National Native Title Tribunal

Registration test decision

Application name	Yaburara and Mardudhunera People
Name of applicant	Valerie Holborow, Kevin Cosmos and Robert Boona
NNTT file no.	WC1996/89
Federal Court of Australia file no.	WAD127/1997
Date application made	1 August 1996
Date application last amended	16 January 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: 17 April 2014

Date of reason: 22 May 2014

_____

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 background

[3] The Registrar of the Federal Court of Australia (the Court) gave a copy of the Yaburara and Mardudhunera People claimant application to the Registrar on 17 January 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] I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply. That is because the application was not amended as a result of an order under s 87A and the effect of the amendments do not fall within those described under s 190A(6A)(d).

[5] 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.

Registration test

[6] 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.

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

Information considered when making the decision

[8] 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.

[9] Below in my reasons for each condition, I identify the information that I have considered.

Procedural fairness steps

[10] The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

[11] Both the applicant and State of Western Australia (state) were informed of the date by which the registration decision would be made and provided with an opportunity to make submissions or put further information before the Registrar about 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.

[12] 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.

[13] 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.

[14] In reaching my decision for the condition in s 190C(2), I understand that this condition is essentially procedural in nature and generally 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].

[15] 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.

Native title claim group: s 61(1)

[16] Section 61(1) requires that the application 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).

The nature of the task at s 61(1) for the purpose of s 190C(2)

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

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

[19] Thus, the task may be said to be about ensuring that the application contains fulsome details of the persons who are said to be authorised and details of the native title claim group (as that term is defined in s 61(1)) on whose behalf the application is made.

The information in the application

[20] The application at Part A names three (3) persons who jointly comprise the applicant. Schedule R of the application states that the applicant is authorised to make this application.

[21] Schedule A of the application names the persons on whose behalf the application is made, being the native title claim group: Schedule A states that:

> The claim is brought on behalf of the descendants of:
> (a) Mirbin Lowe
> (b) Willy Cooper
> (c) Alf Boona
> (d) Woggi
> (e) Tutparinya
> (f) Pantun
> (g) Eva
> (h) Mabel
> (i) Jessie
> (j) Toby
> Who recognise themselves, and are recognised by a substantial number of those other Aboriginal people who are descendants of one or more of the above ancestors, as members of the Mardudhunera community group.

Consideration

[22] I have considered the description of the native title claim group and other information in the application, and 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.

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

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

Name and address for service: s 61(3)

[25] The name and address for service of the applicant appears at Part B of the application.

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

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

[27] Section 61(4) requires that the persons in the native title claim group be either named (s 61(4)(a)) or described sufficiently clearly (s 61(4)(b)) in the application.

[28] From the description contained in Schedule A (see my reasons above at s 61(1)), it follows that the provision of s 61(4)(b) applies 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' — s 61(4)(b).

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

[30] I am satisfied that within the application at Schedule A there is a description of the persons in the native title group which appears to be sufficiently clear for the purpose of s 190C(2).

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

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

[32] 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.

[33] In *Doolan v Native Title Registrar* [2007] FCA 192 (*Doolan*), Spender J held that '[a]s a matter of language (and in fact practice), the requirements of s 62 are satisfied by the filing of affidavits by each of the persons who constitute 'the applicant' deposing to the specified beliefs. The

'applicant' in s 62(1), in my view, is a reference to each of the persons who comprises 'the applicant' for the purpose of s 61 of the Act'—at [67].

[34] 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.

[35] As noted above, there are three (3) persons named jointly as the applicant, being Kevin Cosmos, Robert Boona and Valerie Holborow.

[36] Affidavits of Robert Boona and Valerie Holborow dated 16 December 2013 accompany the application. I note that the application was not accompanied by the affidavit of Kevin Cosmos dated 4 December 2013. However, it is my view that I can consider this affidavit (which was filed with the Court and is referred to in Attachment R of the application), as part of the application. I note that the order of Barker J dated 11 December 2013 requires only that the amended application be accompanied by affidavits from Robert Boona and Valerie Holborow and it is implicit that the affidavit of Kevin Cosmos (as previously filed) should be considered as forming part of the amended application. In that regard, the order of Barker J, which accompanies the application, states that:

> 1. Subject to the filing of affidavits by Robert William Boona and Valerie Holborow confirming the contents of the affidavit of Keven Cosmos filed 6 December 2013 in support of the interlocutory application filed 6 December 2013 by 18 December 2013, Schedule R of the amended Form 1 Native Title Determination application filed on 7 May 2013 in these proceedings be amended as follows:
> (a)...
>
> 2. The Form 1 Application as amended be filed in the Court thereafter.

[37] Each of the affidavits of the three (3) persons comprising the applicant, in effect, recite the statements required by s 62(1)(a)(i)–(iv), albeit with some anomalies. The affidavit of Kevin Cosmos refers to his belief in the matters that are set out in ss 62(1)(a)(i)–(iii) in that it affirms that 'I believe..'

[38] There is also an error in the affidavit of Robert Boona, where he states that the 'application' rather than the 'applicant' is authorised by all the persons in the native title group to make the application and to deal with matters arising in relation to it.

[39] In relation to the above anomalies, I consider that the affidavits of each of the persons can be read together, and thus the reference to 'I' rather than 'applicant' in the affidavit of Kevin Cosmos is not significant. Alternatively, it may be regarded as a slip. Similarly, I consider that the error in the wording of the affidavit of Robert Boona can also be regarded as a slip. It is my understanding that an error in the wording required by s 62(1)(a) for the affidavits may be treated

as such unless it is indicative of the deponents having failed to turn their mind to the matters which must be established— see, for instance, French J in *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) at [12].

[40] I do not consider that the errors in the wording of these affidavits signify that the deponents failed to turn their mind to the matters which must be established.

[41] The requirement at s 62(1)(a)(v), as it stood prior to the *Native Title Amendment (Technical Amendments) Act 2007*, is for the affidavit to state 'the basis on which the applicant is authorised as mentioned in (iv).'

[42] In the affidavits of Robert Boona and Valerie Holborow the following statement is made:

> The process of decision-making complied with in authorising the applicant to make the application and deal with the matters arising in relation to it was as set out in the affidavits of Kevin Kelvin Cosmos affirmed 4 December 2013 (*name deleted*) sworn 4 December 2013 and *(name deleted*) sworn 1 July 2013 are true.

[43] The affidavit of Kevin Cosmos dated 4 December 2013 contains a lengthy summation of events pertaining to the authorisation of the applicant, including identifying the decision-making process which was used to authorise the applicant. I consider that the affidavit states the basis on which the applicant is authorised as mentioned in (iv). As indicated above, I am also of the view that the three (3) affidavits can be read together when forming a view as to whether the requirements of s 62(1)(a) are met.

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

Details required by s 62(1)(b)

[45] 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)*

[46] The application must contain details and other information which describe 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)).

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

[48] 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)*

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

[50] Attachment C of the application is a map of the external boundaries of the area.

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

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

[52] 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.

[53] Schedule D of the application refers to Attachment I, and also states that '[t]he applicant is only aware of the searches of non-native title interests which are set out in Attachment I.'

[54] 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)*

[55] 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.

[56] 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.

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

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

[58] 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).

[59] Schedule F contains details that are about the factual basis of the claim. These details are relatively scant, but they do speak to the matters described in s 62(2)(e). I also consider that Schedules A, E, G and M also contain details that are about the factual basis of the claim, such that I am of the view that the application does contain a general description of the factual basis on which it is asserted that the native title rights and interests are said to exist.

[60] I note that I have only considered whether the information regarding the claimant's factual basis contained in the application addresses, in a general sense, each of the particular assertions at

s 62(2)(e)(i)–(iii) and have not undertaken an assessment of its sufficiency. Any 'genuine assessment' of the details/information contained in the application at s 62(2)(e), is to be undertaken by the Registrar when assessing the applicant's factual basis for the purpose of s 190B(5) — *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (Gudjala FC) at [92].

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

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

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

[63] 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.

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

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

[65] 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.

[66] Schedule H of the application refers to Attachment I as containing details of other applications. Attachment I contains the details of other applications to which this section refers.

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

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

[68] 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.

[69] Schedule I of the application refers to Attachment I, which contains details of s 29 notices that relate to the application area.

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

Conclusion

[71] The application contains the details specified in ss 62(2)(a)–(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)

[72] 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] FCA 652 (*Strickland FC*) at [9].

[73] 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 was an entry on the Register of Native Title Claims 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)).

[74] The Geospatial assessment and overlap analysis dated 29 January 2014 (geospatial assessment) does not identify any applications that currently overlap the area covered by this application that are on the Register of Native Title Claims (Register). I agree with this assessment.

[75] I understand that the requirements of s 190C(3)(a)–(c) speak in the past tense. For instance, the requirement is to consider if a 'previous application *covered* the whole or part of the area *covered* by the current application' [my emphasis] (s 190C(3)(a)) and further, to consider if that 'previous application *was* on the Register of Native Title Claims when the current application was made' [my emphasis] (s 190C(3)(b)) and whether it *was* an entry made pursuant to s 190A (s 190C(3)(c)).

[76] However, it is my view that it is not the intention of this legislative provision to cause the Registrar to undertake a historical search of the circumstances of the Register at the time when the current application was made when there is currently no overlapping application on the Register. Rather, 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. Thus, a historical search of the Register would be an administrative waste of time and could lead to an unreasonable outcome if

at the time when this application was made there was on the Register a 'previous application' with common members.

[77] 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.

[78] 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.

[79] 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).

[80] 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)

[81] 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)).

[82] Schedule R contains a statement that the requirements set out in s 190C(4)(b) have been met. Schedule R includes the brief grounds on which the Registrar should be satisfied, including the following:

> Kevin Kelvin Cosmos, Robert William Boona and Valerie Holborow , the three people comprising the Applicant, are members of the native title claim group because they are descended from the apical ancestors named in Schedule A of the Amended Form 1...
>
> A meeting of the members of the native title claim group of the (Yaburara and Coastal) Mardudhunnera People was convened on 2 May 2013...to, inter alia, consider and authorise the amendments of the (Yaburara and Coastal) Mardudhunera People's Amended Form 1 the subject of this application.
>
> The (Yaburara and Coastal) Mardudhunera native title claim group have a process of decision-making under their traditional laws and customs and such decision-making process was complied with in relation to the authorising of the amendments to the (Yaburara and Coastal) Mardudhunera People's Amended Form 1 the subject of this application...

[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 task at s 190C(4)(b) requires that I must be satisfied as to the 'fact of authorisation'. 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

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

as taking its colour from those circumstances' — *Evans v Native Title Registrar* [2004] FCA 1070 (*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].

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

The information I have considered

[88] In deciding whether I can be satisfied of the matters in s 190C(4)(b), I may 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* and *Wiri People v Native Title Registrar* [2008] FCA 574 (*Wiri People*) at [23].

[89] 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.

[90] I note that in addition to the information provided by the applicant, I have had regard to the judgement and reasons of Barker J in *Holborow v State of Western Australia (No 2)* [2013] FCA 1040 (*Holborow*). This information was not provided by the applicant, however, I am of the view that it is appropriate to have regard to.

<u>Information provided by the applicant</u>

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

[91] Schedule A sets out the native title claim group on whose behalf the application is made, being the descendants of ten (10) named persons [cited above] who recognise themselves and are recognised as members of the Mardudhunera community or group.

Attachment R

[92] The relevant information from Attachment R is extracted above in these reasons.

Affidavit of Kevin Cosmos dated 4 December 2013

[93] The affidavit of Kevin Cosmos of 4 December 2013 sets out details around the authorisation of the applicant to make the amended application. These include that:

- on 28 March 2013 members of the YM native title claim group were given notice of a meeting to be held on 2 May 2013 to authorise the amended claim;
- a decision-making process was adopted whereby the representatives at such community meetings discuss the proposed decision amongst each other and then the family members before voting via a show of hands;
- on 2 May 2013 the meeting was held at Wickham Community Hall and Mr Cosmos attended;
- the meeting occurred in two parts due to cultural sensitivities;
- the persons present at the meeting were split into two groups, the first YM Group and the second YM Group;
- a resolution regarding authorisation of the applicant to make the application, including amending the native title claim group description and to otherwise amend the form 1 was put to the meeting, that is to the two groups;
- in the presence of Mr Cosmos, the first YM Group unanimously resolved and authorised the above resolution; and

Mr Cosmos is informed that the second YM Group authorised the applicant by adopting the decision-making process outlined above.

Affidavit of (name deleted) dated 1 July 2013

[94] The affidavit of (*name deleted*) contains similar information pertaining to the authorisation of the applicant to that which is recited above. In addition, (*name deleted*) states of the meeting held on 2 May 2013 that:

> I have attended many Yaburara Mardudhunera community meetings in my capacity as the claim group's solicitor. During these meetings I have observed the Yaburara Mardudhunera people's decision making process — at [9].
>
> I have observed that the Yaburara Mardudhunera community adopt a process by which the representatives at the community meetings will discuss the proposed decision amongst each other at the meeting, and then with family members, before voting by a show of hands at a further meeting. A resolution is passed and a decision made when there is a majority of those present and voting at the community meeting — at [10].
>
> The authorisation meeting occurred in two parts due to cultural sensitivities on the day. Some members of the YM People were split into one group (First YM Group), whom I joined and managed the process of passing the resolution. Other members of the YM People were split into another group (Second YM Group), whom (*name deleted*) joined and managed the process of passing the resolution — at [13].
>
> In my presence, the First YM Group unanimously resolved and authorised the Resolution in accordance with the adopted process of decision-making outlined in paragraph 10 in this affidavit — at [14].

Affidavit of (name deleted) dated 1 July 2013

[95] The affidavit of (*name deleted*) speaks to his knowledge of the events relevant to authorisation, including the notice provided and the conduct of the authorisation meeting. (*name deleted*) confirms that notice of the meeting was given to members of the YM native title claim group of the meeting to be held on 2 May 2013, including those persons of the Kuruma Marthudunera who have Marthudunera ancestry. (*name deleted*) also provides some details of how the authorisation meeting proceeded.

Other information

Holborow

[96] The applicant's authorisation to make the amended application was considered by Barker J in *Holborow*. Much of the information extracted above was also before His Honour when deciding whether the applicant was authorised at the meeting of 2 May 2013. His Honour concludes that:

> In light of this affidavit material I am satisfied that the applicants [sic] in WAD127/1997 move for the amendment of the claimant applicant and that the members of the initial claim group as well as the proposed enlarged claim group including the KM people of the Mardudhunera descent as individual groups and as a whole have authorised the amendment of the claimant application in the manner proposed. Thus, I am satisfied that the requirements of s 251B of the NTA have been met — at [23].

[97] I consider that it is appropriate that I give such findings weight in my decision, however I understand that I cannot simply adopt those findings as I must independently turn my mind to the issues of which I must be satisfied — *Cadbury Uk Ltd v Registrar of Trade Marks* [2008] FCA 1126 (*Cadbury*) at [18].

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

[98] 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.

[99] The applicant is comprised of three persons. Schedule R of the application states that each of these persons is a member of the native title claim group because they are descended from the apical ancestors listed in schedule A. Each of the persons comprising the applicant swears to the truth of the information in the application.

[100] On that basis I am of the view that I can be satisfied that the applicant is a member of the native title claim group.

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

[101] Section 190C(4)(b) requires the Registrar to be satisfied that the applicant is authorised by all the other persons in the native title claim group to make the application. Authorise, for this

purpose, is defined in s 251B. 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.

[102] In *Wiri People*, Collier J recognised the distinct nature of the task at s 190C(4)(b) and the matters to which the Registrar is required to be satisfied of. Her Honour, whilst acknowledging the 'intersection' between 190C(2) and s 190C(4), observed that the tasks were quite different with s 190C(4)(b) requiring that the Registrar be satisfied as to the identity of the claimed native title holders — at [25].

[103] Thus, 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].

[104] The factual basis information provided with the application speaks to the identification of the native title claim group, including specifically to the ancestors referred to in the description at Schedule A of the application. This information provides a detailed explanation of the ancestors and their association with the claim area. It also refers to the relevant traditional laws and customs that inform the construction of the native title claim group, including that the traditional land owning group of the relevant society comprised individual country groups and country territories and that language was significant to the formation of such groups. Marduhunera is a language variety associated with the application area. The facts in support of the application include the assertion that '[p]articular areas were associated with particular language varieties because speakers of that language variety habitually lived and hunted in that area.'

[105] The factual basis material also outlines the fundamental prerequisite for inclusion in the native title claim group, according to the relevant traditional laws and customs of the Mardudhunera, as being that persons derive rights to country via descent from ancestors who are acknowledged as belonging to that group.

[106] In that regard, the expanded description of the native title claim group was considered at the authorisation meeting on 2 May 2014 and was part of the resolution put to the persons present at the meeting. Given that, it is possible to infer that the ancestors identified in Schedule A are acknowledged as belonging to the Mardudhunera language group.

[107] In my view, there is clear and cogent information explaining the identity of the native title claim group.

[108] The authority that flows from all the other persons in the native title claim group to the applicant must also be shown to have been 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].

[109] In this instance, I understand the applicant asserts compliance with the process described in s 251B(b). Schedule R of the application states that the Yaburara and Mardudhunera People have a process of decision-making under their traditional laws and customs 'and such decision-making process was complied with in relation to the authorising of the amendments.' This may suggest that it is the process under s 251B(a) which the applicant asserts compliance with. However, from other information in the application I understand that the process used was one under s 251B(b), albeit that it may be a process that is informed by traditional laws and customs. Thus, I will proceed to consider whether the applicant is authorised under s 251B(b).

[110] It is well settled in law 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].

[111] 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 about 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].

[112] In the context of s 251B, the Court has particularly scrutinised what may be reflective of an appropriate notice as one part of a process that seeks to afford a native title claim group every reasonable opportunity to participate in the decision to authorise an applicant. That notice 'must be sufficient to enable the persons to whom it is addressed, namely members or potential members of the native title claim group, to judge for themselves whether to attend the meeting and vote for or against a proposal or whether to leave the matter to be determine by the majority who do attend and vote at the meeting' — *Weribone on behalf of the Mandandanji People v State of Queensland* [2013] FCA 255 at [40] (Rares J in the context of competing applications pursuant to s 66B).

[113] As is described in the information before me, notice of the meeting was given to members of the native title claim group. The notice provides details of the business of the meeting, including the change to the native title claim group description and the intention to authorise the making of an amended application.

[114] The persons in attendance proceeded to separate into two groups before considering the resolutions and making decisions. It is relatively unusual in this context that the persons present at such a meeting would separate in this way. However, as I understand it, this was due to cultural sensitivities.

[115] There is no information to suggest that a formal resolution was put to those present at the meeting about authorising in two separate groups. However, the consent to such a process can, in my view, be taken to have occurred because the conduct of those present suggests that there was general consent. The affidavits elicit that the two separate groups proceeded to consider the resolution about authorising the applicant to make the amended application and the resolution was passed with unanimous support from each group. I would note that there is nothing before me to support that the persons present didn't generally consent to this course.

[116] In *Noble v Mundraby* [2005] FCAFC 212, the Full Court agreed with the decision of the primary judge that it was the conduct of those present at such a meeting that is central to considering whether they agreed to a particular process. In that instance, it was the participation of those present in the voting process that was determinative of their agreement to that process. In that regard, the Full Court concluded that s 251B does not require formal agreement to the process adopted, but rather such agreement to the process used will be proved by the conduct of those present at the meeting — at [18].

[117] Given the information about the notice of the meeting, the conduct of the meeting, the decision-making process adopted which involves broad discussion and each person being able to vote, I am of the view that all persons in the native title claim group were given a reasonable opportunity to participate in authorisation. I consider that all the persons in the native title claim group authorised the applicant to make the application.

[118] 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.

[119] 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.

[120] 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.

[121] Schedule B of the application defines the external boundaries of the claim area as being those set out in the map at Attachment C and described in the document at Attachment B. Attachment B of the application describes the area by metes and bounds, referencing native title determination boundaries and coordinate points. The map at Attachment C depicts the area covered by the application in a bold black outline.

[122] 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.

[123] The areas not covered by the application are identified in Schedule B of the application. This includes a list of general exclusions and also specifically excludes some areas that were covered by the original application.

[124] Upon my understanding, the general formulaic approach is one that is typically 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.

[125] 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.'

[126] 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.

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

[128] 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].

[129] 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].

[130] The description of the native title claim group in the application includes three criteria of membership, being essentially descent from a named person coupled with self-identification and group identification.

[131] Such a description would require quite considerable factual inquiry into who the members of the native title claim group are, including genealogical research and also inquiries into who considers themselves and who is recognised by others as members of the group.

[132] 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].

[133] Reading the description as a whole, it is my view that the criterion of descent from the named persons offers an objective starting point for the inquiry into whether a person is a member of the native title claim group. Describing a claim group in reference to named ancestors is one that has been accepted by the Court as satisfying the requirements of s. 190B(3)(b). I am of the view that with some factual inquiry it will be possible to identify the persons who fit that part of the native title claim group description — see *WA v NTR* at [67].

[134] The additional criteria of self-identification and group identification may in some instances be cause for concern for lack of clarity and understanding of how such criteria will operate. For instance, in *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198

Kiefel J observed, but did not decide, that a requirement of self-identification may not meet the objective of the registration test of providing a clear description of the persons making up the group because '[a]t a practical level it cannot be known whether descendants will or will not identify with the group.' — at [38].

[135] The same may, arguably, be said of the requirement that the persons also be recognised by other members of the Mardudhunera community. That is, there may be some practical difficulty with ascertaining this.

[136] It is my understanding, however, that descent from the named ancestors provides the fundamental basis for membership to the native title claim group. This is informed by the factual basis material. Under the relevant traditional laws and customs, which I set out below in my reasons, traditional rights to country derive unequivocally from descent. There may be some deviation from this in the contemporary era where certain members have a choice about primary country because they have multiple traditional countries through different ancestors, some of whom may not be of the Mardudhunera language group. This is where the criterion of self-identification (i.e. that they recognise themselves as members) becomes relevant. This element of choice is described as a modern adaptation of pre-contact principles. Recognition by the group would also be relevant in this situation, given that group members would likely have knowledge of how other members identify. I don't consider, however, that these criteria make the description less clear.

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

[138] 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.

[139] 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.'

[140] 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].

[141] 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), being in relation to Area A, and the right to undertake various activities on the application area.

[142] 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.

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

The Pre-sovereignty society

[144] The applicant's factual basis material sets out that the claim group comprises a group who identify with the Mardudhunera language, known as the Yaburara and Mardudhunera people who are associated with the claim area. The pre-sovereignty society is described as a regional society of which the Yaburara and Mardudunhera people are a part and which operated with clans owning 'rights in common over the whole of the clan territory.' The Yaburara and Mardudhunera own the territory over which this claim is made. In that regard, the material sets out that:

> ...the pre-contact traditional land tenure system could be summarised as local groups within a regional system. The essence of the traditional land owning unit is a body of persons who were closely related to one another in the male line. The clan has rights in common over the whole of the clan territory. These rights are inherited by clan members and essentially include the right to use the resources of the clan territory and exclude other non-clan members from the territory. The punishment for trespass on another clan's territory was death. Clan rights also appear to include the exclusive right to the ceremonial use of the *thalu* sites within the clan territory. Radcliffe-Brown's descriptions of traditional rights to land in the *Three Tribes* article recognised a mana's secondary rights to mother's country.
>
> Mardudhunera clan territories did not have a name but were distinguished by reference to a focal camping site. There were relatively defined country group territories in the pre-contact era.

> There is overwhelming evidence that Aboriginal people also identified themselves by a language variety which were associated with a relatively large tract of land. In the vicinity of the application area the recognised language varieties associated with large tracts of country were the Ngarluma, Yindjibarndi, Mardudhunera, Kurrama, Nhuwala, Thalanyji, Pinnikura, Jurruru, Yinawangka and Banyjima. Particular areas were associated with particular language varieties because speakers of that language variety habitually lived and hunted in that area.Language varieties are reflected in place names and the changing names for different stretches of long watercourses. In the pre-contact era tribal boundaries in the Pilbara region were not delineated in an exact way, but comprised transitional zones between core areas...Being precise about tribal boundaries became more important in a later era when the language group became the primary vehicle for the assertion of traditional country, ie. the relevant country group became the language group. The available evidence indicates that, in pre-contact times, the Mardudhunera were associated with a much more extensive area than is being claimed today — at [36] to [38] of draft report.

[145] The native title claim group comprises the descendants of ten (10) named ancestors, who are said to have historically had an association with the claim area, which by inference dates back to before sovereignty — [3] of draft report.

Combined reasons for s 190B(5)

[146] 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].

[147] The Registrar 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]

[148] Whilst the Registrar must assume that the facts asserted are true and only consider whether they are capable of supporting the claimed rights and interests, 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) — *Gudjala FC* at [92]; *Doepel* at [17].

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

[149] 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

[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]*.

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].

[150] 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 Native Title Registrar* [2013] FCA at [39].

The factual basis material in support of the assertion at s 190B(5)(a)

The association of the predecessors with the application area

[151] The material sets out that the ethnographic record supports the association of the predecessors of the claimants with the application area. Historical records cite the Murdudhunera as being associated with 'the mouth of the Fortescue River and the Robe River'. Other references to the historical and anthropological material are made throughout the draft report, including:

> The Mardudhunera tribe occupies the coast of Western Australia from a point somewhere between the Cane and Robe Rivers as far as the Maitland River — citation of Brown 1913:175 at [14] of draft report.
>
> The country of the Mardudhunera tribe lies on the coast, at the north-west end of the Hamersley Range — citation of Brown 1913:175 at [15] of draft report.
>
> The Mathudunera [variant spelling] are the western neighbours of the West-Ngaluma. The name, composed with mardu "flat plain" indicates that they are a genuine coastal tribe. Their centre is at Mardie Station halfway between Onslow and Roebourne on the coastal highway. There are about a dozen speakers left — citation of von Brandenstein 1970:84-85 at [20] of draft report.

[152] The applicant's material also provides facts about the society of persons living in the area around the time of contact, including:

> The Ethnographer Radcliffe-Brown visited the area in 1911 and found 100 Mardudhunera people there — at [5] of draft report.

[153] There are facts to support that the named ancestors of the Yaburara Mardudhunera people were associated with the area prior to or around the time of contact and that they were part of the pre-sovereignty society, including the following extracts from the material:

> Within the Pilbara region, Alf Boona (deceased) and Miribin Lowe (deceased) are widely regarded as having been Mardudhunera. They lived at Mardie Station for long periods of their lives and were two of the last three fluent speakers of the Mardudhunera language ((*name deleted*) being the third). It is believed by their descendants that Alf Boona and Miribin Lowe were brothers from the same Mardudhunera father, (*name deleted*). If this is correct, they form one separate descent group under the apical (*name deleted*) — [11] of draft report.

> There is strong evidence that the ancestor Toby was Mardudhunera. He is one of the few ancestors who appear on Radcliffe-Brown's Mardudhunera genealogies. Consequently there is an unusually high level of independent corroboration of his identity. The current identification of Toby as Mardudhunera comes from George Shecklar, Toby's son. Toby was approximately 70 years old at the time of his death on 20 September 1950. He was probably born sometime in the 1880s. There is also a list of members of a Mardudhunera clan, which Radcliffe-Brown called Mandamalu (his clan 4), which includes Toby's father 'Marduwalawara'. Additional confirming evidence that Toby was Mardudhunera comes directly from (*name deleted*). As part of (*name deleted*) research into the Mardudhunera language, he recorded (*name deleted*)singing Mardudhunera songs and one of those was composed by 'Toby Winarrany' — at [11.5] of draft report.

[154] Another named ancestor, Willie Cooper, who was born around the early 1900s regarded himself as Mardudhunera and the majority of his songs are sang in the Mardudhunera dialect. Support for his association with the claim area and his connection to the pre-sovereignty society can be found in the written historical record, including:

> One of the key documents produced by von Brandenstein that is relevant to Willy Cooper'scountry identity was an unpublished manuscript about the Mardudhunera language simply entitled *Mardudhunera* (von Brandenstein 1974). In the sample texts, Willy Cooper describes aspects of Mardudhunera country and lists the names of 17 permanent pools along the Fortescue River that fall within Mardudhunera country. The information in the sample texts give some depth to his claim to be Mardudhunera for they demonstrate his knowledge of the history and traditional uses of the country and a fairly comprehensive list of the economically important permanent pools — [11.12] of draft report.

The history of association of the native title claim group through to the present day

[155] The applicant's factual basis provides examples of the continuity of association from at least the period around contact to the present day. For instance, (*name deleted*) was born in 1939 at Mardie Station and she grew up there with her parents. It can be inferred from the information that her parents and grandparents had been associated with the claim area. The information surrounding her association, and that of her predecessors, also includes references to other Murdudhunera people, and thus is demonstrative of the wider association of the whole claim group:

> (*name deleted*)father, (*name deleted*), was working on Mardie Station and told (*name deleted*) that he had been born on the Sherlock River but that his grandmother had brought him back, first to Balmoral Station then to Mardie Station when he was small because his family was living there. Balmoral Station in those days had a very mixed Aboriginal group including Ngaluma, Yindjibarndi, Kurrama, Mardudhunera and Nhuwala from Onslow.
>
> There were a number of other people living on Mardie at the time, some living at the old landing near the mouth of the Fortescue River. They included (*names deleted*) Uncle Toby ((*name deleted*)), (*name deleted*) and her father's brother, (name deleted), and others. Her father and (name deleted) would speak Mardudhunera with each other and some of the old ladies at Mardie. Mirbin also used to travel around Mardie and Balmoral Stations and regularly they

> used to camp at Forty Mile beach and Mirbin and Willie Cooper would take a boat to nearby Mardie and Fortescue Islands. From her relations and the other old people at Mardie she learned some traditional fishing and hunting techniques and learned about some of the important traditional places on Mardie, including a baby *thalu* site. (*name deleted*) married (*name deleted*), a Yindjibarndi man, and they worked at various stations throughout the 1950s, 60s and 70s, including at Mardie and Karratha Stations. Both (*names deleted*) were measured and photographed at Roebourne in 1953 by (*name deleted*) — [127] to [128] of draft report.

[156] The story of the association of (*name deleted*) and her family with the application area also continues to the next generation. It is said that (*name deleted*)'s children have strong memories of Mardie Station during the 1960s and 70s, (*name deleted*) the oldest daughter of, (*name deleted*) was born on Mardie Station and has memories of her grandfather (Mirbin) teaching her about country and of playing and fishing and (*deleted for cultural reasons*), learning the Aboriginal names of the various species of fish and so on' — [130] of draft report.

[157] More current examples of the claim group's association can also be found in statements made on behalf of the native title claim group in the context of a future act matter for the grant of a tenement falling wholly within the application area. For instance:

> Members of the Yaburara Mardudhunera group travel to the islands within the proposed tenement area and engage in traditional activities such as camping, hunting and fishing on the islands. The young members of the Yaburara & Mardudhunera people continue to travel to the islands at every chance they get to fish. The young members spear fish around the islands. They also occasionally hunt kangaroos on some of the larger islands.
>
> Off the coast of Mardie within the proposed tenement area, there is a large density of mangroves. The presence of these mangroves means there are large quantities of mudcrabs. The members of the Native Title Party often go crabbing in the mangroves all along the coast of the tenement area.

Consideration

[158] There are, in my view, ample facts that support the assertion of an association of the whole claim group with the area dating back to at least the period of contact.

[159] The factual basis in my view does elicit 'the relationship which all members claim to have in common in connection with the relevant land' (*Gudjala [2007]* at [39]), which I understand to be closely linked to clan (pre-sovereignty) and language affiliations. Today, the relationship between the country and the native title claim group is primarily defined by the language group, which has become the 'primary vehicle for the assertion of traditional country, ie. the relevant country group became the language group' — [38] of draft report.

[160] 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].

[161] The facts in support of the assertion that the predecessors of the claim group were associated at the time of sovereignty include various references to historical accounts of the Mardudhunera clans being present around the time of contact (late 1800s). This includes some of the named ancestors of the group.

[162] Within the factual basis there are stories of the continuity of various lines of descent. For instance, Willy Cooper (a named ancestor of the claim group) was born in the early 1900s and regarded himself as Mardudhunera. He is recorded as being associated with areas that fall within Mardudhunera country, including Fortescue River. His descendants are also recorded as being associated with the claim area. The following is included:

> (*name deleted*) [sic] recalls Willie Cooper living on Mardie and helping to grow her up. Willie Cooper had apparently been born on Yarraloola Station to a Mardudhunera mother and white father. He used to take her out in his boat when (*name deleted*) was little and she used to call him grandad.
>
> Willie (Willy) Cooper had married (*name deleted*) and they raised a family on Mardie Station. Their daughter (*name deleted*)), born in 1953, recalled her father showing her the country all around Mardie, Balmoral and the Fortescue River while they went hunting, impressing upon them that it was all Mardudhunera country, their country.
>
> The(*names deleted*), were born at Mardie Station in 1953 and 1955 respectively.

[163] 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

[164] 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.

[165] 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;[2002] HCA 58 (*Yorta Yorta*)).[3]

[166] In *Gudjala [2007]*, Dowsett J observed that 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].

[167] 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].

The factual basis in support of the assertion at s 190B(5)(b)

The relevant society

[168] Some details of the pre-sovereignty society relevant to the Yaburara and Mardudhunera people are set out above. That pre-sovereignty society, which is said to continue today, is a regional society, extending to other groups. The facts state that:

> Individual country groups and country group territories were part of a regional system of mutual recognition, networks of kin, trade, regional identities, alliances, overlapping cultural commonalities and regional cultural events. The strict rule that a man must seek a wife outside his clan would have inevitably led to the establishment of various networks of kin relations. Actual solidarity seems to have operated at the level of clans and these kinship networks, especially in the [sic] relation to the disputes with neighbouring groups and organising protection from depredations of more distant marauding groups or revenge parties — at [37] of draft report.

[169] Providing some link between the pre-sovereignty society and the named ancestors are the historical and anthropological accounts of those persons, including:

> Of all the Mardudhunera descendants named in Radcliffe-Brown's genealogies 'Winaraing' (Toby), a descendant of '*Mamaju*' (clan 4), is the most clearly identifiable ancestor in contemporary genealogies. There is a possibility that a Mardudhunera ancestor known to the current generation as *Patun*, appears under a different Aboriginal name, '*Malinbidi*, in the Radcliffe-Brown's genealogy for his Mardudhunera clan 9, named after their main camping area, variously spelled '*Talianu*', '*Tyalyianyu'* and '*Chalyianu*'. This name appears to refer to the pool *Jaliyarnu* on the Robe River. In addition there is also a fragment of a genealogy, mentioned above, that represents Mardudhunera ancestor (*name deleted*) as the mother of (*name deleted*). If this (*name deleted*) is the same (*name deleted*) as (*name deleted*)'s mother it would

[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].

> link contemporary genealogy to Radcliff-Brown's (ungrouped descendants of (*name deleted*)) — at [10] of draft report.

[170] The link between the pre-sovereignty society and the named ancestors is also provided in accounts of the period around the time of contact in the late 1800s and early 1900s, including:

> We know from Radcliffe-Brown that there were significant numbers of Mardudhunera people on Mardie and Karratha Stations in 1911. There are also instances of intermarriage between the Mardudhunera and Kurrama in this era, for example, *Patun* (Mardudhunera) and (*name deleted*) (Kurrama), (*name deleted*) (Kurrama) and (*name deleted*) (whose mother was likely to have been Mardudhunera) and, in some family traditions (*names deleted*) were Mardudhunera or of Mardudhunera descent and married to (*name deleted*) (Kurrama) — at [124] of draft report.

[171] There are also accounts of persons born in this period, who are descendants of or raised by the named ancestors, including Alf Boona born in about 1920 who was partly raised by the ancestor Willy Cooper:

> Alf Boona had a long association with Mardie Station. He married a Yindjibarndi woman,, (*name deleted*) and they raised a large family of seven children, most of whom were born at Mardie Station — at [135] of draft report.

[172] And (*name deleted*), born in 1939, the daughter of the ancestor (*name deleted*)

> My father (*name deleted*) and his brother (*name deleted*) used to be the bosses for Mardudhunera country. They were the ones that people had to come and see if they wanted to come onto our country to visit. It was my father who used to invite other Aboriginal people onto Wirrawanti for corroborees. Now my cousin Robert Boona and myself are the bosses. This means that if people want to go and visit our country then they should come and ask our permission first. Our families can go without permission because we are close and they know that country.

Traditional laws and customs of the pre-sovereignty society that give rise to the claimed rights and interests

[173] As described above the Yaburara and Mardudhunera people are part of a regional society, where primarily tribal clan or country groups were in the pre-sovereignty context associated with particular territories. Language was also important to these groups at this time. The system has continued into the contemporary context, but with a greater emphasis on language identity in determining primary rights and interests in land. The traditional laws and customs continue to operate to recognise the 'autonomy of each language group and a hesitancy to interfere with the internal matters of another group is the general rule' — at [71] of draft report.

[174] Obligations to country are paramount within the system of traditional laws and customs that has continued to regulate the responsibilities of the Yaburara and Mardudhunera people to their territory. The factual basis sets out that:

> The efforts of the claimants and their immediate ancestors to protect their significant sites, has a long history. The claimants participate in heritage survey teams to clear areas for proposed developments. The claimants cite their desire to preserve the significant sites as the principal motivation for their involvement — at [98] of draft report.

[175] What might be called the totemic landscape of the overlap area and adjacent areas consists of numerous thalu sites, physical features of the land which relate to transformations wrought in the foundational epoch and associated stories, general appreciations of the typical association of warlu (snake) beings with deep permanent pools and general connections between the Fortescue River as a whole and a regional style of initiation ceremony which focuses on the exploits of mythical beings in the upper reaches of the Fortescue River. There is also a unique site near the mouth of the Maitland River which represents something like a tribal map of the area. It is information about these sites and connections that is closely guarded and becomes the basis of assertions of traditional authority especially in the competition between families and between claimant groups — at [103] of draft report. The contemporary concern to maintain country can be seen as a direct adaptation of traditional law and customs, which included maintenance of *thalu* sites, proper behaviour towards dangerous sites and the performance of ritual — at [105] of draft report.

[176] The material also provides details of other laws and customs of the normative system that do not necessarily relate to the regulation of land ownership and rights — see, for instance, [110]–[116] of draft report.

Consideration

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

[178] There are also other matters that are relevant to the sufficiency of a factual basis for this purpose. For instance, if 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 (*Gudjala [2009]* at [40]). 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 [52], [55] and [69].

[179] As outlined above, the factual basis for the claim does identify a relevant pre-sovereignty society and provides specific details about that society. There are also sufficient facts that go to identifying the link between the named ancestors and the relevant society. The ancestors are generally identified within the historical record as being associated with the application area and as being of the Mardudhunera clan or language group. Current claimants also provide facts that support the assertion that the predecessors, including the identified ancestors, were of a relevant pre-sovereignty society. Some of the identified ancestors of the Yaburara and Mardudhunera people can be placed in the area around the time of contact. With the making of some favourable inferences, these and other facts within the material are sufficient to provide the link between the named ancestors of the native title claim group and the pre-sovereignty society.

[180] (*name deleted*)recounts how the laws and customs of the Yaburara and Mardudhunera people were passed down to her:

> (*name deleted*)also recalled the many corroborees she saw performed at Mardie Station using red, white, black and yellow ochres and she knows of red ochre sources in the hills along the Fortescue River. The hunting traditions of (*name deleted's*) father, (*name deleted*), continued to be passed down to (*name deleted's*) children and grandchildren when he took them on hunting trips during their visits to him in the 1970's and 80s on Balmoral Station.

[181] Thus, it is possible to say that the explanation within the factual basis material of how laws and customs can be said to be traditional comes from examples of how both earlier and succeeding generations have informed their relationship with the land and waters in accordance with particular laws and customs. Thus, there does seem to be some information upon which a comparison of the current laws and customs with those that are asserted to have existed at sovereignty is possible.

[182] It is my view, for the above reasons, that the factual basis is sufficient to support the assertion at s 190B(5)(b).

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

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

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

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

[185] There are sufficient facts within the material to support the assertion of the Yaburara and Mardudhunera people's continuous holding of native title in the application area. The material points to the historical record to support the assertion that the Yaburara and Mardudhunera predecessors were within the area at sovereignty. It cites accounts from the period around contact as being indicative of a continuing and prior association. In the 1880s, there were Aboriginal camps within the claim area including Mardi Station, which became a refuge for the people of the Mardudhunera tribes and was where the last speakers of the Mardudhunera were known to converse in their language. By 1912 Radcliffe-Brown had mapped the Mardudhunera clan territories and provided focal places for clan names.

[186] The material also generally describes a continuing association of the Yaburara and Mardudhunera people with the application area since that period. It also contains facts that support the assertion that the normative society, despite some necessary adaptation, has continued.

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

Conclusion

[188] 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)

[189] 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].

[190] 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].

[191] 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

[192] In *Gudjala [2007]*, Dowsett J referred, in relation to the requirement at s 190B(5), to the decision of the High Court in *Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors* (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta*) and to the Court's consideration of s 223 and 'traditional'— *Gudjala [2007]* at [86].

[193] 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].

[194] 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.

[195] I now turn to consider each of the native title rights and interests that are claimed in the application. These are set out in Schedule E of the application. In some instances, I have grouped certain rights and interests together.

The claimed rights and interests in Schedule E of the application

[196] The claimed rights in Schedule E of the application have been divided between two areas, titled Area A rights and Area B rights.

[197] My understanding of this division, having regard to the description in Schedule E and also the description of Area A and Area B in Part A of the application, is that:

- over parts of Area A where exclusive possession could be recognised, the rights set out in (1), (12), (14), (30), (31) and (51) are claimed;
- over parts of Area A, the remaining rights are claimed as non-exclusive;

- over Area B, the rights set out in (a) – (i) are claimed in addition to all of the rights claimed for Area A, except excluding those claimed in (1), (12), (14), (30), (31) and (51) (ie. the exclusive rights) — see Schedule E.

[198] It is upon that understanding that I proceed to consider whether the rights claimed are established.

The exclusive rights claimed in relation to Area A

(1) The right to possess, occupy, use and enjoy the area as against the whole world;

(12) A right to make decisions about the use of the area by persons who are not members of the Aboriginal society to which the native title claim group belong;

(14) A right to make decisions about the enjoyment of the area by members of the Aboriginal society to which the native title claim group belong by persons who are not members of the Aboriginal society to which the native title claim group belong;

(30) A right to control the access of others to the area;

(31) A right to control access of others to the area except such persons as may be exercising a right accorded by the common law, statute law of the Commonwealth or the State of Western Australia or a lawful grant by the British sovereign or its successor;

(51) A right to control the taking, use and enjoyment by others of the resources of the area, including for the said purposes (set out a sub-paragraphs (32) – (41) and/or in the said form (set out in paragraphs (42) – (50) above), other than minerals, petroleum and gas and any resource taken in exercise of a statutory right or common law right, including the public right to fish.

[199] As a preliminary point in my consideration of these claimed rights to exclusive possession, it is my understanding that it is neither necessary nor apt to have various expressions of the right to exclusive possession as the applicant has chosen in (12), (14), (30), (31) and (51) that are claimed in addition to (1).

[200] In *Griffiths v Northern Territory of Australia* [2006] FCA 903 (*Griffiths*) it was stated that:

> In some circumstances, native title will be found to be "exclusive". In such cases, the "bundle of rights and interests" that make up native title may be expressed as including "a right to possession, occupation, use and enjoyment of the land or waters to the exclusion of all others"—at [608].

[201] Further, it is the expression in these terms (a right to possess, occupy, use and enjoy the area as against the whole world) which 'reflects not only the content of a right to be asked permission about how and by whom country may be used, but also the common law's concern to identify

property relationships between people and places or things as rights of control over access to, and exploitation of, the place or thing'— *Western Australia v Ward [2002] HCA 28 (Ward HC),* [88].

[202] In *Banjima People v State of Western Australia (No 2)* [2013] FCA 868 (*Banjima*), Barker J considered various arguments where the applicant had chosen similar formulations to those in (1), (12), (14), (30), (31) and (51) of Schedule E. His Honour acknowledged of the right against the whole world to possess, occupy, use and enjoy the land and water, that earlier decisions (including *Ward HC*) suggest that it is this expression alone, which 'comprehends that a claimant group has such an array of traditional rights and interests in relation to land and waters claimed that the right formulated in those terms is appropriate.' Nonetheless, His Honour did accept that rights expressed similarly to those here in (12) and (30) could be articulated and recognised as an 'aspect of that exclusive possession' — at [725] and [726].

[203] Of a right expressed similarly to that in (51), his Honour noted (in addition to not being reflected in any of the evidence and also being repetitive and redundant) that:

> ...I am uncertain about the meaning and implications of proposed right (1)(d), to control the taking, use or enjoyment by others of resources of the land and waters. It may mean that there is a right, following authorised taking, to control the use made of the taken resource; which would seem unusual...It would also not seem to be one in relation to land or waters — at [728].

[204] Of the above I understand that whilst the expression 'possess, occupy, use and enjoy the area against the world' is the most apt and appropriate way in which to claim exclusive possession, the Court has held that 'further articulation of that exclusive possession' may in some circumstances be appropriate — *Banjima* at [727].

[205] Thus, I will proceed to consider whether the claimants' factual basis material supports that the rights at (1), (12) and (30) are prima facie established. Also, in my view, the right at (14) is similarly expressed to that at (12) and may be considered. Equally, the right at (31) is similarly expressed to that at (30) and may be considered. I do acknowledge, however, that claiming the rights in (12), (14), (30) and (31) is likely redundant.

[206] Given the reasons of Barker J in *Banjima* in relation to a right expressed in the same way as that at (51), I am of the view that this right cannot be recognised because it likely is not a right in relation to land and waters. The right at (51) is not established for that reason.

Are the rights at (1), (12), (14), (30) and (31) established in Area A?

[207] I note that I will only consider here whether the right to exclusive possession (articulated in claimed right (1)) is prima facie established, as I believe that the rights claimed in (12), (14), (30) and (31) are essentially a comparable articulation of that same right. Albeit, if the claimed right in (1) is established, the Register will reflect the rights claimed in (12), (14), (30) and (31).

[208] In *Western Australia v Ward* [2002] HCA 28 (*Ward HC*), the majority considered that '[t]he expression "possession, occupation, use and enjoyment … to the exclusion of all others" is a composite expression directed to describing a particular measure of ***control over access to land***' [emphasis added]. Further, that expression (as an aggregate) conveys 'the assertion of rights of control over the land', which necessarily flow 'from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country'—at [89] and [93].

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

[210] Establishing the existence of this right was also more recently explored by Barker J in *Banjima*, where His Honour noted that a number of decisions have now affirmed that 'a right to exclusive possession of land is not dependent upon evidence that permission must always be demanded; that the right must always be enforceable against others' — at [685].

[211] I have reviewed the factual basis material provided by the applicant, which indicates to me that, arguably, this exclusive right claimed by the native title claim group exists under the traditional laws and customs of the Mardudhunera people. I refer to the following material within the factual basis that, in my view, prima facie, supports the existence of the right to possess, occupy, use and enjoy the claim area as against the whole world:

- the native title claim group are part of a pre-sovereignty regional society where originally clan territories, which transformed into language groups, held rights and interests in tracts of land;
- in the pre-sovereignty context, the clan had rights in common over the whole clan territory and '[t]he punishment for trespass on another clan's territory was severe' — at [142] of draft report;
- following the period of contact, '[t]he relevant country group evolved from the clan and clan territories in the pre-contact era to language group areas in the contemporary era';
- the Mardudhunera people (the language group) hold rights and interests in the land and waters subject to the claim;
- rights of the clan and its territories are now with the 'recognised language group and the tract of land traditionally associated with that language. This is the case with the Mardudhunera Aboriginal people in the region continue to refer to discrete tracts of land by reference to language varieties like Mardudhunera and Kurrama' — at [143] of draft report; and

- the traditional laws and customs of the native title claim group give rise to rights in country being derived via descent from ancestors who are acknowledged as belonging to a particular language group.

[212] Other information to support the existence of this right pursuant to the traditional laws and customs of the native title claim group are also contained in the contemporary accounts of the tradition, including that:

> In the old days people would get speared if they came into our country without permission. There would be a big fight and the old people would use their nulla nulla (fighting sticks) on them.
>
> When people came to visit us when we lived on Wirrawanti and Koolimpa they would bring gifts for us, like *muliyarra* (sting body decorations), boomerangs, nulla nulla and spears. Then they would be free to be in our country. We would give the same kind of gifts back to them as well— at [148] of draft report.

[213] In my view, the factual basis material sufficiently demonstrates how this right to possess, occupy, use and enjoy the area as against the world (which has the character of the assertion of control of access) arises under the traditional laws and customs of the relevant society.

[214] This right is prima facie established. The rights at (12), (14), (30) and (31) are also prima facie established.

The non-exclusive rights claimed in relation to Area A

(2) A right to occupy the area;

(3) A right to use the area;

(4) A right to enjoy the area;

(5) A right to be present on or within the area;

[215] The factual basis material provides details and facts relevant to the predecessors and their descendants occupying, using, enjoying and being present on the application area.

[216] There is, for instance, material supporting the occupation of the area by the Mardudhunera at a time around contact. From this information, it is possible to infer that the occupation of the area pre-dates that period. Also, the factual basis material sets out of the pre-sovereignty society and the association of the Mardudhunera language group that:

> Particular areas were associated with particular language varieties because speakers of that language variety habitually lived and hunted in that area. Language varieties are reflected in place names and the changing names for different stretches of long watercourses.

[217] Of the relevant traditional laws and customs, the factual basis sets out that:

> Language groups like the present Mardudhunhera claim group, have 'internal' responsibilities such as ensuring members have the appropriate genealogical connection to a recognised ancestor and teaching the younger generation.

[218] I am of the view that the non-exclusive rights at (2) – (5) are prima facie established.

(6) A right to be present on or within the area in connection with the society's economic life;

(7) A right to be present on or within the area in connection with the society's religious life;

(8) A right to be present on or within the area in connection with the society's cultural life;

[219] Of the above rights at (6) – (8) I do not understand these rights to have meaning above that of the 'right to be present on or within the area'.

[220] I am of the view that the non-exclusive rights at (6) – (8) are not established.

(9) A right to hunt in the area;

(10) A right to fish in the area;

[221] The factual basis material provides information to support that these rights exist under the relevant traditional laws and customs. For instance, it contains examples of how claimants and their predecessors were taught the laws and customs relevant to exercising these rights:

> [(*name deleted*)] remembered travelling in Willy Cooper's boat, probably in the early 1940s, when he and her father would take her with them when they went pearling or hunting for turtle among the islands adjacent to Mardie Station: Mardie Island and Fortescue Island. Her father taught her to hunt and fish in the traditional way — at [145] of draft report.

[222] I am of the view that the non-exclusive rights at (9) – (10) are prima facie established.

(11) A right to make decisions about the use of the area by members of the Aboriginal society to which the native title group belong;

(13) A right to make decisions about the enjoyment of the area by members of the Aboriginal society to which the native title group belong by persons who are members of the Aboriginal society to which the native title group belong;

[223] The law has observed a tension with the expression of these kinds of claimed rights as non-exclusive. For instance, in the *Ward HC* joint judgment, the Court concluded that:

> It is necessary to recognise that the holder of a right, as against the whole world, to possession of land, may control access to it by others and, in general, decide how the land

> will be used. But ***without a right of possession of that kind, it may greatly be doubted that there is any right to control access to land or make binding decisions about the use to which it is put*** [emphasis added]. To use those expressions in such a case is apt to mislead—at [52].

[224] In *Attorney General of the Northern Territory v Ward* [2003] FCAFC 283 (*Ward FC*), the Court in making a consent decision recognised 'a right to make decisions about the use and enjoyment of land by Aboriginal people who will recognise those decisions and observe them pursuant to their traditional laws and customs' as a non-exclusive right and held that it was not inconsistent with the existence of pastoral lease entitling the lessee to determine who has access to the area—at [27]. Also in *Jango v Northern Territory of Australia* [2006] FCA 318 (*Jango*), Sackville J considered that he was bound by the Full Court in *Ward FC* and held that a non-exclusive right 'to make decisions about the use or enjoyment of the Application Area by Aboriginal people who are governed by the traditional laws and customs of the Western Desert bloc' could be recognised—at [571]. A number of consent determinations have also recognised a similarly expressed right[4].

[225] I am of the view that the rights claimed at (11) and (13) are similarly expressed such that they are not inconsistent with being recognised as non-exclusive rights.

[226] In my view, the factual basis also demonstrates how these rights arise under the traditional laws and customs of the regional society of which the Yaburara and Mardudhunera People form part of. For instance, the factual basis provides details of the mutual recognition between the language groups that make up the regional society and the decisional control of the individual language group for their own territory.

[227] The non-exclusive rights claimed at (11) and (13) are prima facie established.

(15) A right of access to the area;

(16) A right to live within the area;

(17) A right to reside in the area;

(18) A right to erect shelters upon or within the area;

(19) A right to camp upon or within the area;

(20) A right to move about the area;

[228] There is information within the factual basis to support the existence of the above rights under the traditional laws and customs. The facts support the history of the presence of the Mardudhunera People within the application area, including living and travelling on the area.

---

[4] See for instance *Mundraby v Queensland* [2006] FCA 436 and *Yankunytjatjara/Antakirinja Native Title Claim Group v The State of South Australia* [2006] FCA 1142.

[229] The non-exclusive rights claimed at (15) – (20) are prima facie established.

(21) A right to engage in cultural activities within the area;

(22) A right to conduct ceremonies within the area;

(23) A right to participate in ceremonies within the area;

(24) A right to hold meetings within the area;

(25) A right to participate in meetings within the area

[230] There are within the factual basis material references to ceremonial and cultural activities occurring across generations.

[231] The non-exclusive rights claimed at (21) – (25) are prima facie established.

(26) A right to teach as to the physical attributes of the area;

(27) A right to teach as to the significant attributes of the area;

(29) A right to teach as to the significant attributes within the area of the Aboriginal society connected to the area in accordance with its laws and customs;

[232] I do not understand the above non-exclusive rights claimed at (26), (27) and (29) to be rights in relation to land and waters. They do not relate to activities to be carried out on the land and waters.

[233] The non-exclusive rights at (26) and (27) are not established.

(28) A right to teach upon the area as to the significant attributes of the area;

[234] There is information within the factual basis that supports this right existing under the traditional laws and customs of the native title claim group. Accounts are provided as to how members are taught on the application area about the physical and spiritual aspects of the area, including the following:

> In the 1970s and 80s, (*name deleted*) also visited his grandfather, (*name deleted*), who was working for (*name deleted*)at Balmoral Station. (*name deleted*) took with him on his work rounds and taught him how to look for wild potatoes and to catch wild ducks. They also went fishing at the old landing near the mouth of the Fortescue River and he also observed (*name deleted*) using traditional techniques for attracting emus — at [130] of draft report.

[235] The non-exclusive right claimed at (28) is prima facie established.

(32) A right to take resources, other than minerals, petroleum and gas, used for sustenance from the area;

(33) A right to take resources, other than minerals, petroleum and gas, used for sustenance within the area;

(34) A right to gather resources, other than minerals, petroleum and gas, for sustenance within the area;

(35) A right to use and/or enjoy resources, other than minerals, petroleum and gas, for sustenance within the area;

(36) A right to use and/or enjoy resources, other than minerals, petroleum and gas, for food, on, in, under or within the area;

(37) A right to use and/or enjoy resources, other than minerals, petroleum and gas, for shelter, on, in or within the area;

(38) A right to use and/or enjoy resources, other than minerals, petroleum and gas, for healing on, in or within the area;

(39) A right to use and/or enjoy resources, other than minerals, petroleum and gas, for decoration on, in or within the area;

(40) A right to use and/or enjoy resources, other than minerals, petroleum and gas, for social purposes on, in or within the area;

(41) A right to use and/or enjoy resources, other than minerals, petroleum and gas, for cultural, religious, spiritual, ceremonial and/or ritual purposes on, in or within the area;

(42) A right to take fauna;

(43) A right to take flora (including timber);

(44) A right to take soil;

(45) A right to take sand;

(46) A right to take stone and/or flint;

(47) A right to take clay;

(48) A right to take gravel;

(49) A right to take ochre;

(50) A right to take water;

(52) A right to manufacture from and trade in the said resources of the area, upon or within the area, other than minerals, petroleum and gas including the manufacture of objects materials or goods for sustenance, and or food, shelter, healing, decoration, social, cultural, religious, spiritual, ceremonial and/or ritual purposes and/or including objects, materials or goods in the form of tools, weapons, clothing, shelter and/or decoration;

[236] There is material within the factual basis that supports the existence of the right to take, gather, use, enjoy and trade in the resources that are identified in (42) – (50). (*name deleted*)says that:

> All my life I have used the plants and animals on Mardudhunera country when I have been able. When I lived on the station as a child, and later in life when I was a married woman, we would hunt and fish and gather bush foods and medicines when we needed them. We hunt a lot of waterbirds like swans and ducks. We used to use a plant called kalanu as a snorkel when we went hunting for ducks. You hunt ducks by diving down swimming up underneath them, and grabbing their legs. That plant kalanu is a kind of reed that grows in the water of the Fortescue River. Our people still gather food this way whenever they can. When I worked on Karratha station in the 1970's, I used to catch muntamirra (mud eels) at a pool along the Yanyare River. If you don't have a fishing rod, you can catch fish using spinefex, because it has sharp ends and they can't swim through it. You can catch a big bunch of fish that way. Our people still fish today whenever they can. There are lots of different bush foods growing in our country — at [145] of draft report.

[237] Whilst there does not seem to be sufficient facts that would support the right to generally take, gather, use, enjoy and trade in all manner of resources, as seem to be suggested by the rights claimed at (32) – (41) and (52), I consider that the reference to resources here can be understood to refer to the resources that are identified in the rights claimed at (42) – (50).

[238] The non-exclusive rights claimed at (32) – (50) and (52) are prima facie established.

(53) A right to receive a portion of the said resources (other than minerals, petroleum and gas) taken by other persons who are members of the Aboriginal society from the area;

[239] I do not consider that there is any specific material within the factual basis that goes to supporting the existence of this right. It may be that it could be surmised that, given the mutual recognition between language groups forming part of the relevant regional society and the laws governing the relationship between those groups, this right arises from the traditional laws and customs. Nonetheless, there is no direct material that supports the existence of this right.

[240] This right is not prima facie established.

(54) A right to receive a portion of the said resources (other than minerals, petroleum and gas) taken by other persons other than those who are members of the Aboriginal society from the area;

[241] In my view this right cannot be prima facie established as a non-exclusive right. That is because I do not understand that claimants can control the use of resources, in the sense of demanding a portion of those resources from those who are not members of the relevant society, in relation to areas where a right to exclusively possess, occupy, use and enjoy cannot be recognised.

[242] In *Neowarra v Western Australia* [2003] FCA 1402, Sundberg J held that the right to control the uses and enjoyment of others of resources of the claim area 'asserts an entitlement to control access to the land and the use to be made of the land' and was inconsistent with the pastoral leases that existed in the area of the claim. Of the argument put by the applicant that the decision of *Ward HC* was not applicable as it did not address the issue of resources, Sundberg J stated that '[w]hat was said in *Ward* in relation to control of access and use is applicable to the presently asserted right even though their Honours' were not directing themselves to resources.'—at [479].

[243] This right claimed at (54) is not established.

(55) A right in relation to any activity occurring on the area to

(i) maintain;

(ii) conserve; and/or

(iii) protect

significant places and objects located within the area, by preventing, by all reasonable lawful means, any activity which may injure, desecrate, damage, destroy, alter or misuse any such place or object;

[244] A right as identically framed was considered by Barker J in *Banjima*. His Honour held that a modified articulation of the right was capable of recognition — at [830].

[245] In *Alywarr, Kaytetye, Warumungu, Wakay Native Title Claim v Northern Territory of Australia* [2004] FCA 427 Mansfield J rejected submissions on behalf of the Northern Territory Government that 'protect' had connotations of control. Instead, His Honour held that '[it] contemplates conduct in relation to places and areas of importance which may fall well short of controlling access to those places in a way which is inconsistent with previously granted rights...' — at [176] and [322].

[246] There is information within the factual basis to support that the protection and preservation of significant sites and areas within the claim areas is a right and a serious obligation that arises pursuant to the traditional laws and customs of the group. It is said of the Yaburara and Mardudhunera People that:

> In traditional terms, there is a strong law requiring Yaburara and Mardudhunera people to care for and protect places where their ancestors have lived, and particularly where they camped, or carried out ceremonies, or where they were buried. The spirits of their ancestors live in these places.
>
> If these places are disturbed or damaged then in the Yaburara and Mardudhunera people's belief system they can expect that the disturbance of their ancestors' spirits will lead to misfortune, ill health and possibly death within their people's society — [21] and [22] of Native Title Party Statement of Contentions in Matter No W012/664.

[247] This non-exclusive right claimed at (55) is prima facie established.

(56) A right, in relation to any activity occurring on the area, to:

(i) maintain;

(ii) conserve; and/or

(iii) protect

Significant ceremonies, artworks, song cycles, narratives, beliefs or practices by preventing, by all reasonable lawful means any activity occurring on the area which may injure, desecrate,, damage, destroy, alter or misuse any such ceremony, artwork, song cycle, narrative, belief or practice.

(57) A right, in relation to a use of the area or activity within the area, to:

(i) prevent any use or activity which is unauthorised in accordance with traditional laws and customs

(ii) prevent any use or activity which is inappropriate in accordance with traditional laws and customs

In relation to significant places and objects within the area or ceremonies, artworks, song cycles, narratives, beliefs or practices carried out within the area by all reasonable lawful means, including by the native title holders providing all relevant persons by all reasonable means with information as to such uses and activities, provided that such persons are able to comply with the requirements of those traditional laws and customs while engaging in reasonable use of the area and are not thereby prevented from exercising any statutory or common law rights to which that person may be entitled.

[248] Rights as identically framed were considered by Barker J in *Banjima* and held to be 'not reasonably capable of being characterised as rights in relation to land or waters' because they are essentially rights that relate to the protection of intellectual property — at [826].

[249] Given that, I consider that the non-exclusive rights claimed at (56) and (57) are not established.

(58) A right to enjoy all the features, benefits and advantages inherent in the environment of the area;

[250] It is unclear to me as to how this right has a meaning distinct from other rights that are claimed. There is no specific information in the claimant's material that explains this right.

[251] This non-exclusive right at (58) is not established.

(59) A right of individual members of the native title holding group or groups to be identified and acknowledged, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area;

(60) A right of the group or groups who hold common or group native title rights and interests to identify and acknowledge individual members of the native title holding group, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area.

[252] I do not understand the above non-exclusive rights claimed at (59) and (60) to be rights in relation to land and waters. Instead, they appear to be rights in relation to persons who are the holders of native title.

[253] The non-exclusive rights claimed at (59) and (60) are not established.

The non-exclusive rights claimed in relation to Area B

[254] The native title rights claimed in relation to Area B as set out in Schedule E are said to be all of the rights claimed in relation to Area A, excepting the rights at (1), (12), (14), (30), (31) and (51).

[255] In that regard, I consider that the rights established in Area A (excepting those in (1), (12), (14), (30), (31) and (51)) are also established in Area B.

[256] In addition, the native title claim group also claims the rights set out in (a) – (i) of Schedule E for Area B. I now consider whether those rights are prima facie established.

(a) the right to speak for the area covered by the application;

[257] I consider that there is sufficient information to support that this right is prima facie established. There is information within the material before me which suggests that particular persons have the right to speak for tracts of land as they are recognised pursuant to the traditional laws and customs as the owners of that country.

[258] The non-exclusive right at (a), claimed in relation to Area B, is prima facie established.

(b) the right to be asked permission to use the land and waters of the area covered by the application;

(c) the right to make decisions about the use, enjoyment and management of the land and waters of the area covered by the application;

(g) the right to control the access to and activities conducted by others on the lands and waters of the area covered by the application.

[259] In my view these rights cannot be prima facie established as non-exclusive rights. That is because I do not understand that the claimants can generally control access via the right to be asked permission or have decision making power, without any limitations, in relation to areas where a right to exclusively possess, occupy, use and enjoy cannot be recognised. Upon my understanding of the High Court decision in *Ward HC*, the above rights can only be recognised where there is a right of exclusive possession against the whole world — at [52].

[260] These rights are not established.

(d) the right to live on the area covered by the application;

(e) the right to hunt and gather and to take water and other resources (including ochre) on the area covered by the application;

(f) the right to use and enjoy resources of the area covered by the application;

(h) the right to maintain and protect areas of cultural significance to the native title claim group on the area covered by the application; and

(i) the right to participate, engage in and conduct ceremonial activities and other cultural activities on the area covered by the application.

[261] For the reasons provided in relation to Area A for similarly expressed rights, I consider that these non-exclusive rights can be established in relation to Area B.

[262] These rights are prima facie established.

Conclusion

[263] 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.

[264] Based on the 'evidentiary' material the Registrar must be satisfied 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].

[265] Here, the term 'traditional' should be construed in accordance with the approach taken in *Yorta Yorta—Gudjala [2007]* at [89].

[266] 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].

[267] 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].

[268] In that regard, the applicant's material provides information that supports the traditional physical connection with the application area of particular members of the native title claim group. There are plentiful examples given as to how the physical association of claim members has been pursuant to the relevant traditional law and customs. For instance, (*name deleted*)says that:

> We use many different plants from Mardudhunera country for medicines. There is one that comes from the *marra* wood, or blood wood tree. The sap of this tree is very good for asthma...(*name deleted*) and I collected some when we were going through Mardudhunera country recently, and we will boil it up to make medicines for ourselves and our family — at [145].

[269] 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 s 61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

Section 61A provides:

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

(2) If:

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

[270] 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)

[271] 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.

[272] There is no approved determination over any of the area covered by the application — see geospatial assessment and Overlap Analysis Report dated 14 April 2014.

Section 61A(2)

[273] 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.

[274] The application is not made over areas covered by a previous exclusive possession act. Schedule B (2) of the application excludes any such areas except where ss 47, 47A and 47B apply.

Section 61A(3)

[275] 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.

[276] The application does 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.

[277] The application defines parts of the areas separately as Area A and Area B. In relation to Area A native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others are claimed, including those described as (1), (12), (14), (30), (31) and (51). Other non-exclusive native title rights and interests are also claimed. Area B includes a claim to only non-exclusive native title rights and interests. Thus, it is clear from the way in which Area A and B are defined in Part A of the application and Schedule E that the claim to exclusive rights and interests is only made where it can be recognised and not over areas where a previous non-exclusive possession act was done and cannot be disregarded under the Act.

Conclusion

[278] 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.

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

Section 190B(9)(a)

[280] The native title claim group does not make a claim to minerals, petroleum or gas wholly owned by the Crown — Schedule Q of the application.

Section 190B(9)(b)

[281] The native title claim group does not make any claim to exclusive possession of all or part of an offshore place — Schedule P of the application.

Section 190B(9)(c)

[282] The native title rights and interests claimed have not, to my knowledge, been extinguished. The application excludes any areas of land or waters where native title rights and interests have been extinguished — Schedule B(3) of the application.

Conclusion

[283] 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]