National Native Title Tribunal

Registration test decision

Application name	Kowanyama People
Name of applicant	Lawrence Daphney, Chris Henry, Charlotte Yam, Michael Mitchell, Arthur Luke, Teddy Bernard, Colin Lawrence Jr., Charmaine Lawrence, Lavinia Inkerman, Celza Inkerman and Hilton Noble
NNTT file no.	QC2014/001
Federal Court of Australia file no.	QUD6119/1998
Date application made	25 March 1997
Date application last amended	7 February 2014

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

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

Date of decision: 7 April 2014

Date of reasons: 2 May 2014

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Renee Wallace

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 30 July 2013 and made pursuant to s 99 of the Act.

Reasons for decision

Introduction

[1] This document sets out my reasons, as the delegate of the Native Title Registrar (the Registrar), for the decision to accept the claim for registration pursuant to s 190A of the Act.

[2] All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cth) 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 and introduction

[3] The Registrar of the Federal Court of Australia (the Court) gave a copy of the amended Kowanyama People claimant application to the Registrar on 10 February 2014 pursuant to s 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

[4] The Kowanyama People application is a combination application, amended pursuant to orders of Greenwood J dated 5 December 2013. It is a combination of three applications, being Kowanyama People (QUD6119/1998), Kowanyama People #2 (QUD282/2012) and Kowanyama People #3 (QUD743/2013).

[5] I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

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

[7] 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.

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

Information considered when making the decision

[9] 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.

[10] 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.

[11] 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 of the Act.

[12] Also, I have not considered any information that may have been provided to the Tribunal in the course of mediation in relation to this or any other claimant application.

Procedural fairness steps

[13] 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) 167 FCR 325 at [23]–[31]. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

[14] On 13 February 2014, the case manager wrote to the applicant and to the State of Queensland (the state) to inform them of the date by which the registration test would be applied and the date by which any additional information and/or submissions to the Registrar could be made.

[15] On 3 April 2014, the case manager provided the state with additional information received from the applicant by the Registrar in relation to the claim made in the application.

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.

[16] 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.

[17] I note that I am considering this claim against the requirements of s 62 as it stood prior to the commencement of the *Native Title Amendment (Technical Amendments) Act* 2007 on 1 September 2007. This legislation made some minor technical amendments to s 62 which only apply to claims made from the date of commencement of the Act on 1 September 2007 onwards, and the claim before me is not such a claim.

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

[19] 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). 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.

[20] Below I consider 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)

[21] An application for a determination of native title must be made by persons who are authorised by the native title claim group, being those 'who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed…'— see s 61(1). This, in my view, requires that the application contain details and other information identifying the person who is, or persons who are, the applicant and on whose behalf those persons make the application (namely, the native title claim group).

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

The requirements of s 61(1) for the purpose of s 190C(2)

[23] This assessment does not involve the Registrar going beyond the application, nor does it require any form of merit assessment of the material to determine whether 'in reality' the native title claim group described is the correct native title group— *Doepel* at [37] and [39].

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

The information in the application

[25] Part A of the application names eleven (11) persons as jointly comprising the applicant, being Lawrence Daphney, Chris Henry, Charlotte Yam, Michael Mitchell, Arthur Luke, Teddy Bernard, Colin Lawrence Jr., Charmaine Lawrence, Lavinia Inkerman, Celza Inkerman and Hilton Noble.

[26] Schedule A of the application states that '[t]he claim is lodged on behalf of the Kowanyama People who comprise those people known as the Yir Yoront (sometimes called Kokomenjen), Koko Bera, Kunjen and Koko Berrin peoples including the applicant and other claimants, who together form the native title group. Schedule A also refers to Attachment A. Attachment A of the application contains further information describing the native title claim group, being the cognatic descendants of over 70 persons or those recruited by adoption in accordance with the traditional laws and customs.

Consideration

[27] Having considered the description of the native title claim group and other information in the application, it is my view that the application contains the information required by s 61(1) for

the purpose of s 190C(2). The claim, on its face, appears to be brought on behalf of all members of the native title claim group.

[28] The application also names the persons comprising the applicant and states that they are authorised.

Name and address for service: s 61(3)

[29] The application must contain the name and address for service of the person who is, or persons who are, the applicant — s 61(3).

[30] Part B of the application contains the name and address for service of the applicant.

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

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

[32] This subsection requires that the members of the native title claim group be either named or described sufficiently clearly in the application — s 61(4).

[33] The nature of the task here is similarly confined by the parameters of s 190C(2). The task at s 190C(2) is discussed above.

[34] From the description contained in Schedule A and Attachment A of the application (see my reasons above at s 61(1)), it follows that the provisions of s 61(4)(b) apply and that the application must contain the details/information that otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

[35] As the task here does not involve any merit or value assessment of that description, I am satisfied that within the application at Schedule A there is a description which appears to meet the requirements of the Act, being s 61(4)(b).

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

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

[37] Section 62(1)(a) requires an affidavit from the applicant in a prescribed form. This requires the inclusion of prescribed statements in the affidavit/s. I note that I must consider compliance with s 62(1)(a) as it stood prior to the 2007 amendment. There is one notable divergence in what was required then by s 62(1)(a)(v) to that which is now required, being that the affidavit sworn by the applicant simply had to state 'the basis on which the applicant is authorised as mentioned in (iv)' rather than requiring details of the process of decision-making.

[38] The application is accompanied by affidavits of each of the eleven (11) persons who are named as the applicant.

[39] In *Doolan v Native Title Registrar* (2007) 158 FCR 56 (*Doolan*), Spender J held that '[a]s a matter of language (and in fact practice), the requirements of s 62 are satisfied by the filing of affidavits by each of the persons who constitute 'the applicant' deposing to the specified beliefs. The 'applicant' in s 62(1), in my view, is a reference to each of the persons who comprises 'the applicant' for the purpose of s 61 of the Act'—at [67].

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

[41] Each of the affidavits of the eleven (11) named persons contain the following statements that are relevant to this requirement:

> I believe that the native title rights and interests claimed by the Kowanyama People claim have not been extinguished in relation to any part of the area covered by the application; and
>
> I believe that none of the area covered by the Kowanyama People native title claim is also covered by an approved determination of native title; and
>
> I believe that all of the statements made in the Kowanyama People native title application are true; and
>
> I am personally authorised by all the persons in the Kowanyama People native title claim group to make this application and to deal with all matters arising in relation to it; and
>
> There is a process of decision-making under the traditional laws and customs of the Kowanyama People that must be complied with in relation to authorising things like native title claims.
>
> That process was used to authorise me.

[42] Whilst each of the affidavits seems to refer only to that person's own authority, i.e. 'I am personally authorised…', I consider that the affidavits must be read together. Reading all of the eleven (11) affidavits in conjunction, I consider that they contain the statements required by s 62(1)(a), as it stood prior to the 2007 amendments.

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

Details required by s 62(1)(b)

[44] Subsection 62(1)(b) requires that the application 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)*

[45] The application must contain details and other information which describes the boundaries of the application area referred to in s 62(2)(a)(i) and (ii). These are the area covered by the application (s 62(2)(a)(i)) and any areas within those boundaries that are not covered (s 62(2)(a)(ii)).

[46] Schedule B and Attachment B of the application a description of the boundaries that are referred to in s 62(2)(a).

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

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

[48] Section 62(2)(b) requires the application to contain a map of the application area.

[49] Attachment C of the application is a map of the application area.

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

Searches: s *62(2)(c)*

[51] Section 62(2)(c) requires details and results of any 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 application area.

[52] Schedule D of the application states that '[n]o searches have been carried out.' This, in my view, meets the requirements of s 62(2)(c) as it only requires details of the searches that have been carried out by or for the native title claim group.

[53] The application contains all details and other information required by s 62(2)(c).

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

[54] Section 62(2)(d) requires that the application contain a description of the native title rights and interests claimed. This description must not merely consist of a statement that all native title rights and interests in relation to the area are claimed.

[55] Schedule E of the application contains a description of the native title rights and interests claimed. It does not merely consist of a statement that all native title rights and interests in relation to the area are claimed.

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

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

[57] The application must contain a 'general description' of the factual basis on which it is asserted that the native title rights and interests are said to exist. This general description must

include details and other information relating to the particular matters described in s 62(2)(e)(i), (ii) and (iii).

[58] There are various parts of the application that include information about the factual basis on which it is asserted that the native title rights and interests are said to exist. These include Schedules A, F and G as well as Attachments F and R.

[59] For this requirement I need only consider whether the information regarding the claimant's factual basis contained in the application addresses, in a general sense, each of the particular assertions at s 62(2)(e)(i) to (iii) and I do not need to undertake an assessment of its sufficiency. Any 'genuine assessment' of the details/information contained in the application at s 62(2)(e), is to be undertaken by the Registrar when assessing the applicant's factual basis for the purpose of s 190B(5) — *Gudjala People #2 v Native Title Registrar* (2008) 171 FCR 317 (Gudjala FC) at [92].

[60] The application contains the details and other information required by s 62(2)(e).

Activities: s *62(2)(f)*

[61] The application must contain details relating to any activities carried out by the native title claim group in relation to the land or waters.

[62] Schedule G of the application contains a list of activities that are said to be carried out by members of the native title claim group within the application area.

[63] The application contains the details and other information required by s 62(2)(f).

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

[64] The application must contain details in relation to any other applications, of which the applicant is aware, that have been made in relation to the whole or part of the area covered by the application.

[65] Schedule H of the application contains the statement '[n]ot applicable', which I understand to mean that there are no other applications that relate to the area of which the applicant is aware.

[66] The application contains the details and other information required by s 62(2)(g).

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

[67] Section 62(2)(h) requires details of any notifications under s 29 (or under a corresponding law), which relate to the application area and which the applicant is aware.

[68] Schedule I of the application contains the statement '[n]ot applicable', which I understand to mean that there are no s 29 notices that relate to the area of which the applicant is aware.

[69] The application contains the details and other information required by s 62(2)(h).

Conclusion

[70] The application contains the details specified in ss 62(2)(a) to (h), and therefore contains all details and other information required by s 62(1)(b).

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 requirements of s 190C(3)

[71] The requirement here is that the Registrar be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application. This requirement, however, is only triggered if the previous application meets all of the criteria in s 190C(3)(a), (b) and (c)— see *Western Australia v Strickland* (2000) 99 FCR 33 (*Strickland FC*) at [9].

[72] Those requirements are that the previous application covered the whole or part of the area covered by the current application (s 190C(3)(a)), that there is an entry on the Register of Native Title Claims (Register) for the previous application when the current application is made (s 190C(3)(b)) and that the entry was made (or not removed) as a result of consideration of the previous application under s 190A (s 190C(3)(c)).

[73] The Geospatial assessment and overlap analysis dated 19 February 2014 identifies only one application on the Register of Native Title Claims, being the Kowanyama People (QC1997/009; QUD6119/1998). The application that I am testing is a combined application of the Kowanyama People (QC1997/009; QUD6119/1998), Kowanyama #2 (QC2012/007; QUD282/2012) and Kowanyama People #3 (QC2013/009; QUD743/2013).

[74] In my view, it would be illogical to treat the Kowanyama People (QC1997/009; QUD6119/1998) registered native title claim as a 'previous application' for the purpose of s 190C(3) given that it now forms part of this application. If this application meets all of the conditions of registration and is entered onto the Register, the Kowanyama People (QC1997/009; QUD6119/1998) application is removed from the Register at a concurrent time.

[75] It is my understanding that the intention of s 190C(3) is to prevent the registration of multiple applications with overlapping members being on the Register at the same time.

[76] The application satisfies the condition of s 190C(3).

Subsection 190C(4)
Authorisation/certification

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

(a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or

(b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

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

Section 251B provides that for the purposes of this Act, all the persons in a native title claim group authorise a person or persons to make a native title determination application . . . and to deal with matters arising in relation to it, if:

a) where there is a process of decision–making that, under the traditional laws and customs of the persons in the native title claim group, must be complied with in relation to authorising things of that kind—the persons in the native title claim group . . . authorise the person or persons to make the application and to deal with the matters in accordance with that process; or

b) where there is no such process—the persons in the native title claim group . . . authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision–making agreed to and adopted, by the persons in the native title claim group . . . in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.

Under s 190C(5), if the application has not been certified as mentioned in s 190C 4(a), the Registrar cannot be satisfied that the condition in s 190C(4) has been satisfied unless the application:

(a) includes a statement to the effect that the requirement in s 190C(4)(b) above has been met, and

(b) briefly sets out the grounds on which the Registrar should consider that the requirement in s 190C(4)(b) above has been met.

[77] 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.

[78] The application is not certified and thus the requirements of s 190C(4)(a) are not relevant to the application. Thus, it follows that I must be satisfied of the matters in s 190C(4)(b).

[79] For that purpose, I must firstly decide whether the application contains the information required by s 190C(5)(a) and (b). In addition, I must be satisfied that the applicant is a member of the native title claim group and is authorised to make the application by all the other persons in

the native title claim group. Section 190C(4)(b) contains a note that the word 'authorise' is defined in s 251B.

Section 190C(5)

The information required by s 190C(5)

[80] The information required by s 190C(5) is straightforward and must be contained in the application. This information is a statement that the requirements set out in s 190C(4)(b) have been met (s 190C(5)(a)) and the brief grounds on which the Registrar should be satisfied that it has been met (s 190C(5)(b)).

[81] Schedule R contains the statement that '[t]he Applicants are members of the native title claim group and are authorised to make the Application, and to deal with matters arising in relation to it by all the other persons in the native title claim group in accordance with their traditional laws and customs...' Schedule R refers to Attachment R as containing more information on this requirement.

[82] Attachment R consists of affidavits from the persons who comprise the applicant and the Anthropologist's Report. I consider that this contains the brief grounds on which the Registrar can be satisfied that s 190C(4)(b) has been met.

[83] I am satisfied that the application contains the information required by s 190C(5).

Section 190C(4)

The task at s 190C(4)(b)

[84] The Registrar's task at s 190C(4)(b) is distinct from that at s 190C(4)(a) and 'involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given.' — *Doepel* at [78].

[85] In that regard, whilst the law considers the interaction between the information required by s 190C(5) and the task at s 190C(4), to be informative[1] (see s 190C(5) and *Doepel* at [78]), ultimately what is required to satisfy the Registrar must be 'understood in the particular circumstances and as taking its colour from those circumstances' (*Evans* at [42]).

[86] As part of that inquiry through the material the Registrar must consider issues of the kind that have 'been identified judicially as relevant to an issue of authorisation'—*Evans* at [42]. This may reasonably involve the Registrar considering issues that arise under s 251B, such as the identity of the native title claim group and whether all of the persons in the native title claim

[1] See s 190C(5)—'the Registrar cannot be satisfied that the condition is subsection (4) has been satisfied unless the application' contains the information required by subsection (5);

group were afforded a reasonable opportunity to participate in authorising the applicant to make the application.

The information to which I may have regard

[87] In deciding whether I can be satisfied of the matters in s 190C(4)(b), I am entitled to consider a range of information —see *Strickland v Native Title Registrar* [1999] FCA 1530 at [57], confirmed by the Full Court in *Western Australia v Strickland* (2000) 99 FCR 33 at [78]; see also *Doepel* at [16]; *Evans v Native Title Registrar* [2004] FCA 1070 and *Wiri People v Native Title Registrar* (2008) 168 FCR 187 (*Wiri People*) at [23].

[88] Primarily, in relation to the information to which I have had regard for this statutory condition, I have considered the particular circumstances of the matter and whether it is information that is or may be relevant to the issues that arise for consideration by the Registrar in being satisfied of s 190C(4)(b). Below I extract the general nature and content of that information under the heading of each document or part of the application from which it is extracted.

Information in the application

Schedule A and Attachment A—native title claim group on whose behalf the application is made

[89] Schedule A and Attachment A contain information on the native title group on whose behalf the application is made, namely a description of those persons. This is relevant to the issue of the identity of the native title claim group and whether all the persons, defined by s 61(1), authorised the applicant to make the application.

Affidavits of the persons who comprise the applicant

[90] Eleven (11) persons jointly comprise the applicant. Each of the persons swore an affidavit that contains information about authorisation of the applicant. The information in each of those affidavits includes:

> The decision to authorise me at the meeting held on the 1st of August 2013 in Kowanyama is the culmination of a process held in accordance with Kowanyama traditional law and custom.
>
> It was agreed by the Kowanyama People who attended that meeting on the 1st of August 2013 that:
>
> i. No-one had concerns about the notice given for the meeting.
>
> ii. All Kowanyama families were represented at the meeting.
>
> iii. The group had enough time to consider authorising the applicants.
>
> iv. Each new applicant is authorised personally to make this claim and deal with all matters arising in relation to it.

v. If an applicant dies, resigns, consents to his/her removal, or exceeds his/her authority then the remaining applicants continue as authorised.

vi. Where the applicants cannot reach a unanimous decision, the decision of the majority of applicants prevail.

vii. The applicants are authorised in the broadest possible terms to make these applications, to make new applications and deal with maters arising in relation to them. This authorisation includes entering into Indigenous Land Use Agreements, Future Act and Mining and Exploration Agreements on behalf of the claim group.

Anthropologist's report on authorisation

[91] The Anthropologist's report on authorisation sets out details of the meeting held on 1 August 2013, including about notification, identification of native title holders, attendance and decisions made.

[92] In relation to notification, **[Anthropologist 1 – name deleted]** sets out that the meeting date and purpose were contained in notices that were: sent to Kowanyama People on the Cape York Land Council (CYLC) mailing list; placed on noticeboards in Kowanyama; advertised on radio; published in local newspapers; and personally communicated by CYLC and others at appropriate times. Further, **[Anthropologist 1 – name deleted]** sets out that he reviewed the contact list of Kowanyama People before the meeting notices were sent. **[Anthropologist 1 – name deleted]** view is that 'CYLC has taken all possible steps to ensure that the Kowanyama People in general were notified of the date of the meeting and the meeting's objects.'

[93] **[Anthropologist 1 – name deleted]** says that the 'traditional owners of the claim area acquire their interests in land primarily through descent and occasionally through adoption.' He describes the extensive research process that has led to the identification of the native title claim group and the area covered by the claim. He asserts that:

> In the claim documentation, some 48 individuals together with 18 sets of siblings have been identified in the oral tradition, mission records and anthropological research as the apical ancestors of the claim group. As far as can be established from the records, the dates of birth of the apicals range from the 1860s to 1900. A check of the genealogies shows that seven of the listed apical ancestors appear to have no known surviving descendants.

[94] **[Anthropologist 1 – name deleted]** then speaks to attendance at the meeting, in the context of the tribal affiliations that are part of the native title claim group. In that regard, **[Anthropologist 1 – name deleted]** asserts that:

> The attendees were relatively evenly distributed among the three "tribal" groupings...A plotting of known apical ancestor's traditional estates shows a relatively even spread across the claim area. In my opinion, the meeting attendees were broadly representative of the claim group with no particular focus on any one set of descendants, nor a particular focus on tribal affiliations.

[95] **[Anthropologist 1 – name deleted]** also speaks to attendance at the meeting by two Yarrabah families (being the **[Family name 1 – name deleted]** and the **[Family name 2 – name**

deleted]), who claim to have ancestral links to the claim area. **[Anthropologist 1 – name deleted]** discusses the nature of these claims, including that both families claim to have ancestral links to the claim area. In relation to the **[Family name 2 – name deleted]** family links, the report sets out information about the ancestor **[Person 1 – name deleted]**, including:

> **[Person 1 – name deleted]**, was a Koko Bera man born on the Staaten River which forms the lower boundary of the Kowanyama claim. Other non-Aboriginal researches have asserted that he was born variously in the western Gulf area, or near Boulia from Normanton. The introduction to the Yarrabah baptisimal register notes only that **[Person 1 – name deleted]** was a "native of the Gulf country". He was born circa 1876.
>
> Whatever the case may be about **[Person 1 – name deleted]** origins, Kowanyama people have little difficulty in accepting the **[Family name 2 – name deleted]** family as having connections in the claim area. I was informed that Kowanyama people continue to re-affirm that connection by staying with **[Family name 2 – name deleted]** family in Yarrabah whenever occasions require them to spend extended periods in Cairns.

[96] An overview of the conduct of the meeting is also provided by **[Anthropologist 1 – name deleted]**. **[Anthropologist 1 – name deleted]** provides an outline of the discussions which occurred prior to making any decisions. Subsequent to these discussions, a list of persons to comprise the applicant was composed at the meeting and the report sets out the following:

> On being presented with the new list, **[Applicant's legal representative 1 - name deleted]** asked the group if it was comfortable with revoking the authority of the previous groups and endorsing the people on the new list. The group as a whole indicated that they were happy with the new applicant list. **[Applicant's legal representative 1 - name deleted]** then ascertained if Normanton people were represented at the meeting. They were in the person of Christopher Henry.
>
> Before concluding, **[Applicant's legal representative 1 - name deleted]** referred to a request made earlier to him by Koko Bera elder, **[Person 2 – name deleted]**. **[Applicant's legal representative 1 - name deleted]** explained that during the break, **[Person 2 – name deleted]** had asked for Hilton Noble's name to be added to the list of newly authorised applicants. **[Applicant's legal representative 1 - name deleted]** explained that this was not a matter for him; rather it was a matter for the claim group. **[Applicant's legal representative 1 - name deleted]** and the CYLC representatives again left the room to allow the group to settle this proposal. As I discussed earlier, the oral tradition holds that **[Person 1 – name deleted]**, Hilton's great grandfather in the paternal descent line came from the Staaten River area and on that basis has interests in the country similar to that possessed by Lavina and Celza Inkerman and Christopher Henry. The meeting concurred with this addition and Hilton Noble was added to the whiteboard list of applicants.

[97] The final parts of the report on authorisation set out **[Anthropologist 1 – name deleted]** view on the conduct of the meeting. He states that in his opinion 'the meeting attendees were broadly representative of the claim group with no inherent biases.' He also provides an overview of the decision-making process that was used to authorise the applicant to make the application, including that it was a traditional decision-making process:

> Underlying the conduct of meetings is a set of conventions that, as far as I can determine, structured pre-settlement as well as present day meetings. This code of conduct specifies that depending on the issue, the meeting should be representative of the family groups principally involved and include their senior decision-makers or representative spokespersons. Meetings may be attended by others who are not involved directly but "give witness" to the deliberations on behalf of the wider community. Meetings should proceed to outcomes by consensus. At such meetings, everyone has the right to speak and be heard without interruption.

[98] **[Anthropologist 1 – name deleted]** concludes that 'the meeting of August 1 2013 conformed with the traditional meeting precepts and came to a decision firmly in line with traditional law and custom viz: those with responsibilities under traditional law and custom should speak for country.'

Request for additional information on Hilton Noble

[99] On 24 March 2014 I asked the case manager to write to the applicant about the membership of Hilton Noble to the native title claim group. In particular, the applicant was asked to provide information to clarify how Hilton Noble is a member of the native title claim group on whose behalf the application is made.

[100] Based on my understanding of the anthropologist's report on authorisation, Hilton Noble is a descendant of the ancestor **[Person 1 – name deleted]**. The anthropologist's report on authorisation suggests that the native title claim group accepts that **[Person 1 – name deleted]** is an ancestor with connections to the claim area and on that basis his great grandson, Hilton Noble, was included in the group of persons comprising the applicant. However, the native title claim group description in Attachment A of the application does not permit the membership of the cognatic descendants of **[Person 1 – name deleted]** as he is not listed as an ancestor.

[101] Further information in the anthropologist's report on authorisation suggests to me that Hilton Noble may not be a descendant of any of the ancestors listed in Schedule A. For instance, on page 93 and 94 a table lists the attendees at the authorisation meeting and the apical ancestor/s that they are descended from corresponding with the list at Attachment A. No ancestor is recorded against the name of Hilton Noble. Instead, the table refers the reader to the notes that follow. Those notes describe Hilton Noble as a descendant of **[Person 1 – name deleted]**. They make no reference to Hilton Noble being connected to any of the ancestors listed in Attachment A and nor does the information in the report suggest that Hilton Noble has been recruited by adoption.

Applicant's responses to request for additional information on Hilton Noble

[102] On 26 March 2014, the applicant provided additional information on Hilton Noble and his membership to the native title claim group. The additional information consisted of an email from **[Anthropologist 1 – name deleted]** dated 25 March 2014 and an email from **[Applicant's legal representative 2 - name deleted]** (Senior Legal Officer of CYLC) dated 26 March 2014.

[103] In his email **[Anthropologist 1 – name deleted]** sets out that the attendance of the descendants of **[Person 1 – name deleted]** at the authorisation meeting 'took me by surprise,' noting, however, that 'their presence was not queried by any traditional owner and was strongly supported by certain Koko Bera families (notably, the descendants of Boandonlly).' **[Anthropologist 1 – name deleted]** also sets out that after the meeting he interviewed Hilton Noble and **[Person 3 – name deleted]** about the family's asserted connections through **[Person 1 – name deleted]**. Of his conclusions about **[Person 1 – name deleted]**, **[Anthropologist 1 – name deleted]** states that:

> On the balance of probabilities, I incline to the Koko Bera view that the **[Family name 2 – name deleted]** family has valid Koko Bera links. However, like a number of other families caught up in the diaspora that occurred during the initial pastoral occupation of the area, the exact location of their traditional lands is now not remembered even if kinship links are. Because I cannot identify the estate associated with the **[Family name 2 – name deleted]** family, I have not listed **[Person 1 – name deleted]** as an apical ancestor. Neither is there any evidence that suggests the nature of his relationship to the existing apical ancestors cited in the claim documentation. It has however been intimated that there is a connection to Boandonolly or his line. This connection cannot be evidenced from the materials I have examined.

[104] The email from **[Applicant's legal representative 2 - name deleted]** essentially sets out two alternative options as to the possible basis of the membership of Hilton Noble to the native title claim group. Those options are that he might be a descendant of Boandonolly or that there is a possibility that **[Person 1 – name deleted]** (the great grandfather of Hilton Noble) may have been incorporated into the native title claim group via adoption.

[105] On 27 March 2014, I asked the case manager to write to the applicant to request a statement on behalf of the applicant that Hilton Noble is a member of the native title claim group and further to state the actual, not merely the possible, basis of that membership.

[106] On 31 March 2014 the applicant provided further information consisting of an email from **[Applicant's legal representative 2 - name deleted]**, which included the following statement:

> ...I have spoken with Hilton Noble and explained to him the apparent doubts concerning his membership of the claim group. He stated to me that whatever issues there are about the **[Family name 2 – name deleted]** family's connection to the Kowanyama People he is also connected to the claimant group through his mother's side as a descendant of Boandonolly, one of the named apical ancestors of the Kowanyama Native Title Claim Group.

First limb of s 190C(4)(b)– is the applicant a member of the native title claim group?

[107] The first part of s 190C(4)(b) requires that I be satisfied that the applicant is a member of the native title claim group. Where the applicant is made up of more than one person, this requires that I be satisfied that each person is a member of the native title claim group.

[108] Schedule R of the application contains the statement that the applicants [sic] are members of the native title claim group. The affidavits of each of the persons who jointly comprise the applicant contain a statement that they are members of the native title group.

[109] On the issue of Hilton Noble's membership to the native title claim group, there is some ambiguous information before me as to the basis of his membership. However, given the statement provided on behalf of the applicant on 31 March 2014, I am of the view that I can be satisfied that Hilton Noble is a member of the native title claim group via descent from one of the persons named in Attachment A, being Boandonolly.

Second limb of s 190C(4)(b) – is the applicant authorised by all the other persons in the native title claim group to make the application and to deal with matters arising in relation to it?

The authorisation that is required by s 251B

[110] The word authorise, for the purpose of a native title determination application, is defined in s 251B of the Act.

[111] Section 251B of the Act requires that the authority to make a native title determination application flow from the 'native title claim group'. That expression also has a clear and defined meaning within the Act. The native title claim group must comprise 'all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed'—s 61(1). It is these persons from whom authority must be sought and gained in the making of a native title determination application. The law has clearly defined the relationship between these specific provisions of the Act, and the Registrar in being satisfied of authorisation is bound to consider that relationship.

[112] The relationship between s 61(1) and s 190C(4)(b) is a unique one that has been distinguished from other parts of the registration test. Under s 190C(2) I considered whether the application 'appears' to identify a native title claim group that comes within the s 61(1) definition of that term. That is all I may do for that part of the registration test given that the task there is a confined one, limited to considering only what appears on the face of an application—see, for instance, *Doepel* at [16].

[113] However, the requirements of s 190C(4)(b) are distinct, as was explained by the Court in *Wiri People*, where Collier J set out the following in order to reflect the different nature of the Registrar's consideration at s 190C(4)(b):

> In my view the applicant's argument confuses the terms of ss. 190C(2) and 190C(4)(b). While there is an obvious intersection between ss. 190C(2) and (4), the matters of which the Registrar is required to be satisfied by each are, in my view, quite different. In relation to s. 190C(2), the Registrar must be satisfied as to the contents of the application and that it contains information required by ss. 61 and 62...whereas in relation to section 190C(4) the Registrar must be satisfied as to the identity of the claimed native title holders including the applicant (emphasis in original)—at [29].

[114] In undertaking this consideration, however, I understand that for the purpose of the registration test, there is no need for an exact or literal identification of each and every member of the claim group (see, for instance *Risk* at [47]). The correct identification of the persons in a native title claim group is a difficult and cumbersome exercise, and it is not the role of the Registrar to adjudicate and to decide upon who are each of the actual holders of native title for an application area—*Wiri People* at [25].

[115] Rather there must at least be clear and cogent material before me upon which I can reach a reasonable state of satisfaction of the matters under s 190C(4). In that regard, the relevant law does firmly suggest that the task at s 190C(4)(b) envisages that the Registrar have a clear understanding of the 'identity' of the claimed native title holders before proceeding to consider whether those persons authorised the applicant to make the application. This understanding is not simply verified or confirmed by having regard to the way in which the applicant chooses to define the claim group —*Risk* at [34]–[35]; *Wiri People* at [12] and [26]–[36].

[116] Whilst the meaning of 'native tile claim group' for the purpose of the Act is clear, its identification in any particular matter will depend upon the facts before the Registrar. The understanding of the composition of a native title claim group must be informed having regard to those facts.

[117] I consider that the information does raise some ambiguity about the ancestor **[Person 1 – name deleted]** and his non-inclusion in the native title claim group described in the application. Upon my understanding of the anthropologist's report on authorisation, at the meeting on 1 August 2013 those members of the native title claim group present appear to have agreed that the oral tradition holds that **[Person 1 – name deleted]** came from the Staaten River area and on that basis has interests in the country covered by the application. Thus, those of his family line (being the **[Family name 2 – name deleted]** family) would presumably also have interests in that country.

[118] The traditional laws and customs of the Kowanyama People hold that 'the interests of the claimants in land are acquired through descent which is why identifying family lines (patrilines) associated with parcels of land (estates) in the claim area has been important to identifying the scope of the claimant group' — *Kowanyama People v State of Queensland* [2009] FCA 1192 (*Kowanyama People #1 determination*).

[119] Subsequent to the authorisation meeting, **[Anthropologist 1 – name deleted]** states that he formed a contrary view, based upon the lack of documentary evidence to support this, and on that basis did not include **[Person 1 – name deleted]** in the apical ancestor list at Attachment A of the application. **[Anthropologist 1 – name deleted]** does acknowledge that the Noble family have valid Koko Bera links, originating from the ancestor, **[Person 1 – name deleted]**. He was unable, however, to identify a particular estate associated with the Noble family **— [Anthropologist 1 – name deleted]** email dated 25 March 2014.

[120] The email of **[Applicant's legal representative 2 - name deleted]** dated 26 March 2014 appears to offer a different view, asserting that **[Anthropologist 1 – name deleted]** caution arises from a lack of documentary evidence, but that 'older traditions predating the initial pastoral occupation' can validate membership to the native title claim group.

[121] A native title claim group must comprise all the persons who, according to the relevant traditional laws and customs, hold the native title rights and interests claimed. Given that, membership to a native title claim group cannot be arbitrary and 'the process of consideration of acceptance and the basis of such consideration are not irrelevant considerations' — *A. D. (deceased) on behalf of the Mirning People v State of Western Australia (No 2)* [2013] FCA 1000 at [67].

[122] The process of consideration of the membership of the ancestor **[Person 1 – name deleted]** occurred at the authorisation meeting on 1 August 2013 in the context of authorising his great

grandson as one of the persons comprising the applicant. There does not appear to have been any formal resolution passed or recorded to add him as an apical ancestor, though in my view the material supports that Hilton Noble was added to the applicant list on the understanding that he is **[Person 1 – name deleted]**'s great grandson and that **[Person 1 – name deleted]** (and his descendants) have interests in the area of the claim. The process used at the meeting is said to be in accordance with the traditional laws and customs of the native title claim group. This is set out in the anthropologist's report on authorisation and in the affidavits of the persons who together comprise the applicant. Upon my understanding, the foundation of the consideration of his membership arose from general agreement of the native title claim group that the oral tradition holds **[Person 1 – name deleted]** to be an ancestor with interests in country covered by the claim, specifically the Staaten River. Thus, it is on that basis the native title group accepts that his descendants also hold native title rights in that country, which would appear consistent with how rights in land are acquired under the traditional laws and customs of the claim group. It could be said then that both the process and basis of the consideration of **[Person 1 – name deleted]** membership by the native title claim group was pursuant to the relevant traditional laws and customs and on that basis he should be an ancestor listed in Attachment A.

[123] Notwithstanding the above uncertainty, the application and other material before me generally provides clear and cogent information about the identity of the native title claim group. This includes the determinations that have been made by the Court in favour of the Kowanyama People, information in the application that describes the native title claim group and the anthropologist's report on authorisation, which speaks to the identity of the native title claim group.

[124] The material before me asserts that a traditional decision-making process, as provided for under s 251B(a), was used to authorise the applicant to make the application. That is, a decision-making process which under the traditional laws and customs must be complied with in authorising things of this kind.

[125] The authority given to the applicant to make the application must also be shown to have flowed from all the persons in the native title claim group in compliance 'with either of the processes for which the legislature has allowed', being those set out in s 251B(a) or (b). That is, the information must show compliance with a decision making process mandated by the traditional laws and customs of the native title claim group or (where there is no such process) a decision making process agreed to and adopted by the persons in the native title claim group—*Evans* at [53].

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

[127] Further, in *Ward v Northern Territory* [2002] FCA 171 (*Ward*), O'Loughlin J posed a number of questions, the substance of which must be addressed, in the context of examining an authorisation meeting for the purpose of s 251B. In that regard, His Honour, was concerned to

know what notice of the meeting was given and how was it given, who attended the meeting and what was their authority to make decisions, what decisions were made, how were decisions made and were they passed unanimously — at [24].

[128] The decisions in *Lawson* and in *Ward* were contemplating the replacement of an applicant pursuant to s 66B and the decision of Stone J in *Lawson* speaks principally to the requirements of s 251B(b). Nonetheless, when examining authorisation in the context of s 251B(a), it may be appropriate to draw parallels.

[129] Upon my understanding of the traditional decision-making process used here, it contemplates that all persons in attendance be representative of the Kowanyama families. The process contemplates that all persons who attend such meetings have an opportunity to speak and voice opinions and that decisions should be made by consensus.

[130] It follows then that any examination of such a mandated process, in my view, clearly requires that I consider whether the members of the native title claim group were given 'every reasonable opportunity to participate.' That is, that all families were given a reasonable opportunity to attend the meeting on 1 August 2013 and to voice their opinion and to participate in reaching a decision.

[131] The material before me supports that sufficient notice was given to members of the native title claim group about the meeting on 1 August 2013, including that public notices were published in regional newspapers.

[132] The anthropologist's report on the authorisation meeting provides specific details of the persons who attended the meeting, including information to support that they are representative of all the necessary family groups.

[133] Further to this, the information before me generally supports that the conduct at the meeting was such that the traditional decision-making process was used to authorise the applicant to make the application.

[134] For the reasons set out above, I am satisfied that the requirements set out in s 190C(4)(b) are met.

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.

[135] This condition of registration requires that the Registrar 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 and waters.

[136] This requires the Registrar to undertake a consideration of the description and map of the application area, and to be satisfied that the boundaries of the area covered, and those areas not included, can be sufficiently identified.

[137] Schedule B of the application refers to Attachment B as providing the description of the area covered by the application. Attachment B describes the application area as consisting of 11 areas identified by reference to land parcels or part parcels and external boundaries. Attachment C contains a map of the external boundaries of the application area.

[138] I have considered the geospatial assessment, which states that the description and map of the external boundaries are consistent and identify the application area with reasonable certainty. I agree with this assessment.

[139] The areas not covered by the application are identified in Schedule B of the application. This includes a list of general exclusions.

[140] In *Daniel for the Ngaluma People & Monadee for the Injibandi People v Western Australia* [1999] FCA 686 a general formulaic approach, as is utilised by the applicant in Schedule B, was discussed in reference to the information required by s 62(2)(a) and its sufficiency for the purpose of s 190B(2). Nicholson J was of the view that such an approach 'could satisfy the requirements of the paragraphs where it was the appropriate specification of detail in those circumstances'. His Honour examined the probable state of knowledge of the applicant at the time of filing the application as a factor in determining what may be appropriate in the circumstances—at [32].

[141] Upon my understanding, the general formulaic approach is one that typically is used in native title determination applications and is an approach that reflects that such issues are often not settled until the final stages of a matter.

[142] I am of the view that both the written description and the map of the application area are clear and identify the area with reasonable certainty. Thus, it is my view 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 the native title rights and interests are claimed in relation to particular land or waters.'

[143] The application satisfies the condition of s 190B(2).

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

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

[144] Schedule A and Attachment A of the application contains a description of the native title claim group, such that consideration falls under s 190B(3)(b).

[145] That description essentially contains two alternative criteria of membership, being either descent from a named ancestor or adoption in accordance with the relevant traditional laws and customs.

The task at s 190B(3)(b)

[146] The nature of the task at s 190B(3)(b) is for the Registrar to consider 'whether the application enables the reliable identification of persons in the native title claim group' — *Doepel* at [51].

[147] That is, the description in the application must operate to effectively describe the claim group such that members of the claim group can be identified — *Gudjala People 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala*) at [33].

[148] In *Western Australia v Native Title Registrar* (1999) 95 FCR 93 (*WA v NTR*), Carr J considered a description of a native title claim group where members were described using three criteria or rules, including descent (biological) and adoption. His Honour infers that the necessity to engage in some factual inquiry regarding the criteria 'does not mean that the group has not been described sufficiently.' Nor is it fatal that the application of the rule may prove difficult — at [67].

Consideration of the description in the application

[149] I note that there is a dearth of material in the application relating to the traditional laws and customs relevant to adoption into the group. However, I note that in the Anthropologist's Report on authorisation, **[Anthropologist 1 – name deleted]** refers to this criteria as a means by which persons can acquire rights and interests in land — at [4].

[150] Further, when the Court made determinations in favour of the Kowanyama People in 2009 and 2012 in relation to surrounding areas, the Court determined the persons who held native title to include those adopted into the group — [2009] FCA 1192; [2012] FCA 1377.

[151] In my view, the description in the application of the native title claim group, which employs two alternative criteria to membership (being either cognatic descent or adoption) is sufficiently clear for the purpose of s 190B(3)(b).

[152] The application satisfies the condition 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.

[153] For the purpose of s 190B(4) the Registrar must be satisfied that the description of the native title rights and interests claimed 'is sufficient to allow the native title rights and interests claimed to be readily identified.'

[154] Whilst it is open to me to find at s 190B(4), with reference to s 223 of the Act, that some of the claimed rights and interests may not be 'understandable' as native title rights and interests, I am of the view that a consideration of the rights and interests in reference to s 223 should be the task at s 190B(6) — *Doepel* at [123].

[155] The native title rights and interests that are claimed appear at Schedule E of the application. Those claimed rights essentially include the right to possess, occupy, use and enjoy the land and waters (where such a right can be recognised) and the right to undertake various activities on the application area.

[156] My view is that the rights and interests claimed at Schedule E have meaning and are understandable.

[157] The application satisfies the condition 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.

[158] I consider each of the three assertions set out in the three paragraphs of s 190B(5) in turn in my reasons below.

Combined Reasons for s 190B(5)

[159] There are clear principles established by the Court which must guide the Registrar when assessing the sufficiency of a claimant's factual basis. These include that the applicant is only required to provide a general description of the factual basis, the truth of which is not subject to scrutiny for the purpose of s 190B(5). Thus, the Registrar must assume that the facts asserted are true and only consider whether they are capable of supporting the claimed rights and interests. That is, whether the factual basis is sufficient to support each of the assertions at s 190B(5)(a) to (c) — *Gudjala FC* at [92]; *Doepel* at [17].

[160] The Registrar, however, must consider whether each particularised assertion outlined in s. 190B(5)(a), (b) and (c) is supported by the claimant's factual basis material. In that regard, the law provides specific content to each of the elements of the test at s 190B(5)(a) to (c) — see, for instance, *Gudjala [2007]* and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala [2009]*).[2]

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

[162] Further, there must be adequate specificity of particular and relevant facts within the claimant's factual basis material going to each of the assertions before the Registrar can be satisfied of its sufficiency for the purpose of s 190B(5).

The nature of the material in support of the factual basis of the claim

[163] Schedule F of the application contains information about the factual basis of the claim. However, it is my view that it contains no information of any real specificity or particular and relevant facts about the claim. Thus, it really does not assist in my consideration of the claimant's factual basis.

[164] Attachment F of the application is a copy of two consent determinations of native title made by the Court in favour of the Kowanyama People over adjacent and surrounding areas. These

[2] Also note that the Full Court in *Gudjala FC,* did not criticise generally the approach that Dowsett J took in relation to these elements in *Gudjala [2007]*[2], including His Honour's assessment of what was required within the factual basis to support each of the assertions at s 190B(5)— See *Gudjala FC* [90]–[96]. His Honour, in my view, took a consonant approach in *Gudjala [2009].*

determinations occurred in 2009 and 2012. The relevance of these decisions to the claim made in this application is that they relate to the same native title claim group and to proximate areas for this claim. Both determinations are over land and waters that is part of Federal Court application QUD6119/1998, namely the original claim made by the Kowanyama People. The whole of the claim area for QUD6119/1998, much of which is now determined:

> ...lies between the Coleman and Staaten Rivers on the western side of Cape York Peninsula. It is centred on the township of Kowanyama and covers an area of approximately 1,639,641.8 hectares including land within the Deed of Grant in Trust No 21345064 over land described as Lot 19 on DB 16 (the "DOGIT"). The claim area also includes the Balurga, Harkness, Koolatah, Rutland Plains, Interman and Dinah Island pastoral properties — *Greenwool for and on behalf of the Kowanyama People v State of Queensland* [2012] FCA 1377 at [1].

[165] Further information to which I have had regard is contained in the reasons for decision of the delegate in Kowanyama People (QC1997/009; QUD6119/1998) dated 1 July 2011 when the pre-combined Kowanyama People application was last considered for registration. The applicant did not provide this to the Registrar, however, I am of the view that it contains relevant information to which it is appropriate to have regard.

The claim area

[166] The claim area is approximately 550 square kilometres. It is made up of relatively small portions of land and waters that mostly adjoin the determined areas in favour of the Kowanyama People. The remaining parts of the claim area, such as rivers, are previously unclaimed areas that fall within the external boundaries of the Kowanyama People determination area. The claim covers eleven (11) areas that are identified as:

1. Errk Oykangand National Park;
2. Galbraith Pastoral Holding;
3. Former Fauna Sanctuary (Pelican Rookery);
4. Nassau River;
5. Alice River;
6. Mitchell River Part 1;
7. Mitchell River Part 2;
8. Staaten North Branch;
9. Staaten River (Western Section);
10. Staaten River (Eastern Section); and
11. Topsy Creek.

[167] As explained above, this is a combination application. It includes the remaining parts of the area claimed in the original application made by the Kowanyama People (QUD6119/1998) combined with the areas covered by Kowanyama People #2 (QUD282/2012) and Kowanyama People #3 (QUD743/2013).

<u>The factual basis material in support of the assertions at s 190B(5)</u>

Attachment F

[168] In the partial determination made by consent on 22 October 2009 in *Kowanyama People v State of Queensland* [2009] FCA 1192 (*Kowanyama People #1 determination*) Greenwood J recited the findings and opinions of **[Anthropologist 1 – name deleted]** in his connection materials on the Kowanyama People, including:

> I am of the opinion that the research conducted in relation to the Kowanyama native title claim group's determination application demonstrates that:
>
> (a) the members of the Kowanyama native title claim group are descended from the traditional society in occupation of the land and waters identified as the determination area at the time of sovereignty;
>
> (b) the society in occupation of the determination area at the time of sovereignty observed traditional laws and customs which have continued to be acknowledged and observed by the members of the Kowanyama native title claim group and their predecessors;
>
> (c) through the continued acknowledgement and observation of the traditional laws and customs, the members of the Kowanyama native title claim group and their predecessors have maintained a connection to the determination area;
>
> (d) the activities undertaken by the members of the Kowanyama native title claim group on the determination area are referable to the right and interests identified in the proposed consent determination of native title, as regulated by their traditional laws and customs.

[169] Greenwood J also makes a number of observations about his understanding of the evidence in support of the determination, including references to the historical records that cite facts about Aboriginal people in the determination area. These include references to the Mitchell River in the vicinity of Topsy Creek, which formed part of the northern boundary near Rutland Plains Station — at [31]. His Honour also recites that:

> These engagements took place in and around the areas the subject of the primary claim. In June 1845, Ludwig Leichhardt's expedition entered the claim area. He observed Aboriginal people diving for water lily bulbs, and engaged in other activities. In 1864 and 1865, the Jardine brothers took a herd of 250 cattle from Carpentaria Downs to Somerset at the tip of Cape York Peninsula. The Jardine party entered the claim area along the Staaten River which they followed westwards until they reached the coastal plains. The party noted many signs of human occupation at campsites and fish weirs and often came upon Aboriginal groups hunting or fishing — at [32].
>
> Mission workers also set up their tents on a fresh water lagoon not far from the tidal reaches of Topsy Creek in the claim area. The mission was abandoned in 1915. A new site was chosen by J.W. Chapman on a creek in the western end of Koko Bera country. The site was called Kowanyama which was an English rendering of the Yir Yoront "kamw yama" meaning "many waters".... — at [34].

[170] In relation to the evidence about the pre-sovereignty society from which the Kowanyama People claim to be descended, Greenwood J observes and concludes that:

> Based on the anthropological research and access to historical documents and records, the Kowanyama People are properly understood as comprising those people known as the Yir

> Yoront (sometimes called Kokomenjen), Koko Bera, Kunjen and Koko Berrin Peoples, including the applicants and other claimants who together form the native title group. The Kowanyama People are those people who are the cognatic descendants of the individuals identified in Schedule 1 to the orders and those people recruited by adoption in accordance with the traditional laws and customs of the Yir Yoront, Koko Bera, Kunjen and Koko Berrin — at [36].
>
> The anthropological material demonstrates that the laws and traditions of the Kowanyama People flow from a totemic ideology constituting a normative system that is widely shared and has been reproduced over generations. The system of laws and traditions specifies obligations and duties and provides for sanctions and punishment. The interests of the claimants in land are acquired through *descent* which is why identifying family lines (patrilines) associated with parcels of land (estates) in the claim area has been important in identifying the scope of the claimant group. The material demonstrates that the regulation of land tenure has been one of the most important aspects of the totemic system in relating *clans* to *clan domains* and *individual members* to *individual clan domains*. The contemporary native title rights and interests of the claimants derive from what is described as a "uniquely Aboriginal world view" which has been substantially maintained by the Kowanyama community since it was first described [*original emphasis*] — at [37].
>
> The four "interdependent and interlocking" traditional and customary "general rights" identified by Dr Taylor are:
>
> 1. The physical possession, occupation, use and enjoyment of the claim area as a right.
>
> 2. The carriage of responsibility for the care and maintenance of the claim area.
>
> 3. The right to hold the claim area as the cultural property of the native title group and the source of its identity.
>
> 4. The right to act as sole authority to speak for country — at [38].
>
> I am satisfied that the anthropological material demonstrates that the Kowanyama People are descended from a society of Aboriginal people who were in occupation of the land and waters of the Determination Area, being a part of the claim area, at sovereignty and who formed a society united by their acknowledgement and observance of a normative body of traditional laws, customs and beliefs. Through their continued acknowledgement and observance of these normative laws and customs, the Kowanyama People have, since sovereignty, maintained a connection with the Determination Area. I am satisfied that the content of those native title rights and interests which derive from the practice of traditional laws and customs have been identified and established through the anthropological material — at [45].

[171] In *Greenwool for and on behalf of the Kowanyama People v State of Queensland* [2012] FCA 1377 (*Kowanyama People #2 determination*), the Court made a further partial determination by consent in favour of the Kowanyama People over land and waters within the original claim. In doing so, Dowsett J set out some of the evidence produced by the applicant:

> In addition to Dr Taylor's reports, extensive affidavit material from the traditional owners has been filed to demonstrate the exercise of the rights to live and to be accompanied onto the determination area. In particular I have been assisted by seven comprehensive affidavits...Paddy Yam was born at a waterhole on Koolatah in 1929. He says that:

> "I was reared up at Koolatah Station and started work there. I did not go to school. I worked at Koolatah for many, many years as a stockman. I worked at Koolatah with my father, my brothers and other aboriginal people. I have travelled all over Koolatah and I know that country well. The only other place that I have worked for a long time is Dunbah Station on Kunjen Country — at [21].

[172] His Honour concludes of the evidence that:

> These affidavits contain comprehensive descriptions of the traditional laws and customs that govern the exercise of the rights and interests that we, today, recognize over pastoral leases. They demonstrate a continued observance of those laws which dictate the day to day lifestyle of the Kowanyama people, their custody and care of significant sites and boundaries, as well as detail concerning the methods of transmission of traditional knowledge.
>
> I infer that the members of the claim group are the descendants of those persons who encountered Leichardt in 1845 and, later, the first European settlers. Such persons were probably the descendants of people who lived there prior to 1788.

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

[173] For the purpose of s 190B(5)(a), the factual basis must demonstrate that the whole claim group presently have an association with the claim area and that their predecessors also had an association since sovereignty, or at least since European settlement. This, however, should not be taken to mean 'that all members must have such an association at all times' but rather that there be some 'evidence that there is an association between the whole group and the area' and a similar association of the predecessors—*Gudjala [2007]* at [52]; *Gudjala FC* at [90]–[96].

[174] I am to be informed as to the nature of the claimant's association with the application area on the basis of the information provided, but I am not obliged to accept broad statements which are not geographically specific—*Martin v Native Title Registrar* [2001] FCA 16 at [26] and *Corunna v NTR* at [39].

Consideration

[175] For the purpose of s 190B(5), particularly s 190B(5)(a), there is a necessity for the factual basis material to elicit 'the relationship which all members claim to have in common in connection with the relevant land'. Further, the fact that some members of the claim group and their relevant predecessors are, or may have been, associated with the application area, does not automatically lead to the conclusion that all members and their predecessors are associated. Thus, the factual basis should demonstrate a common association of the native title claim group with the land and waters—*Gudjala [2007]* at [39], [40] and [51].

[176] Upon my understanding of the information and material that I have considered that relationship between current members and their common association with the land and waters primarily arises from the continuity of family lines (which gives rise to the estate system of land tenure that connects ancestors and their descendants with parcels of land), shared totems and

language affiliation. For instance, **[Anthropologist 1 – name deleted]** describes this in the following passages taken from *Kowanyama People # 2 determination*:

> As described by Sharpe (1939:446), segments of the landscape and its myths are owned by Aboriginal corporations called clans. They are constructed according to the principles of patrilineal descent, or perhaps, serial patrifiliation. We may call these segments "estates".
>
> Clan members also share a common set of totems one or more of which are singled out as clan emblems (eg. emu, red-tailed black snake etc.). Members also draw their personal language names from some section of their mythical heritage or from their place of conception filiation. In Sharp's depiction of Kunjen/Olkola land tenure, totemic associations provide a concise, emblematic guide to the identification of land-owning groups and their inalienable relationship with particular creative beings and the landscape in which they moved. Known totemic associations for the Kunjen/Olkola groups at Kowanyama are described in Taylor 1999b — at [16].

[177] In *Gudjala [2007]* Dowsett J held that sufficient asserted facts going to a history of association are also important in the context of s 190B(5)(a). This requires more than facts which simply support the assertion of an association of the predecessors at sovereignty or contact and the association of current claim group members. It requires facts which are sufficient to support 'the history of such association' in the period over that time — at [51].

[178] Both determinations of native title made in favour of the Kowanyama People, cited above, in my view provide facts in support of the assertion that the predecessors and identified ancestors of the native title claim group were associated with the land and waters covered by this application. That is because those determinations were made in favour of the same native title claim group described in this application and the areas to which they relate either surround or adjoin to the areas covered by this application.

[179] It is also clear that some of the information and material cited in the determinations relate to land and waters covered by this application, including the historical material which evidences the association of the apical ancestors and other predecessors. For instance the following passages contain references to land and waters within the application area for this claim:

> Eighteen years later, two other Dutch vessels visited the area, making landfall near to Cape Keerweer. Indigenous people were observed burning grass. Those on board also landed further south, encountering Aboriginal people. This encounter appears to have been in the vicinity of Topsy Creek which forms the northern boundary of Rutland Plains Station and the southern boundary of the DOGIT — *Kowanyama People #1 determination* at [16].

[180] There are also references in the determinations to claimant's current association with areas that would fall within the application area, including the following:

> Priscilla Major speaks of her country as being both on the DOGIT and on Rutland Plains Station. She says that Koko Bera country from north of the Nassau River to somewhere up near the South Mitchell River. She speaks the Koko Bera language of her father and the Kokomenjen language of her mother — *Kowanyama People #2 determination* at [24].

> John Clarke was born in 1958 and says he is a Koko Bera man through his father and his father's father. His father was born under an old mango tree at Old Lochnagar on Rutland Plains. His father died in 1995 and he is buried at Old Lochnagar as he had requested. He says that under his law he is not allowed to take people on to country if it is closed because of the death of one of the people who were connected to country. Anyone who breaks this rule would get into trouble — *Kowanyama People #2 determination* at [25].

[181] Further information in support of the assertion of the history of association of the native title claim group is contained in the Anthropologist's report on authorisation, where **[Anthropologist 1 – name deleted]** provides information about the identification of the native title holders over Part B and Part C claim area [referring to those areas covered by this application], including:

> The standardized collection of genealogies for the claim area began in the mid-1930s when Lauriston Sharp collected genealogical details on 485 people pursuing a traditional hunter/gatherer lifestyle on the land in the vicinity of the Coleman River. Copies of his genealogy cards and hand-drawn family trees have been obtained.
>
> Over 780 named places have been recorded to date in the DOGIT, the Mitchell/Alice Rivers National Park and the pastoral properties of Koolatah, Rutland Plains, Dunbar, and Inkerman. All mapping has taken place under the guidance of panels of elders who, according to Aboriginal law and custom, were entitled to speak for the country being mapped. Across the 70 years or so of mapping endeavour, two points emerge. The first is that the location, content and ownership of named places is consistent across the various mapping teams reflecting the stability of the knowledge base underlying Aboriginal perceptions of the environment. The second is that verbal descriptions on affiliations to particular area or estates are always confirmed when mapping is carried out at the detailed place name level — at p. 92.

[182] The Anthropologist's report on authorisation also contains a map of the Kowanyama People's claim areas. This includes the land and waters covered by this application. **[Anthropologist 1 – name deleted]** has identified on the map areas where, for instance, current named applicants and their predecessors are and were associated with the land and waters covered by this application.

[183] All of the above, in my view, provides sufficient facts that support a history and continuity of association throughout the period since sovereignty with the claim area.

[184] In my view, the factual basis is sufficient to support assertion of the association between the whole native title claim group and the application area dating back to the period at sovereignty, or at least since the time of contact.

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

[185] In requiring that the factual basis describe the basis of the native title claim group's entitlement to the claimed rights and interests, the focus of s 190B(5)(b) is upon the existence of traditional laws and customs acknowledged and observed and that give rise to the claimed native title rights and interests.

[186] The phrase 'traditional laws acknowledged by, and traditional customs observed by' is of a similar vein to that employed in s 223 of the Act and, thus, the meaning to be afforded to the term 'traditional' in s 190B(5)(b) can be derived from cases that explore s 223—see *Gudjala [2007]*—at [26] and [62]–[66] (citing the High Court in *Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors* (2002) 214 CLR 422 (*Yorta Yorta*)).[3]

[187] In *Gudjala [2007]* Dowsett J observed that '[t]here can be no relevant traditional laws and customs unless there was, at sovereignty, a society defined by recognition of laws and customs from which such traditional laws and customs are derived', with the starting point for any consideration being whether the facts identify an Indigenous society at the time of sovereignty — at [66].

[188] In the context of the registration test (and explicitly the task at s 190B(5)(b)), it is clear that the facts asserted, assuming that they are true, must be capable of supporting the assertion that there are 'traditional' laws and customs, acknowledged and observed by the native title claim group and that give rise to the claimed native title rights and interests—*Gudjala [2007]* at [62] and [63].

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

[190] There are also other matters to which the Registrar or her delegate must turn her mind in examining the sufficiency of a factual basis for the purpose of s 190B(5)(b). If, for instance, descent from named ancestors is the basis of claim group membership the factual basis must demonstrate some relationship between those named ancestors and the relevant pre-sovereignty society from which it is said that the laws and customs are derived. Further to this, the factual basis must contain some explanation of how current laws and customs are said to be traditional. A sufficient explanation of such does not transpire from the mere assertion that the laws and customs are traditional — *Gudjala [2009]* at [40], [52], [55] and [69].

Consideration

[191] As detailed above, the Court has made two determinations of native title recognising the Kownanyama People's native title rights and interest in areas that are proximate to this claim area. I understand that these decisions for the determinations recognise that the Kowanyama People are descendant from a society of persons, who occupied the areas over which they are

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

made, at a time prior to sovereignty. Further, that the traditional laws and customs now acknowledged and observed by members of the native title claim group derive from that society.

[192] Some of the factual basis material that supports the assertion of traditional laws and customs of the native title claim group is outlined above. I have also considered information contained in the reasons for decision of the delegate in Kowanyama People (QC1997/009; QUD6119/1998) dated 1 July 2011 when the pre-combined Kowanyama People application was last considered for registration in forming my understanding of the factual basis.

[193] Further information from the material includes details of the traditional laws and customs that have endured through to the contemporary context and how members of the native title claim group are linked to their country and obtain their rights and interests, including the following citations in *Kowanyama People #2 determination* from **[Anthropologist 1 – name deleted]** reports:

> In the contemporary situation, the management and control of estates and homeland cores is vested in the senior members of owning patrilines. It is the duty of experienced clan members to ensure that newcomers to their lands are properly introduced to the supernatural hazards left behind by the creative acts of the "story people". Those using the state have a duty to ensure the good health of that estate by carrying out prescribed observations and rituals associated with it. Such elders may apply sanctions to those who flout conventions pertaining to the use of land and its cultural content.
>
> An elementary core right is that which enables a person to claim a certain area as their own main place, their own proper or real country, and thus to assert a fundamental proprietary relationship to it. Some of the other core rights asserted by native title claimants are concerned with the bestowal or recognition of specific other rights, and might be described in particular as meta-rights (rights about rights), or rights-generating rights. These include the right to transmit further transmissible rights to make proprietary claims on the country, and the rights to pass on certain aspects of group identity through the assignment of names, languages or totems to children, for example, as well as through the handling on of knowledge, including designs and songs, which may symbolise the relationship between a group and its country — at [16].

[194] The determinations recognised the link between the apical ancestors identified in Attachment A and other predecessors and the current claimants. For instance, Justice Dowsett concluded that 'the members of the claim group are descendants of those persons who encountered Leichhardt in 1845 and, later, the first European settlers. Such persons were probably the descendants of people who live there prior to 1788' — *Kowanyama People #2 determination* at [28].

[195] Also, within the factual basis material is the provision of examples of how traditional laws and customs continue to be acknowledged and observed, demonstrative of 'a continued observance of those laws which dictate the day to day lifestyle of the Kowanyama People…' — *Kowanyama People #2 determination* at [27].

[196] Whilst the determinations obviously relate to other areas, in my view it is reasonable to infer that the society to which the determinations refer also existed over this area. That is because the factual basis material I have considered is sufficient to support the assertion that the native title claim group and their predecessors have and had an association with the land and waters the subject of this application. It is also possible to infer that claim group members and their predecessors who are the traditional owners of 'estates' and 'homelands' that fall within the area covered by this application have demonstrated a continued acknowledgement and observance of the traditional laws and customs. Thus, it follows that the factual basis is sufficient to support the assertion that the traditional laws and customs acknowledged and observed by the Kowanyama People also give rise to the native title rights and interests claimed in this application.

[197] The factual basis material is sufficient to support the assertion at s 190B(5)(b).

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

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

[199] This aspect of the test was considered by Dowsett J in *Gudjala [2009]*. His Honour stated that:

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

[200] In my view, the information cited above in these reasons, provides a sufficient factual basis to support the assertion at s 190B(5)(c).

Conclusion

[201] 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).

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 nature of the task at s 190B(6)

[202] I understand that a right or interest may be said to be prima facie 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'—*Doepel* at [135].

[203] The task at s 190B(6) is said to involve some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed.' Furthermore, where appropriate, 's 190B(6) may also require consideration of controverting evidence' —*Doepel* at [126], [127] and [132].

[204] Primarily, however, I must have regard to the relevant law as to what is a native title right and interest, specifically the definition of native title rights and interests contained in s 223(1) of the Act (see *Gudjala [2007]* at [85]). That is, I must examine each individual right and interest claimed in the application to determine if I consider, prima facie, that they:

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

[205] In *Gudjala [2007]*, Dowsett J referred, in relation to the requirement at s 190B(5), to the decision of the High Court in *Yorta Yorta* and to the Court's consideration of s 223 and 'traditional'— *Gudjala [2007]* at [86].

[206] In *Yorta Yorta* it was observed that:

> ..."traditional" does not mean only that which is transferred by word of mouth from generation to generation, it reflects the fundamental nature of the native title rights and interests with which the Act deals as rights and interests rooted in pre-sovereignty traditional laws and customs — at [79].
>
> ..."traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty — at [86].

[207] In that native title '***owes its existence and incidents to traditional laws and customs*** [emphasis added], not the common law' (*Yorta Yorta* at [110]) I consider that a prima facie case to establish a particular native title right or interest would be one that provides a sufficient factual basis that the right or interest arises from the laws and customs of the pre-sovereignty society.

Consideration of the native title rights and interests claimed in Schedule E

In relation to exclusive areas, the native title rights and interests that are possessed under their traditional laws and customs are, subject to the traditional laws and customs that govern the exercise of the native title

rights and interests by the native title holders, possession, occupation, use and enjoyment to the exclusion of all others.

[208] In *Western Australia v Ward* (2002) 213 CLR 1 (*Ward HC*), the majority considered that '[t]he expression "possession, occupation, use and enjoyment … to the exclusion of all others" is a composite expression directed to describing a particular measure of ***control over access to land***' [emphasis added]. Further, that expression (as an aggregate) conveys 'the assertion of rights of control over the land', which necessarily flow 'from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country'—at [89] and [93].

[209] In *Griffiths v Northern Territory of Australia* (2007) 165 FCR 391 (*Griffiths FC*), the Full Court explored the relevant requirements to proving that such exclusive rights are vested in a native title claim group, stating:

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

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

[211] For the purpose of the task at s 190B(6), the above principles elicit the kind of asserted facts that may be necessary in order to prima facie establish the right to possess, occupy, use or enjoy the land and waters to the exclusion of all others.

[212] There is some information contained in the determination decisions that provide support for the existence of traditional laws and customs that give rise to this claimed right, albeit this right is not recognised in either of the determinations of native title for the Kowanyama People. Upon my understanding relevant features of the traditional laws and customs of the Kowanyama People include that:

- segments of landscape and its myths are 'owned' by specific clans, which are constructed according to the principles of descent;
- totemic associations of members provide for the identification of 'land-owning groups'; and
- the management and control of estates and homelands is vested in senior members, who have a duty to protect the estate and may apply sanctions to those who do not follow the laws and customs when on the land.

[213] I have also considered information contained in the reasons for decision of the delegate in Kowanyama People (QC1997/009; QUD6119/1998) dated 1 July 2011 when the pre-combined Kowanyama People application was last considered for registration. The delegate set out her understanding of the traditional laws and customs of the Kowanyama People as they relate to this claimed right:

> The Applicant's Overview provides information to support the group's claimed right to exclusive possession by detailing examples of how traditional ownership rights of the Kowanyama People are respected and implemented. This includes that where a standing invitation exists for everybody to use a certain area, this invitation is qualified and always understood to be subject to the permission and authority of the owner(s) of that country – access could be revoked for 'unreasonable' use of country. It is also stated that visitors from neighbouring Aboriginal groups can approach appropriate families for permission to access country because those visitors know who speaks for country from their knowledge of Kowanyama's traditional protocol.
>
> The Applicant's Overview also contains information about the responsibilities entailed in care and maintenance of country, as being part of what ownership of country means to the claim group. It is important to the claim group to supervise, control and protect sacred sites and story places, as well as to oversee management of the wider area — reasons for decision of the delegate in Kowanyama People (QC1997/009; QUD6119/1998) dated 1 July 2011, p. 35.

[214] In my view, the laws and customs outlined above arguably demonstrate the necessary element of control over land that is crucial to establishing the existence of this claimed right such that I can be satisfied it is prima facie established over areas of this application where such a right can be recognised. Of course, as the application makes plain, this would only be over areas that are not the subject of a previous non-exclusive possession act.

[215] This right is prima facie established.

In relation to the non-exclusive area, the native title rights and interests of the native title holders that are possessed under their traditional laws and customs are, subject to the traditional laws and customs that govern the exercise of the native title rights and interests by the native title holders, non-exclusive rights to use and enjoy those areas being:

the right to access, be present on, move about on and travel over the area; the right to hunt and fish in or on, and gather from, the land and water; the right to take, use, share and exchange natural resources; the right to take and use water; the right to live, to camp and for that purpose to erect shelters and other structures on those areas; light fires on the area for cultural, spiritual or domestic purposes, including cooking, but not for the purpose of hunting or clearing vegetation; be buried and bury native title holders within the area; conduct ceremonies on the area; hold meetings on the area; teach on the area the physical and spiritual attributes of the area; maintain places of importance and area of significance to the native title holders under their traditional laws and customs and protect those places and areas from harm; and be accompanied on to the area by those persons who, though not native title holders are: (a) spouses or

partners of native title holders; (b) people who are members of the immediate family of a spouse or partner of a native title holder; (c) people reasonably required by the native title holders under traditional law and custom for the performance of ceremonies or cultural activities on the Determination Area; or people who have specialised knowledge based on their training, study or experience who are requested by native title holders to observe or record traditional activities or otherwise to investigate matters of cultural significance on the Determination Area.

[216] I note that similar rights were recognised in favour of the Kowanyama People in relation to the area the subject of the Kowanyama People determinations. Thus, this in my view, supports that such rights do arise pursuant to the traditional laws and customs of the native title claim group — see, for instance, *Kowanyama People #2 determination* at [19].

[217] Whilst the area covered by this application is different, there is nothing before me that would support such rights in relation to the particular area claimed here have been extinguished. Thus, it is my view that the above rights are prima facie established in relation to the claim area.

[218] The above non-exclusive rights are prima facie established.

Conclusion

[219] The application satisfies the condition of s 190B(6).

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.

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

[221] I also understand that the term 'traditional,' as used in this context, should be construed in accordance with the approach taken in *Yorta Yorta—Gudjala [2007]* at [89]. In describing the

necessary physical connection in the 'traditional' sense as required by s 223 of the Act, the members of the joint judgment in *Yorta Yorta* felt that:

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

[222] Exploring how this understanding of 'traditional' may feature in the task of the Registrar at s 190B(7), Dowsett J in *Gudjala [2009]* observed that '[i]t seems likely that such connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs'—at [84].

[223] I have considered the reasons for decision of the delegate in Kowanyama People (QC1997/009; QUD6119/1998) dated 1 July 2011 when the pre-combined Kowanyama People application was last considered for registration. The delegate considered affidavits of persons in the native title claim group, which detailed the nature of their traditional physical connection with areas covered by the claim (which includes areas covered by this combined application). The delegate sets out that:

> Each of the four deponents of these affidavits attest to being born in a location inside the application area, and that the relevant territory of their particular descent group was country belonging to their parents. All the deponents talk about the ongoing relationship they have had with their country (citing areas located in the application area), from birth into their adult lives. Their traditional connection with the area has continued in spite of the establishment of pastoral stations and missions where the deponents and their families lived/worked. Examples are given by each of the deponents about special story places within the application area, which are specific to their particular descent group's territory. They each also describe the stories that are associated with these places, and which connect them to their country under their traditional laws and customs — at p. 28.

[224] The delegate also cites examples from claimant's that expressly refer to areas with which they have a traditional physical connection including the Mitchell River where claimant's provide details of camping and other traditional activities — at p. 39.

[225] On the basis of this information and other information within the factual basis of the claim relating to the traditional laws and customs, I am satisfied that at least one member currently has a traditional physical connection with the application area.

[226] The application satisfies the condition 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 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 in relation to an area; 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 provision 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 in relation to an area; 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 provision 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 claimed confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.

(4) However, subsection (2) or (3) does not apply to an application if:

(a) the only previous exclusive possession act or previous non-exclusive possession act concerned 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 section 47, 47A or 47B, as the case may be, applies to it.

[227] In the reasons below, I look 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.

Section 61A(1)

[228] 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.

[229] The geospatial assessment states that there is no determination of native title over the area covered by the application. I agree with this and consider that the information upon which this assessment is based remains current.

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

Section 61A(2)

[231] 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.

[232] Schedule B of the application clearly excludes any area that is covered by a previous exclusive possession act except to the extent that the circumstances described in subparagraph (4) may apply.

[233] In my view the application does not offend the provisions of s 61A(2)

Section 61A(3)

[234] 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.

[235] Schedule B of the application states that the native title claim group do not claim rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others over areas that is or has been the subject to a previous non-exclusive possession act, unless the circumstances described in subparagraph (4) apply.

[236] In my view the application does not offend the provisions of s 61A(3).

Conclusion

[237] In my view the application does not offend the provisions of ss 61A(1), 61A(2) and 61A(3) and therefore the application satisfies the condition of s 190B(8).

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.

[238] I consider each of the subconditions of s 190B(9) in my reasons below.

Section 190B(9)(a)

[239] For the purpose of s 190B(9)(a), the application must not disclose (or the Registrar must not be aware) that 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.

[240] Schedule Q states that the claim to such resources is only made to the extent to which they can be validly claimed under the laws of the Commonwealth or State. Thus, in the delegate's view, this is to be understood to preclude any claim to ownership of minerals, petroleum or gas wholly owned by the Crown.

[241] The application satisfies the sub-condition of s 190B(9)(a).

Section 190B(9)(b)

[242] For the purpose of s 190B(9)(b), the application must not disclose (or the Registrar must not be aware) that a claim is being made for exclusive native title rights and interests to waters in an offshore place.

[243] Schedule P of the application, in my view, is to the effect that the applicant makes no claim to exclusive possession of an offshore place.

[244] The application satisfies the sub-condition of s 190B(9)(b).

Section 190B(9)(c)

[245] For the purpose of s 190B(9)(c) the application must not disclose (or the Registrar must not be aware) that a claim is being made where native title rights and interests have otherwise been extinguished (except to the extent that the extinguishment is required to be disregarded under ss 47(2), 47A(2) or 47B(2)).

[246] I am not aware that the claim is being made where native title rights and interests have otherwise been extinguished.

[247] The application satisfies the sub-condition of s 190B(9)(c).

Conclusion

[248] In my view the application does not offend the provisions of ss 190B(9)(a), (b) and (c) and therefore the application meets the condition of s 190B(9).

[End of reasons]