area, namely the Kabi Kabi People, living according to a system of identifiable laws and customs; secondly, an assertion that the Kabi Kabi apical ancestors named in the application were born into, or a part of, the Kabi Kabi People at European settlement; and thirdly, an assertion of a system of laws and customs acknowledged and observed by the claim group today that has been passed down through the generations preceding the claim group, that is relatively unchanged from the normative system acknowledged and observed by the Kabi Kabi People at European settlement, as recorded within various ethnohistorical sources referred to within the material.

On this basis, I consider that the factual basis is sufficient to support an assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title.

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

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

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(c), namely that the native title claim group have continued to hold their native title in accordance with their traditional laws and customs.

Noting the wording of s. 190B(5)(c) regarding 'those traditional laws and customs', it is my understanding that the assertion can be directly related to that at s. 190B(5)(b), such that where the factual basis is not found to be sufficient to support the assertion of traditional laws and customs at subsection (b), it follows that it cannot be found sufficient for the purposes of subsection (c) – see *Martin* at [29].

In referring to the way in which the group have 'continued to hold' the native title claimed, it is also my understanding that the assertion at s. 190B(5)(c) can be equated with the second element of the term 'traditional laws and customs' as discussed by the High Court in *Yorta Yorta*, namely that the group have continued to hold their native title rights and interests by acknowledging and observing the laws and customs of a pre-sovereignty society in a substantially uninterrupted way – *Yorta Yorta* at [87]. Similarly in relation to this second element of the term 'traditional laws and customs', the High Court held that the system under which the rights and interests are possessed must be shown to be a system that has had a 'continuous existence and vitality' since sovereignty – at [47].

In *Gudjala 2007*, Dowsett J indicated that the following types of information may be required to address the assertion at s. 190B(5)(c):

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

My consideration – s. 190B(5)(c)

I have already discussed above at s. 190B(5)(b), my reasons for being satisfied that the factual basis is sufficient to support an assertion that there was, at the time of European settlement in the area, a group of indigenous persons occupying the land and waters of the application area, acknowledging and observing laws and customs with a normative content. I set out above, my reasons for being of the view that these persons were the Kabi Kabi People, a localised language group comprising part of the broader regional society known as the Dippil Nation, with territorial interests confined to the application area.

As discussed in my reasons above, the material asserts that the laws and customs acknowledged and observed by the Kabi Kabi People in the area at European settlement have been passed down through the generations preceding the present one to the claim group members today, by significant elders understood by the wider group as possessing the requisite knowledge and authority to pass on such information.

In relation to an assertion of continuity of acknowledgment and observance of laws and customs, it is my view that statements by claimants regarding the way in which they were taught Kabi Kabi laws and customs by their grandparents and elders, is the same method of teaching by which their grandparents and predecessors were passed this knowledge. For example, one claimant speaks of the way in which he spent time hunting and fishing with his father and other 'old fellas' in the following way:

> When the bark falls off the red gums, it means the sharks are out. So we used to go down to Coona when I was a kid... And dad would go out and find a kangaroo. Get a kangaroo and drag it fresh while the blood was still in it. And we'd attract the sharks, and then the old boys used to swim... Oh, any size. And then you bury him in the sand and cook him. Under the sand... We got into .303s and .310s. Of course the .22 wouldn't have touched a shark, not in the water. You needed a good gun, and you'd run up almost to the edge of the water, up to your place sometimes and shoot him. Some of the old fellas, like old Wandunna and all them blokes, they used to prefer the spear. And they were good... – at [760].

It is my understanding that such methods of teaching were similarly employed by Kabi Kabi ancestors, in the way they taught their children and young people. For example, Attachment F/M provides that ***[name removed]*** (an apical ancestor listed at Schedule A of the application) was observed by one early settler with his sons tracking and netting mullet in the shallow waters of a lake within the application area – at [25]. In my view, this material supports an assertion that the normative system according to which the group claim their native title rights and interests is one that has had a continuous existence and vitality since the time of European settlement.

I note that the factual basis does speak to the way in which certain Kabi Kabi predecessors and their families were removed from their traditional country to settlements in the region such as Cherbourg. While I consider that this may indicate that the predecessors of the group were unable to continue to acknowledge and observe their traditional laws and customs in relation to the application area, it is my view that the material has addressed this potential interruption, and provided substantial information going to the way in which claimants continued to be taught Kabi Kabi laws and customs by their elders, and practise those laws and customs while living on

the settlements, and that families were not prevented from continuing to visit and spend time during holiday periods or breaks on the application area – see for example Attachment F/M at [12] and [25]; the connection report at [456]. In the same way, the material asserts that many claimants were able to remain on the application area despite some forced removals, through their employment in the pastoral, rail and timber industries – see Attachment F/M at [29]; the connection report at [783] to [785], [791] and [793].

Further support for the continuity of native title held in accordance with Kabi Kabi traditional laws and customs, in my view, comes from the level of detail within the material regarding each of the apical ancestors present in the area at European settlement, and their families and subsequent descendants. The material speaks to specific persons comprising most, if not all, of the generations between the apical ancestors and the claim group today, and details of the life and location of those people – see for example Attachment F/M at [25]. This detail frequently includes information regarding the way in which those persons spent time on Kabi Kabi traditional country acknowledging and observing various laws and customs, and the way in which they were taught this information by their predecessors – see for example the connection report at [791].

In light of the material of this nature, I have formed the view that the factual basis is sufficient to support an assertion that the native title claim group have continued to hold their native title in accordance with the traditional laws and customs of the group.

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

Subsection 190B(6)
Prima facie case

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

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

The task at s. 190B(6)

With regards to the wording of s. 190B(6), I note that it is not fatal to the application passing this condition of the registration test that not all of the rights and interests claimed can be, prima facie, established – see *Doepel* at [16]. Relevant to my consideration of the application pursuant to s. 190B(6), Mansfield J in *Doepel* held that the Registrar's delegate was not restricted to the information contained in the application – at [16].

The standard to be applied in relation to whether the rights and interests claimed can be established, is 'prima facie'. Again in *Doepel*, Mansfield J approved the meaning given to that term by the High Court in *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at [615] to [616], [652], being the ordinary meaning, that is, 'at first sight; on the face of it; as appears at first sight without investigation' – *Doepel* at [134].

His Honour found in relation to the task at s. 190B(6) that 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis' – at [135]. Following from this finding, Mansfield J referred to the task as requiring 'some measure of the material available in support of the claim' (at [126]), and found that s. 190B(6) appears to 'impose a more onerous test to be applied to the individual rights and interests claimed' than any prior condition of the registration test – at [132].

In imposing a 'more onerous test' to each of the individual rights and interests subject of the claim, it is my view that the task cannot be undertaken without reference to the definition of 'native title rights and interests' at s. 223(1), and a consideration of whether those rights and interests claimed do, in fact, fall within the scope of that definition.

I have set out s. 223(1) in my reasons above at s. 190B(5)(b). It is my understanding, therefore, that in order for the rights and interests claimed to be, prima facie, established as native title rights and interests, the factual basis material must demonstrate how those rights and interests are, firstly, possessed under the traditional laws and customs of the group, secondly, how they are rights and interests in relation to land or waters, and thirdly, that they are rights and interests able to be recognised by the common law that have not been extinguished over the whole of the application area.

My consideration – s. 190B(6)

A list of the rights and interests claimed by the native title claim group is contained at Schedule E of the application. This includes a claim to a right of exclusive possession, and a further 17 non-exclusive native title rights and interests. Those rights and interests are claimed subject to the following qualifications, appearing in paragraphs [3] and [4] of Schedule E:

> 3. The native title rights and interests are subject to:
>
> a. The valid laws of the State of Queensland and the Commonwealth of Australia; and
>
> b. The rights conferred under those laws.
>
> 4. The native title rights and interests do not include ownership of any minerals, petroleum or gas that are wholly owned by the Crown.

In my reasons below, I have turned to consider each of the rights and interests contained in Schedule E, and the material provided within the factual basis material in support of each of those rights and interests, in considering whether they can be, prima facie, established.

- Exclusive possession

Regarding a right to exclusive possession, the Full Court in *Griffiths v Northern Territory* [2007] FCAFC 178 (*Griffiths*) reached the following view about the nature of such a right under the traditional laws and customs of Aboriginal persons, upon a review of the existing case law authorities:

> ...the question of whether the native title rights of a given native title claim group include the right to exclude others from the land subject of their application does not depend on any formal classification of such rights as usufructuary or proprietary. It depends rather on consideration of what the evidence discloses about their content under traditional law and custom. It is not a necessary condition of the existence of a right of exclusive use and occupation that the evidence

> discloses rights and interests that "rise significantly above the level of usufructuary rights"... – at [71].

Prior to the decision in *Griffiths*, the High Court in *Western Australia v Ward* [2002] HCA 28 (*Ward HC*) provided considerable guidance as to the content and substance of a native title right to exclusive possession, finding that:

> ...a core concept of traditional law and custom [is] the right to be asked permission and to "speak for country". It is the rights under traditional law and custom to be asked permission and to "speak for country" that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others... – at [88].

Further indication as to the content of a native title right to exclusive possession, and therefore, the matters I consider the factual basis must speak to, was given in *Scampi v State of Western Australia* [2005] FCA 777 (*Scampi*), where the Court held that:

> the right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation – at [1072].

And again, in *Griffiths*, in emphasising that there is no requirement that such a right be shown to be usufructuary or proprietary in character, the Full Court held that:

> ...It is not necessary to a finding of exclusivity in possession, use and occupation, that the native title claim group should assert a right to bar entry to their country on the basis that it is "their country". If control of access of country flows from spiritual necessity because of the harm that "the country" will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive... – at [127].

Consequently, it is my view that in order that a right to exclusive possession be prima facie established, the native title claim group must show how, under their traditional laws and customs, they are able to exclude people from their country who are not of their community, including through the imposition of spiritual sanctions upon unauthorised entry. Similarly, I consider that the material before me provided in support of a right of exclusive possession must speak to the way in which the traditional laws and customs of the group allow them to make decisions about access to and the use and enjoyment of the land by others.

It is my view that the material does support the existence of a right, held under the traditional laws and customs of the group, to exclusive possession of the application area. Firstly, noting the Full Court's observations in *Griffiths*, it is my view that the material speaks to a real belief held by the claimants in the ability of their traditional country, or the ability of the spiritual forces within that country, to impose spiritual sanction upon unauthorised visitors. This is seen in the following statement by a claimant:

> We went on a sort of big trip, me and ***[name removed]*** there, up to Fraser Island. And they asked us to go into this place, you know this thing, and they had a Bora ring there. And as he was walking towards it, I was, I felt physically sick, I said to ***[name removed]***, Boy, I can't go in there. And he said, what's wrong. I said, well I don't think this is, you know? I felt physically sick. And I couldn't go into the place where they had that bora ring there – the connection report at [696].

The connection report explains that claimants today widely recognise the potential for physical impairment and illness from spiritual forces to come upon any person who trespasses, or speaks 'out of turn' in relation to country with which they have no legitimate connection – at [696].

It is also my view that the material speaks to the way in which the laws and customs of the group require that the native title claim group's permission is sought by other non-Kabi Kabi persons seeking to access their traditional country. For example, one claimant states that:

> Kabi country runs from Buderim, Gympie, Yandina down to Maleny that way...People using our country without permission will cause a row but so many people are related it doesn't happen really because people respect that sort of thing – the connection report at [694].

Further detail as to the nature of the right held by the claim group is seen in the following statement by a claimant:

> We can do what we like on Kabi country. We wanted to buy a place for families to go to near Buderim and tell them this is part of your country, your grandfather's country and where you come from. We can camp, meet up with people, tell yarns about old people, fish, hunt and all that. Wakka Wakka people would need permission to do those kinds of things in Kabi country. My kids will have the same rights and interests as me and I always try to take one or two of them with me to meetings. They will control the country from Buderim down. Kabi country runs from Buderim, Gympie, Yandina and down to Maleny that way – the connection report at [762].

Material of this nature, in my view, indicates that members of the claim group do, in fact, exercise elements of control over the use of and access to their traditional country by other non-Kabi Kabi persons.

I understand that there is also support within the material before me for the fact that the nature and content of the right claimed by the group is determined by the traditional laws and customs of the group. That is, I consider the material to support the right as one held pursuant to the traditional laws and customs of the group, being laws and customs whose normative content is derived from the laws and customs of a pre-sovereignty society.

Material supporting this fact, in my view, is found within the connection report, which contains various observations regarding the territorial rights and interests of the group at the time of European settlement. One early settler in the area observed that:

> Each tribe had its own boundary, which was well-know, and none went to hunt, etc, on another's property without an invitation, unless they knew they would be welcome, and sent special messengers to announce their arrival. The Turrbal or Brisbane tribe owned the country as far north as North Pine, south to the Logan, and inland to Moggill Creek...The tribe in general owned the animals and birds on the ground, also roots and nests, but certain men and women owned different fruit or flower trees and shrubs – at [761].

And also that:

> Each blackfellow belonging to the district had two or three trees which he considered his own property, and no one else was allowed to climb these trees and gather the cones, though all the guests would be invited to share equally in the eating of the nuts – at [380].

In this way, in comparing the right of exclusive possession asserted within the material as held by the claim group today and the right held by the Kabi Kabi People at European settlement in the area, and noting that there is no apparent change in the content of that right, I am of the view that

a right to exclusive possession is held by the native title claim group pursuant to their traditional laws and customs, and that it is, therefore, a 'native title right or interest'.

The right is, prima facie, established.

Conclusion: Prima facie established.

- Non-exclusive rights and interests

The right to access and move about the application area

In support of a right held by the claimants to access and move about the application area, the connection report contains statements from a large number of claimants, each of whom speaks to the particular country within the application area with which they understand their family to be associated with. The material asserts that such family connections are premised on long-term associations with the area, and the possession of cultural knowledge regarding an area as passed down within that family between the generations right back to the Kabi Kabi apical ancestors.

In the same way, claimants provide various statements of the way in which they and their predecessors travelled across the application area, whether as a result of following the seasons and ensuring resources were sustained, as a result of the employment of parents on pastoral stations or in the rail or timber industries, or merely as a result of visiting family and relatives in other locations – see for example the connection report at [680], [628] and [784]. The following statement is an example of this material:

> We've always had mob from Maryborough, like I said, you know, them ***[name removed]*** boys from up that way. We've always known, we've always travelled between Maryborough, with ***[name removed]***, and Mum and Dad. Hervey Bay, out that way. So every other year we spend our holidays up at Hervey Bay. And we always went up that way to see the mob – at [661].

Noting that the material speaks not only of claimants' experiences, but also that of claimants' parents, grandparents, and the way in which the 'old people', or Kabi Kabi ancestors travelled across the area, I am of the view that the material supports the existence of a right to access and move about the application area, held by the group pursuant to their traditional laws and customs.

Conclusion: Prima facie, established.

The right to camp on the application area

Statements made by claimants within the connection report, in my view, indicate their knowledge of the way in which the 'old people' and the Kabi Kabi ancestors exercised a right to camp on the application area. The following statement I consider is an example of this material:

> Back before settlement a particular camp would be allocated a particular area to look after. And a lot of them were bound by creeks. So a camp would have an area to live on and manage and maintain according to the laws and customs. And they'd look after it and manage it and maintain it and the head man of that camp, he'd be the one to see about what business goes on there and look after it and manage it and look after the area. And he'd have to report to and take orders from the head man of several camps... – at [762].

In addition to this, there are also numerous statements made by claimants which tell stories of the way in which, as children, they spent time on the application area, camping with their parents and grandparents – see for example the connection report at [754] and [760]. These statements further indicate that the claimants take their kids and the younger Kabi Kabi generations out on country camping – see the connection report at [767].

In light of the material of this nature, I consider that the right to camp on the application area is a right held pursuant to the traditional laws and customs of the group, and that it is, prima facie established.

Conclusion: Prima facie, established.

The right to erect temporary shelters and other structures on the application area

Noting my finding above, that a right to camp on the application area is, prima facie, established, it is my view that a right to erect temporary shelters on the area flows naturally from the recognition of the former. Notwithstanding this, statements made by claimants within the connection report speak specifically to the existence of this right. The following statement is an example:

> I was born in Kingaroy and moved to Gympie when I was about five or 6, then moved to Brooloo. Dad was a forestry worker at Imbil State Forest. We had a shack 3 miles out from Brooloo on the Bluff towards Kenilworth. Dad used to shoot roo, wallaby... Holidays we went to Coonangibba Creek to fish for jewfish, mullet, and boney bream... Dad made little gunyahs for us and used tarps from the truck... we lived in the Brooloo shack til I was about 15 or 16 and then we moved into Brooloo township... I took my kids out on country at Brooloo and Gympie, to the Bluff and all our old spots, to where we lived. I take them home... My kids call it home too – at [754].

Noting that the material pertaining to the groups' exercise of a right to camp and erect associated structures refers to both the period of European settlement in the area, and the right as exercised by the claimants and their predecessors on the area, I consider that the material supports the right as one held pursuant to the traditional laws and customs of the group, and that it is, prima facie, established.

Conclusion: Prima facie, established.

The right to live on the application area

Each of the claimants interviewed for the purposes of the connection report speaks to the way in which they and their family members were born on, grew up on, or spent a considerable period of their lives on, various parts of the application area. The following statement I consider to be an example:

> The ***[name removed]*** lived at Caloundra at Duckhole Creek. We lived in tents and caravans like squatters. One of my aunties, ***[name removed]***, ***[name removed]***'s sister, had a house on Golden Beach. I came up here to Murgon in the 1940s when I was seven or eight years old. But after I left school I went back and lived with ***[name removed]*** there...Later on I worked at Jimna with ***[name removed]***, ***[name removed]*** and ***[name removed]***. We'd go fishing at Sheep Station Creek from Jimna on the weekends and go shooting scrub turkey – at [754].

Noting also that Attachment F/M asserts that the Kabi Kabi ancestors were persons born on, or firmly associated with the application area at the time of European settlement in the area, and that the descendants of those persons have maintained a physical occupation of the area since

that time (see Attachment F/M at [2] and [3]), I am of the view that the material shows the right to live on the application area is one held pursuant to the traditional laws and customs of the group.

The right is prima facie, established.

Conclusion: Prima facie established.

The right to hold meetings on the application area

The factual basis material speaks of gatherings of the claim group and the claim group's predecessors for various purposes, including dispute resolution fights, corroborees, bunya nut harvesting, trading and fishing – see for example the connection report at [137], [140], [683] and [719]. These gatherings are spoken of in relation to the claimants' predecessors and the Kabi Kabi ancestors, and in relation to gatherings of claim group members today. The following statement I consider to indicate that meetings of claim group members on country is a right held and exercised by the group that is being passed onto younger generations:

> We can do what we like on Kabi country. We wanted to buy a place for families to go to near Buderim and tell them this is part of your country, your grandfather's country and where you come from. We can camp, meet up with people, tell yarns about old people, fish, hunt and all that. Wakka Wakka people would need permission to do those kinds of things in Kabi country. My kids will have the same rights and interests as me and I always try to take one or two of them with me to meetings. They will control the country from Buderim down. Kabi country runs from Buderim, Gympie, Yandina and down to Maleny that way – the connection report at [762].

From the material before me of this nature, I consider that the right to hold meetings on the application area is a right held pursuant to the traditional laws and customs of the group, and that it is prima facie established.

Conclusion: Prima facie established.

The right to hunt on the application area

There is substantial material, in my view, contained in the application and additional material that speaks to the existence of a right held by the claimants to hunt on the application area. The following statement is an example:

> We went all around that area in the forest there, we did quite a bit of hunting as kids. Parrots. Ducks. Blue tongue lizard. Porcupine. Possum. We ate all that stuff. We got taught at a very young age, if you ever wanted, if you went to kill something, you got to be prepared to eat it. So we didn't knock off anything that wasn't edible. Just stuff that we ate. So we used to take off on the weekend, we used to take off on a Saturday morning, just a little bit of salt and a bit of damper, and we'd be gone all day. Just make a fire out in the bush and cook our feed up. Turtles. And if you got a long neck turtle, you got to cook that straight away. Short neck turtles, he'll last. But a long neck turtle will go off pretty quick. Same with all the ducks. If you've got a teal duck, a small duck, you've got to cook him straight away too. Because he'll go off very quick. And with porcupine, this dog, he's a bit old now, but somebody stole my dog. So when you get a porcupine you got to cut it open. You do it very carefully. And when you open it up, you see the insides are like that, there's 2 glands on the sides. You pick the little glands out very carefully. You have to use a razor blade, that's how sensitive. Cut it open and rub it on a dog's nose. That dog will always find you a porcupine... The kangaroos out towards the west. A few kangaroos did end up down this way. But mostly wallabies, rock wallabies, scrub wallaby... Right back in the 60s. Late 50s, early 60s. And like I said,

> when our Christmas holiday used to come around, 6 week holidays, we never stayed on the mission. Our mother used to take us down to the bush, down to the bottom weir... – at [760].

I note that the connection report provides that the claimants' predecessors, including the Kabi Kabi apical ancestors, were observed by early settlers in the area, hunting and cooking animals taken from the application area – see for example the connection report at [461].

It is my view that this material allows me to consider that the right to hunt claimed is one held pursuant to the traditional laws and customs of the group and that it is, prima facie, established.

Conclusion: Prima facie established.

The right to fish on the application area

Similarly to above, the material speaks in considerable detail of a right held by the claim group and their predecessors, to fish on the application area. The following statement is an example of such material:

> I was born in Maryborough and our Mum and Dad lived in Buderim. When Dad dies we moved back and forth between Maryborough and Buderim. All our brothers were born in Nambour. ***[name removed]*** and my other brother always fished around there, Bli Bli, Maroochy River and surf fishing at Mudjimba and north shore. All our uncles fished and collected pippi shells, hooking crabs...Mum walked between Buderim and Mooloolah living off the land...- at [754].

In addition to this, the material includes a reference to an early settler observing one of the Kabi Kabi apical ancestors and his sons fishing on a shallow lake within the application area – see Attachment F/M at [25].

On this basis, it is my view that the material supports the right as being one held pursuant to the traditional laws and customs of the claim group. I consider, therefore, that the right is, prima facie established.

Conclusion: Prima facie, established.

The right to take and use the natural water resources of the application area

Noting that the material asserts that the claimants and their predecessors have physically occupied the application area since the time of the Kabi Kabi ancestors, and prior to sovereignty, I accept that the use of the natural water resources of the application area is a necessary implication. The material speaks to the presence of waterholes and wells on the application area, some of which are understood by the claimants as sacred or special places – see for example the connection report at [724]. The material also speaks to the way in which the claimants as children, or their predecessors, accessed and used these natural water resources. The following statement is an example:

> ...But I'm going back there with a couple of the girls when I come back. When I go up to, because I remember some of the old wells that was there because I used to live in the Baralbin with my old Granny. One of my aunties, their husband used to live down, there's like a little village near the slaughter yard where they killed the cows and all that. Well I remember the well there because we used to go down there and they used to say, "Who gonna go and get some water", and I used to lift my hand up. And we used to go and I still remember where the wells are today. Yeah. Some of the girls from Sydney are coming back and we are going up there to look at some of the old wells. Yeah, but the one in Cherbourg itself, right in Cherbourg my great grandparents, my ***[name removed]*** and her husband, ***[name removed]***, ***[name removed]***'s Aunty told me that the ***[name***

> ***removed]***, they more or less looked after that well. I said yeah, I've been there to that well. And my mum was telling me, "Oh beautiful water there; they've had that for years and years. That's where they get all their water from. ***[name removed]***'s Aunty told me that yeah, they've closed all the wells up. But your family, the ***[name removed]*** family, your grandfather built a cottage there. Even my mum told me that they lived near the well. You can still see the well, where it is today – the connection report at [725].

In light of the material of this nature within the application and additional material, I am of the view that the right to take and use the natural water resources of the application area is, prima facie established.

Conclusion: Prima facie established.

The right to gather the natural products of the application area

Again, there is considerable material going to the claimants' and their predecessors' use of the natural products of the application area. The following statement within the connection report is an example:

> They'd use the swamp fern to make bread. To make bread. There's blue tongue berries. You can eat them, they're like a mulberry sort of quality about them. They're very small. There's the wattle, used for the boomerang. Black wattle. Banksias. You eat those banksias. You get the little seed out of them. Also good for starting a fire. The bottle brush. For the nectar. Use the pickie and make a cup out of it, get fresh water. Dip a lot of flowers in it. Oh yeah, we used to go along and just suck the leaves. The most beautiful nectar. Yeah, bush honey. There's an industry in it, but if you ever come across one, yeah, get the honey. But the bigger native bee, it's medicine honey. Medicine for cuts, take it for sore throats. It's got a very sort of strong antibiotic. We used to use that. And mum used to always tell me, every time I went past a red blood wood, she'd say, "You see that tree?" She always told me, "That's a medicine tree, ***[name removed]***. That tree you can use any part of that tree and it's medicine. You can burn it down into a fine coal, a fine charcoal and put it on your wounds. You can use the bark, the inner bark, the leaves, the roots of the tree. It's a medicine tree – at [759].

Noting that the knowledge of methods of use for the resources of the application area is indicated as comprising part of the cultural knowledge that has been passed down to the claimants in accordance with traditional methods of teaching, I am of the view that the right is shown to be one held pursuant to the traditional laws and customs of the Kabi Kabi people.

I consider that the right is, prima facie, established.

Conclusion: Prima facie established.

The right to light camp fires for cooking, heating and lighting purposes on the application area

Noting my findings above, that I consider that the right to camp and the right to hunt on the application area are prima facie established, I am able to accept that the right to light fires for the purposes of cooking, heating and lighting flows naturally from the recognition of the former rights. Within the material, claimants speak of the way in which they and their predecessors have exercised the right. The following statement is an example:

> ...And like I said, when our Christmas holiday used to come around, our 6 week holidays, we never stayed on the mission. Our mother used to take us down to the bush, down to the bottom weir. That's before Joe Bjelke-Peterson Dam was ever built. Went down to the bottom weir and we used to spend 6 weeks down there. Just used to ride down and get some rations. And we lived in the bush. Eels, turtles, ducks, possums, anything that could be caught, we'd cook down there. I

> remember cooking eel in mud, you know? Had all this mud around it, chucked it straight into the coals. When the mud started cracking off it, take it out ready to eat. It was a good feed, too – at [760].

In light of this material, and the material within the factual basis indicating that the Kabi Kabi ancestors also camped on the application area, I consider that the right is shown to be one held pursuant to the traditional laws and customs of the group, and that it is, prima facie established.

Conclusion: Prima facie established.

The right to conduct ceremony on the application area

The material speaks to a number of different ceremonies that the claim group and their predecessors have carried out on the application area. This includes ceremonies of initiation, smoking ceremonies to remove spirits following a death, burial ceremonies and cultural celebration ceremonies such as corroborees – see the connection report at [390] to [392], [445], [446], [461], [464].

The following statement demonstrates the way in which a claimant shares his knowledge of these ceremonies carried out by the group's predecessors with younger generations of Kabi Kabi children, passing the knowledge on through traditional teaching methods:

> ...And it's not as sacred as one, you're not allowed to go down any further than this circle, but you kids can come in here and I'll explain something to you. I'll get in the middle, and I'll get all the kids to stand on the top of the circle, the ring, and get them to hold their hands out like that. And they hold their hands out, and it almost matches 42. And I say, you know how many boys come through here to get initiated, and they say, how many. Same amount as you kids right here right now. As I can tell you, almost exactly to the one, how many people were initiated the last ceremony they had here, because it hasn't been changed since. So they had 42 or 43 young fellas in here getting initiated at that time, and that was the last ceremony – the connection report at [767].

In light of the material of this nature, I consider that the material supports the right as one held pursuant to the laws and customs of the group, in the way knowledge of the exercise of the right has been passed down to the claimants today through traditional teaching methods. I am of the view, therefore, that the right is, prima facie established.

Conclusion: Prima facie established.

The right to participate in cultural activities on the application area

In my view, there is little to distinguish the right to conduct ceremony on the application area from the right to participate in cultural activities on the application area. Notably both rights involve the group engaging in very similar activities, namely gatherings on country of some size, face-to-face interactions and discussions, and adherence to certain practices determined by the relevant social and cultural norms. Noting that above I have considered the right to conduct ceremonies on the application area to be, prima facie, established, I also consider that the material supports a right to participate in cultural actitivities on the application area and that the right can be, prima facie established.

Regardless, there are various statements provided by claimants within the connection report that in my view, go towards the existence of the right, such as statements pertaining to the Bunya Festivals held on the application area every three years. The material includes references to these festivals as observed by early settlers in the area (see for example the connection report at [464]),

and also the participation of the claimants and their predecessors in these festivals during more recent decades. The following statement is an example:

> When ***[name removed]*** was born, they stayed then. And every year before then, before she was born. Every year they used to do the Bunyas down there. Down that way. Out there to Bli Bli, up Mapleton, there. They, how they [got] up at Kingaroy, what do they have, Bunya Festival? And marry 'em up then. When granddad married they come across country, went to the Bunya festival there at Maidenwell and got married – at [634].

In this way, I consider that the material supports the right as being one held pursuant to the traditional laws and customs of the group.

Conclusion: Prima facie established.

The right to teach and pass on knowledge of traditional laws and customs on the application area

From the statements made by claimants within the material, it is clear, in my view, that the claimants have been passed knowledge relating to the laws and customs of the group, and knowledge of the application area by their predecessors, particularly their grandparents and elders within the group. This knowledge extends to details of the lifestyles and customs of the Kabi Kabi ancestors occupying the application area – see the connection report at [718], [719]. These elders were considered responsible for imparting such knowledge due to their own extensive knowledge of these matters – see the connection report at [685], [731].

The following statement, in my view, also indicates that there are particular rules and customs surrounding the way in which knowledge is passed on:

> The women would teach the kids everything. They would teach you to cook things in the ground, the marks on the trees, the flowers, the birds. What to eat, what not to eat, where to go, where not to go. Teach the girls and all that. Teach the boys. The men would be up there somewhere doing whatever they do. If they get a certain size then the women take the boys for 4 days or for a couple of days. But they'd bring them back until they're old enough to till they get to the kick off part. Then they don't come back to the women. So, and the reason for that was survival of the tribe, of the clan – at [686].

From material of this nature, I consider that it is the traditional laws and customs of the group that give rise to the right to teach and pass on knowledge of traditional laws and customs on the application area.

I consider, therefore, that the right is prima facie established.

Conclusion: Prima facie, established.

The right to maintain and protect places of importance under traditional laws, customs and practices in the application area

One particular aspect of Kabi Kabi laws and customs passed down to the claimants by the elders of the group is asserted within the material to include knowledge of certain places and sites within the application area that are considered sacred or important, or which are to be avoided. The basis for the significance attached to these sites as indicated within the material is primarily the presence of spirits, both evil spirits and ancestral or creation spirits in those places, or associated with those places. This is shown, in my view, in the following statement by a claim group member:

> Then there's older stories about old woman island, Mudjimba, up there at the Maroochy River, at the mouth, and Bribie, the two women who traveled up from Bribie to Mudjimba. And how men can't go to Mudjimba. And if they go there then the two women, their spirits are still there. And they come in the way of being giant women. And they'll eat men. So, Mudjimba's a sacred place, but there's a connection between Bribie and Mudjimba in that story. Bribie is a dugong itself. Bribie Island. The southern part of Bribie is called Tumber. The next section up is Yippi. The next section up which we're on now, or it's a little bit further north than us, this is part of Tuku. Then there's Tarangiri. Then Woorim, which is the very northern end. The skinny part of Bribie that runs up to Caloundra. Tumber in our language is lips. Yippi is throat. Tuku is the abdomen. Tarangiri is the legs or flippers. Woorim is the tail. So you've got the lips, throat, abdomen, flippers and tail. It's the dugong. That's why I say this is a very important place. Long ago, before the dugongs were hunted out by the settlers, killed just for their oil to be exported to San Francisco, there'd be thousands of dugong in this passage. Mums giving birth. Old dugongs dying. Wounded dugongs going somewhere to die up the passage. It's a very important place for dugong – at [727].

Noting the significance of such places to the members of the claim group, in accordance with their laws and customs, and passed down to them through the generations preceding the present one, I consider that it is the traditional laws and customs of the group that give rise to the right claimed by the group to maintain and protect these places of importance.

I consider, therefore, that the right is, prima facie established.

Conclusion: Prima facie, established.

The right to conduct burials on the application area

The material before me includes information pertaining to the existence of the right as exercised by both the Kabi Kabi ancestors occupying the application area at the time of European settlement (see the connection report at [443] and [445]), and as exercised by the members of the claim group today. The following statement is an example of such material:

> We would like some control [of] our own specific area because that's where our old people are buried...It's very important to be buried in your country. Mum wanted to be buried in Nambour because that's her land. My brother is buried there – at [710].

There are various statements of this nature within the material, demonstrating the knowledge held by the claimants regarding the way in which their predecessors, going back a number of generations, have been buried on their traditional country. These statements, in my view, indicate that the right claimed is one understood by members of the group as held in accordance with their traditional laws and customs.

I consider, therefore, that the right is prima facie established.

Conclusion: Prima facie established.

The right to cultivate and harvest native flora on the application area, according to traditional laws and customs

One cultural event or practice addressed in significant detail within the material, asserted as arising pursuant to Kabi Kabi traditional laws and customs, is the Bunya Festival. This event is described as involving the harvesting of natural products taken from the application area, namely the fruit and nuts of the bunya forests across the Great Dividing Ranges (including areas within

the application area). The following observation was made by an early settler in the area in relation to the participation of the Kabi Kabi People in the Bunya Nut Festival:

> Once in three years the tribes who owned the Bunya Mountains, speaking 'Cabbee' in the north and 'Wacca' in the south, invited all the tribes within a certain radius as guests to feast on the bunya nuts. These invited strangers came from the Clarence on the south to the mouth of the Burnett River on the north, and West to the Moonie and the Maranoa. These strangers were received with every hospitality. The bunyas were gathered by the proprietor tribes and presented to the guests, who were not allowed to climb the trees or take bunyas for themselves... – the connection report at [461].

In including references to the way in which the Kabi Kabi People at European settlement participated in these festivals, and statements from claimants regarding their and their predecessors participation in these events, it is my understanding that the material supports the right to cultivate and harvest native flora on the application area as being one held pursuant to the group's traditional laws and customs, and that it is, prima facie established.

Conclusion: Prima facie established.

The right to distribute, trade or exchange the natural resources on the application area

The material speaks in some detail of the way in which the Kabi Kabi People including the apical ancestors were part of a regional society who interacted for social and cultural purposes. One of those purposes asserted by the material is that the localised sub-groups would gather in order to share in feasts and festivals, and to trade certain resources harvested from the application area.

The sharing of a catch or hunt amongst members of the Kabi Kabi people and beyond, to persons of other groups, is a key aspect of the traditional laws and customs of the group asserted by the material. An example of the factual basis material that speaks to the exercise of this right is the following statement by a claim group member:

> We look out [for] our immediate family, first of all. See who wanted meat or not. Then we extend from that, we'll branch out from that. You know who's the closer to your family than others. Like with ***[name removed]*** here, if I go out hunting and whatever, I'll go out and I'll want to know if she's alright. I'll giver her a call to see if she's alright... And that's what we're teaching our family. I can't say what the other family groups do. I know with the Bundaberg mob, when they go out hunting, they'll give us a call or ring ***[name removed]*** and they'll say, "We got a bag of dugong here or we got a bag of turtle. When you coming up?" And that's the same thing with us. That's our heart. Because we look after our own – the connection report at [680].

The following statement was made by an early settler in the application area, observing the Kabi Kabi People and other groups within the region exercising this right:

> At corroborees the different tribes exchanged their goods, such as shields, spears, nets, etc., and they often made use of the same occasion to give and take wives... – the connection report at [158].

Noting that the material shows the right as one exercised by both the Kabi Kabi ancestors in the area at the time of European settlement, and as a right exercised today by members of the claim group, it is my view that the right is shown to be one held pursuant to the traditional laws and customs of the group that has been passed down through the preceding generations to the claimants today.

I consider, therefore, that the right is prima facie established.

Conclusion: 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).

Noting the use of the word 'traditional' in the condition at s. 190B(7) and my understanding of that term set out above in my reasons at s. 190B(5)(b), I am of the view that the physical connection asserted by the application must be shown to be one that is in accordance with the laws and customs of the group deriving from the laws and customs of the relevant society at sovereignty. Dowsett J supported this approach in *Gudjala 2007*, where His Honour stated that:

> The delegate considered that the reference to 'traditional physical connection' should be taken as denoting, by the use of the word "traditional", that the relevant connection was in accordance with laws and customs of the group having their origin in pre-contact society. This seems to be consistent with the approach taken in Yorta Yorta... – at [89].

The decision in *Yorta Yorta*, in my view, further suggests that there is a need for an actual presence on the land and waters of the application area to be demonstrated – see *Yorta Yorta* at [184].

The nature of the task of the registrar's delegate at s. 190B(7) was discussed by the Court in *Doepel*. Mansfield J held that the task 'does require the Registrar to be satisfied of a particular fact or particular facts' and that this 'therefore requires evidentiary material to be presented to the Registrar' – at [18].

In relying on the statement contained within the s. 62(1)(a) affidavits, and accepting that the information contained in the application is true, I understand that it is *not* my role to consider whether the material proves any asserted connection, or the laws and customs by which that connection is held. As Mansfield J stated in *Doepel*, the 'focus is upon the relationship of at least one member of the native title claim group with some part of the claim area'; it is 'not the same focus as that of the Court when it comes to hear and determine the application for determination of native title rights and interests' – at [18].

Noting that the wording of s. 190B(7) directs my attention to the traditional physical connection held by one particular claim group member with the area, the factual basis material I have considered for the purposes of s. 190B(7) relates to one particular claim group member, that person being Les Muckan.

[name removed] is one of the applicant persons for the native title determination application, and in his affidavit required by s. 62(1)(a), he states that:

> I am a member of the Kabi Kabi First Nation Traditional Owners native title claim group ("Native Title Claim Group") through my descent from ***[name removed]*** of Yandina. ***[name removed]*** was mother to my grandmother ***[name removed]***. I also trace my Kabi Kabi heritage through my great grandmother ***[name removed]*** from the Gunalda Range near Maryborough – at [1].

Noting that ***[name removed]*** is recognised by, and has been authorised by, the native title claim group to be one of the applicant persons for the application, and that he is able to trace his descent from a particular apical ancestor named at Schedule A, persons through whom membership of the group is determined, I am satisfied that ***[name removed]*** is a member of the native title claim group.

[name removed] was interviewed for the purposes of the connection report, and in those interviews, shares the following details of the time he has spent on Kabi Kabi country, with various other Kabi Kabi persons, including his parents and grandparents:

> We grew up in Caloundra and Bli Bli where Dad was working. The ***[name removed]*** and ***[name removed]*** and ***[name removed]*** families were also living there at the time. We spent time with them at Duckhole on the north side of Caloundra. Sandy Bend on the north side of the Maroochy River is where we and the ***[name removed]*** lived...we mixed in with the ***[name removed]*** down there...We hunted and fished right through this area especially at Bli Bli, Maroochy River, Old Woman Island, Rainbow Beach and Tin Can Bay. The back country we used for kangaroo and porcupine hunting and went to Traveston and Imbil area for freshwater turtle. At Tiaro and Woolooga we went for Boney Bream and visited the areas around Skyring Creek and Coolum right through the 1970s, 80s and 90s... – at [754].

And also:

> Don't forget, grandma, ***[name removed]***, she's buried there on Beerwah. She's buried there on the old Beerwah Hospital grounds. So all through there, Granddad used to work in the forestry. He used to take us all through there for porcupine – at [710].

And also:

> Me and Dad grew up around Netherby, which is the back of Tiaro, you know out towards Woolooga. Them places out that way and all them places there, with plenty of porcupine running around. Mate, you'd never go hungry. Down at Imbil, down towards Tuchekoi, I lived there for 3 years. I wanted to go live on the river there. Just live off the land. Then you go further down to Imbil and back towards where they wanted to put the dam. The areas down there where the ***[name removed]*** are still there and the old caves are still there with paintings on – at [754].

And also:

> That area, down to Imbil, because of porcies and that sort of thing. Turtle, freshwater turtle. You go, you look for springs, not so much springs but fresh running water, freshwater turtles. Up here at the back of Tiaro, and you know, Netherby, Gundiah. You know, all them places up there, going back to Woolooga, down the bottom there, we used to go to Coolum. Just forget that little hall. There's a little hall there on the highway, going between here and...On the old road. They built that new bypass in there. Up there near Coolum – at [760].

From these statements, I consider that the material indicates that ***[name removed]*** has spent a considerable amount of time on the application area, both as a child with his father and his

grandparents, and as an adult, living at Imbil for 3 years. From my own research of the Tribunal's mapping databases, I note that Imbil, and the other locations named by ***[name removed]***, all fall within the external boundary of the application area.

Regarding whether the asserted physical connection of ***[name removed]*** with those parts of the application area can be said to be a 'traditional' connection, it is my view that the material allows me to be satisfied that it is. Firstly, I note that ***[name removed]*** speaks of the way in which his grandfather took he and his brothers hunting for porcupine during their childhood. I have inferred from this statement (and from further material within statements made by claimants) that these trips were likely to have entailed ***[name removed]***'s grandfather using traditional methods of teaching to pass cultural knowledge and information onto the boys, regarding how and where to catch the porcupine, and associated lessons of sustainable use of natural resources from the area. In this way, I consider that the time ***[name removed]*** spent on country with his grandfather, and the nature of these trips, was in accordance with the traditional laws and customs of the Kabi Kabi people. Since this time, the statements from ***[name removed]*** indicate that he has continued, as an adult, to spend time on his traditional country, fishing and hunting and using the natural resources of the area in accordance with those traditional laws and customs passed down to him as a child.

Secondly, I note that the statements from ***[name removed]*** indicate his understanding of the particular Kabi Kabi families who were associated with different parts of the application area. Similarly, ***[name removed]***'s statements indicate that the traditional country of his own family, by way of descent, includes the area around Beerwah, where his grandmother is buried. Territorial rights and interests held by particular Kabi Kabi families with particular tracts of land within the broader application area, through that family's descent from an apical ancestor understood as historically associated with that area, is an aspect of the traditional laws and customs of the Kabi Kabi people asserted within the factual basis material. In this way, I consider that ***[name removed]***'s knowledge of, and time spent on, his traditional country indicates a traditional physical connection.

Finally, I am of the view that ***[name removed]***'s connection with the area is shown to be traditional, in the way that ***[name removed]*** holds knowledge regarding special places within the application area, such as places where Kabi Kabi predecessors are buried, and places where rock art can be found. As discussed in more detail in my reasons above at s. 190B(5)(b), I consider that the material before me indicates that knowledge of these matters forms part of the traditional laws and customs passed onto younger Kabi Kabi generations.

For these reasons, I have formed the view that I am satisfied that at least one member of the native title claim group currently has, or previously had, a traditional physical connection with a part of the application area.

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

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

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

Section 61A provides:

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

(2) If :

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

(b) either:

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

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

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

(3) If:

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

(b) either:

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

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

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

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

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

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

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

Reasons for s. 61A(1)

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

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

I have referred to the geospatial assessment for the application which provides that there are no determinations of native title falling within the boundary of the application area as at 14 June 2013. I have since accessed the Tribunal's iSpatial database to confirm that, as at the date of this

decision, it remains that there are no determinations of native title overlapping any part of the application area.

Reasons for s. 61A(2)

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

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

Schedule B of the application contains a number of general exclusion clauses, that is, areas falling within the boundary of the application area that are not covered by the application. Included within that list, I note that the application has adopted the wording of s. 23B of the Act (which defines a 'previous exclusive possession act'), as one of the categories of areas excluded from the application area.

Reasons for s. 61A(3)

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

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

Schedule E of the application lists those native title rights and interests claimed by the group. I note that paragraph [1] of that Schedule includes a claim to a right to possess, occupy, use and enjoy the land and waters of the application area as against the whole world. It is my view that this claim does not offend s. 61A(3), as the exclusive right described is prefaced by the phrase 'over areas where a claim to exclusive possession can be recognised'. It is my understanding therefore, that exclusive possession is not claimed over 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 of the application provides that the native title claim group does not claim ownership of minerals, petroleum or gas wholly owned by the Crown.

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

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

Schedule P of the application provides that the application does not include a claim by the native title claim group to exclusive possession of all or part of an offshore place.

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

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

Schedule B of the application provides that any area within the external boundary of the application area in relation to which native title rights and interests have been otherwise extinguished is excluded from the application area. I note that there is nothing in the application or information before me that indicates that the native title rights and interests claimed have been otherwise extinguished.

[*End of reasons*]

Attachment A
Summary of registration test result

Application name	**Kabi Kabi First Nation**
NNTT file no.	**QC2013/003**
Federal Court of Australia file no.	**QUD280/2013**
Date of registration test decision	**7 August 2013**

Section 190C conditions

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

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

Section 190B conditions

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

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

[*End of document*]