National Native Title Tribunal

# Registration test decision

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|---|---|
| Application name | Woppaburra People |
| Name of applicant | John Cummins, Lesley Barney, Joh-ann Coates, Samala Cronin, Yasmin Green, Nerak Morris, Robert Muir Snr, Robert Muir Jnr and Vincent Singleton |
| State/territory/region | Queensland |
| NNTT file no. | QC2013/008 |
| Federal Court of Australia file no. | QUD738/2013 |
| Date application made | 6 November 2013 |

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

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

**Date of decision:** 7 March 2014

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Radhika Prasad

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

# Reasons for decision

## Introduction

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

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

### Application overview

[3] On 6 November 2013, the application was filed with the Federal Court of Australia (the Court). The Registrar of the Court gave a copy of the application to the Registrar on 7 November 2013 pursuant to s. 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

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

[5] Therefore, in accordance with s. 190A(6), I must accept the claim for registration if it satisfies all of the conditions in ss. 190B and 190C of the Act. If those conditions are not satisfied then, pursuant to s. 190A(6B), I must not accept the claim for registration. 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 contain certain specified information and documents. In my reasons below, I consider the requirements of s. 190C 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] As discussed in my reasons below, I consider that the claim in the application does satisfy all of the conditions in ss. 190B and 190C and therefore, pursuant to s. 190A(6), it must be accepted for registration. Attachment A contains information that will be included in the Register of Native Title Claims (the Register).

### 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] I am also guided by the case law (arising from judgments in the courts) relevant to the application of the registration test. Among issues covered by such case law is the issue that some

conditions of the test do not allow me to consider anything other than what is contained in the application while other conditions allow me to consider wider material.

[10] I understand s. 190A(3) to stipulate that the application and information in any other document provided by the applicant is the primary source of information for the decision I make. Accordingly, I have taken into account the following material in coming to my decision:

- the information contained in the application and accompanying documents;
- the Geospatial Assessment and Overlap Analysis (GeoTrack: 2013/2230) prepared by the Tribunal's Geospatial Services on 11 November 2013 (geospatial assessment);
- the additional information provided by the applicant on 18 November 2013; and
- the results of my own searches using the Tribunal's mapping database.

[11] I have not considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss. 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK of the Act. Also, I have not considered any information that may have been provided to the Tribunal in the course of mediation in relation to this or any claimant application.

## Procedural fairness steps

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

- On 8 November 2013, the case manager for this matter sent a letter to the State of Queensland (the State) enclosing a copy of the application and accompanying documents. That letter informed the State that any submission in relation to the registration of this claim should be provided by 29 November 2013.
- The case manager, also on 8 November 2013, wrote to inform the applicant that any additional information should be provided by 29 November 2013.
- On 18 November 2013, the applicant provided a number of documents, in support of the application for registration, that are of a confidential nature. On 19 November 2013, the applicant provided an amended page 2 of the Form 1.
- On 5 December 2013, the confidential additional material was provided to the State, after receipt of a confidentiality undertaking. The State was informed that any response in relation to the additional material should be provided by 19 December 2013.
- On 12 December 2013, the State was provided with a copy of the amended page 2.
- On 17 December 2013, the State advised, by email, that it did not wish to make any comments regarding the additional material.

# Procedural and other conditions: s. 190C

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

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

[13] 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.

[14] In coming to this conclusion, I understand that the condition in s. 190C(2) is procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss. 61 and 62. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s. 190C(2). As explained by Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112; [2003] FCA 1384 (*Doepel*):

> 37 [Section 190C(2)] does not involve the Registrar going beyond the application, and in particular does not require the Registrar to undertake some form of merit assessment of the material …
> 39 [F]or the purposes of the requirements of s 190C(2), the Registrar may not go beyond the information in the application itself — see also [16], [35] and [36].

[15] Accordingly, the application must contain the prescribed details and other information in order to satisfy the requirements of s. 190C(2).

[16] 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. I do not consider they require any separate consideration by the Registrar. Paragraph 61(5)(c), which requires the application contain such information as is prescribed, does not need to be considered by me separately under s. 190C(2), as I already test these 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.

[17] I now turn to each of the particular parts of ss. 61 and 62:

**Native title claim group: s. 61(1)**

[18] Schedule A of the application provides a description of the native title claim group. The application indicates that the persons comprising the applicant are included in the native title claim group — see s. 62(1)(a) affidavits of the persons comprising the applicant.

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

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

[20] The names of those persons comprising the applicant appear at Part A of the Form 1 — see page 2. I note that on 19 November 2013, the legal representative for the applicant provided directly to the Registrar an amended page 2 of the Form 1 that corrects the spelling of one of the names. Taking a pragmatic approach, I consider that as this amendment is minor in nature, the page accompanies the application. As the court in *Kanak v National Native Title Tribunal* (1995) 61 FCR 103; [1995] FCA 1624 commented at [73], the Act is remedial in character and should be construed beneficially.

[21] Part B provides the name and address for service of the applicant's representative.

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

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

[23] Schedule A of the application contains a description of the persons in the native title claim group that appears to meet the requirements of the Act.

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

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

[25] The application is accompanied by affidavits sworn by each of the persons who comprise the applicant. The affidavits contain all the statements required by s. 62(1)(a) (i) to (v), including details of the process of decision making complied with in authorising the applicant.

[26] The application **is** accompanied by the affidavits required by s. 62(1)(a).

**Details required by s. 62(1)(b)**

[27] Subsection 62(2)(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)*

[28] Attachment B contains information that allows for the identification of the boundaries of the area covered by the application. That Attachment and Schedule B contain information of the areas within those boundaries that are not covered by the application.

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

[29] Attachment C contains a map showing the external boundary of the application area.

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

[30] Schedule D provides that the applicant has not carried out any such searches.

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

[31] A description of the native title rights and interests claimed by the native title claim group in relation to the land and waters of the application area appears at Schedule E. The description does not consist only of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

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

[32] Attachment F/M contains information pertaining to the factual basis on which it is asserted that the rights and interests claimed exist. I note that there may also be other information within the application that is relevant to the factual basis.

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

[33] A list of the activities currently undertaken by members of the claim group on the land and waters of the application area appears at Schedule G of the application.

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

[34] Schedule H provides that the applicant is not aware of any other applications which have been made in relation to the whole or a part of the area covered by the application.

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

[35] Schedule HA of the application provides that the applicant is not aware of any such notifications given in relation to the whole or part of the area covered by the application.

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

[36] Schedule I provides that the applicant is not aware of any notices issued under s. 29 of the Act in relation to the whole or part of the application area.

*Conclusion*

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

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

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

[38] In my view, the requirement that the Registrar be satisfied that there are no common claimants arise where there is a previous application which comes within the terms of subsections (a) to (c) — *State of Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

[39] I note that the text of this provision reads in the past tense, however I consider the proper approach would be to interpret s. 190C(3) in the present tense as to do otherwise would be

contrary to its purpose. The explanatory memorandum that accompanied the Native Title Amendment Bill 1997 relevantly provides that:

> 29.25 The Registrar must be satisfied that no member of the claim group for the application … *is* a member of the claim group for a registered claim which was made before the claim under consideration, which *is* overlapped by the claim under consideration and which itself has passed the registration test [emphasis added].
>
> …
>
> 35.38 The Bill generally discourages overlapping claims by members of the same native title claim group, and encourages consolidation of such multiple claims into one application.

[40] I understand from the above that s. 190C(3) was enacted to prevent overlapping claims by members of the same native title claim group from being on the Register at the same time. That purpose is achieved by preventing a claim from being registered where it has members in common with an overlapping claim that is on the Register *when* the registration test is applied. I consider that this approach, rather than a literal approach, more accurately reflects the intention of the legislature.

[41] I note that in assessing this requirement, I am able to address information which does not form part of the application — *Doepel* at [16].

**Consideration**

[42] The geospatial assessment does not identify a previous application that covered the whole or part of the area covered by the current application.

[43] I have also undertaken a search of the Tribunal's mapping database and am of the view that there is no previous application that covered the whole or part of the area covered by the current application.

[44] I am therefore satisfied that there is no previous application to which ss. 190C(3)(a) to (c) apply. Accordingly, I do not need to consider the requirements of s. 190C(3) further.

[45] 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.

Under s. 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition

of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

[46] 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.

[47] Schedule R states that a copy of the certificate of the representative Aboriginal body accompanies the application at Attachment R. Accordingly, I am of the view that it is necessary to consider whether the requirements of s. 190C(4)(a) are met.

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

[48] Section 190C(4)(a) imposes upon the Registrar conditions which, according to Mansfield J, are straightforward — *Doepel* at [72]. His Honour noted that the Registrar is to be 'satisfied about the fact of certification by an appropriate representative body', but is not to 'go beyond that point' and 'revisit the certification of the representative body' — at [78], [80] and [81]. I therefore consider that my task here is to identify the appropriate representative body and be satisfied that the application is certified under s. 203BE.

[49] Once satisfied that the requirements of s. 190C(4)(a) have been met, I am not required to 'address the condition imposed by s 190C(4)(b)' — *Doepel* at [80].

**Identification of the representative body and its power to certify**

[50] Attachment R is entitled 'Certification of Native Title Determination Application – Woppaburra People' (certificate). It is dated 5 November 2013 and signed by the Chief Executive Officer of Queensland South Native Title Services Limited (QSNTS).

[51] The certificate provides that the statements within the certificate are made pursuant to ss. 203BE and 203FEA of the Act and that QSNTS is a body funded under s. 203FE to perform the functions of a representative body in the application area — see also Schedule K.

[52] If a body is funded under s. 203FE(1) to perform the functions, including the certification functions in s. 203BE, of a representative body over an area, then that body will have the power to certify an application under Part 11.

[53] The geospatial assessment identifies QSNTS to be the only representative body for the area covered by the application.

[54] Having regard to the above information, I am satisfied that QSNTS was the relevant s. 203FE funded body for the application area and that it was within its power to issue the certification.

**The requirements of s. 203BE**

[55] As mentioned above, I consider that I am only required to be satisfied of 'the fact of certification' and am not permitted 'to consider the correctness of the certification by the representative body' — *Doepel* at [78] and [82].

[56] Accordingly, I must consider whether the certification meets the requirements of s. 203BE, the relevant subsection being (4).

*Subsection 203BE(4)(a)*

[57] This provision requires a statement from the representative body confirming that they hold the opinion that the conditions at subsections (2)(a) and (2)(b) have been met.

[58] Subsection 203BE(2) sets out that a representative body must not certify an application for a determination of native title unless it is of the opinion that:

(a) all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and

(b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

[59] The certification contains the statement required by s. 203BE(4)(a).

*Subsection 203BE(4)(b)*

[60] Pursuant to s. 203BE(4)(b), the certification must also briefly set out the body's reasons for making the required statements under s. 203BE(4)(a).

[61] In that regard, the certification sets out details pertaining to the authorisation of the applicant, including that:

- the authorisation meeting was held in Brisbane on 31 August 2013 (the meeting);
- the meeting was extensively advertised with notices placed in the Courier Mail on 27 July 2013, Fraser Coast Chronicle on 27 July 2013 and Koori Mail on 31 July 2013;
- invitations, which included details of the meeting, were sent to the Woppaburra People whose address were known to QSNTS on 31 July 2013 and 23 August 2013;
- the meeting was well attended and attendance records were taken and kept by QSNTS;
- QSNTS is satisfied that all necessary steps were taken in holding the meeting in accordance with the requirements of the Act and the claim group's instructions — at [4].

[62] I am of the opinion that the certificate meets the requirement of s. 203BE(4)(b).

*Subsection 203BE(4)(c)*

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

[64] I do not consider that any application currently overlaps the application area — see my reasons at s. 190C(3). Accordingly, in my view, the requirements of s. 203BE(3) are not applicable to the area covered by this application and, therefore, it is appropriate that QSNTS 'has done nothing to meet and has not met the requirements of s. 203BE(3) of the Act' — at [5].

[65] I am of the view that the requirements of s. 203BE(4) of the Act have been satisfied and therefore find that the criteria under s. 190C(4)(a) have been met.

[66] The application **satisfies** the condition of s. 190C(4).

# 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.

[67] Attachment B describes the application area as 'all the land and waters within the Dharumbal Traditional Use Marine Resources Agreement (TUMRA) – Woppaburra Section' and contains a metes and bounds description of the external boundaries of the application area, referencing geographic coordinates. The description specifically excludes all the land and waters subject to QUD6131/98 Darumbal People (QC2012/008).

[68] Attachment C is a colour copy of a map titled 'Woppaburra' prepared by QSNTS on 22 August 2013. The map includes:

- the application area depicted by a bold blue outline;
- topographic background;
- scalebar, northpoint, coordinate grid, legend and commencement point; and
- notes relating to the source, currency and datum of data used to prepare the map.

**Consideration**

[69] The geospatial assessment concludes that the description and map of the application area are consistent and identify the application area with reasonable certainty. I agree with this assessment.

[70] I note that Schedule B contains some general exclusions to categories of land and waters, which in my view provides a sufficiently certain and objective mechanism to identify areas that are not covered by the application and fall within the categories described — see *Daniels for the Ngaluma People and Ors v State of Western Australia* [1999] FCA 686 at [29] to [38].

[71] In light of the above information, I am satisfied that the description and the map of the application area, as required by ss. 62(2)(a) and (b), are sufficient for it to be said with reasonable certainty that the native title rights and interests are claimed in relation to particular land or waters.

[72] 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.

[73] The following description of the native title claim group appears in Schedule A of the application:

> The native title claim group is comprised of all persons descended from the following Woppaburra ancestors:
>
> 1. Yulowa "Weerobilling"
> 2. Nellie "Ooroong-ooran"
> 3. Oyster Maggie
> 4. Fanny Lohse/Singh

[74] It follows from the description above that the condition of s. 190B(3)(b) is applicable to this assessment. Thus, I am required to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

**Nature of the task at s. 190B(3)(b)**

[75] When assessing the requirements of this provision, I understand that I must determine whether the material contained in the application 'enables the reliable identification of persons in the native title claim group' — *Doepel* at [16] and [51].

[76] In *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*), Dowsett J commented that s. 190B(3) 'requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification' — at [33]. His Honour also confirmed that s. 190B(3) required the Registrar to address only the content of the application — at [30].

[77] In *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*), Carr J commented that to determine whether the conditions (or rules) specified in Schedule A has a sufficiently clear description of the native title claim group:

> [i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently. It is more likely to result from the effects of the passage of time and the movement of people from one place to another. The Act is clearly remedial in character and should be construed beneficially — at [67].

**Consideration**

[78] I note that I am confined, in my view, to the material contained in the application for the purposes of s. 190B(3) and I have therefore been informed by the applicant's factual basis material contained in Attachment F/M that accompanied the application in reaching my view about this condition.

[79] The description of the native title claim group is such that it comprises those persons who are the biological descendants of the named apical ancestors.

[80] Describing a claim group in reference to named ancestors is one method that has been accepted by the Court as satisfying the requirements of s. 190B(3)(b) — see *WA v NTR* at [67].

[81] I consider that requiring a member to show biological descent from an ancestor identified in Schedule A provides a clear starting or external reference point to commence an inquiry about whether a person is a member of the native title claim group.

[82] In my view, as indicated by the factual basis contained in Attachment F/M, descent from a named ancestor provides the fundamental basis for membership to the Woppaburra people native title group — at [24], [25] and [32].

[83] I am of the view that with some factual inquiry it will be possible to identify the persons who fit the description of the native title claim group.

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

[85] 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.

[86] The task at s. 190B(4) is to assess whether the description of the native title rights and interests claimed is sufficient to allow the rights and interests to be readily identified. In my opinion, that description must be understandable and have meaning — *Doepel* at [91], [92], [95], [98] to [101] and [123]. I understand that in order to assess the requirements of this provision, I am confined to the material contained in the application itself — at [16].

[87] I note that the description referred to in s. 190B(4), and as required by s. 62(2)(d) to be contained in the application, is:

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

[88] I will consider whether the claimed rights and interests can be prima facie established as native title rights and interests, as defined in s. 223, when considering the claim under s. 190B(6) of the Act. For the purposes of s. 190B(4), I will focus only on whether the rights and interests as claimed are 'readily identifiable'. Whilst undertaking this task, I consider that a description of a native title right and interest that is broadly asserted 'does not mean that the rights broadly described cannot readily be identified within the meaning of s 190B(4)' — *Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*) at [60]; see also *Strickland FC* at [80] to [87], where the Full Court cited the observations of French J in *Strickland* with approval.

[89] Schedule E of the application provides the following description of the claimed native title rights and interests:

1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where sections 238, 47, 47A or 47B of the Native Title Act 1993 (Cth) apply), the Woppaburra People claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the Woppaburra People.

*Onshore Areas*

2. Over areas where a claim to exclusive possession cannot be recognised, the Woppaburra People claim the following rights and interests, being:
    a. the right to travel over, to move about and to have access to those areas;
    b. the right to hunt and to fish on the land and waters of those areas;
    c. the right to gather and to use the natural resources of those areas such as food, medicinal plants, timber, stone and resin;
    d. the right to take and to use the natural water on those areas;
    e. the right to live, to camp and erect shelter and other structures on those areas;
    f. the right to light fires;
    g. the right to conduct and to participate in the following activities on those areas:
        i. cultural activities;
        ii. cultural practices relating to birth and death, including burial rites;
        iii. ceremonies;
        iv. meetings;
        v. teaching the physical and spiritual attributes of sites and place on those areas that are of significance under law and custom;
    h. the right to maintain and to protect sites and places on those areas that are of significance under their traditional laws and customs;
    i. the right to share and exchange subsistence and other traditional resources obtained on or from those areas;
    j. the right to be accompanied on to those areas by persons who, though not native title holders, are:
        i. people required by traditional law and custom for the performance of ceremonies or cultural activities on the area;

ii. people who have rights in relation to the areas according to the traditional laws and customs acknowledged by the estate group members;

iii. people required by the estate group members to assist in, observe, or record traditional activities on the areas;

k. the right to make decisions about the use and enjoyment of the areas by Aboriginal People who recognised themselves to be governed by the law and customs acknowledged by the Woppaburra People; and

l. the right to conduct activities necessary to give effect to the rights referred to in (a) to (k) hereof.

*Offshore Areas*

3. In relation to the land and waters seaward of the high water mark, the nature and extent of the native title rights and interests that are possessed under the traditional laws and customs of the Woppaburra People are, subject to the traditional laws and customs that governed the exercise of such rights and interests, rights to access to, and use and enjoyment of resources in or on those areas, being:

   a. the right to fish, hunt, gather and use living and plant resources, including the right to hunt and take turtle and dugong, for personal, domestic, non-commercial and communal uses;

   b. The right to access, move about in and on and use and enjoy those areas including:

      i. for religious, spiritual or cultural purposes or to engage in religious, spiritual or cultural practices; or

      ii. maintain sites, places and areas of religious, spiritual or cultural significance.

4. The native title rights and interests are subject to:

   a. The valid laws of the State of Queensland and the Commonwealth of Australia; and

   b. the rights conferred under those laws.

5. The native title rights and interests do not include the ownership of any minerals, petroleum or gas that are wholly owned by the Crown.

**Consideration**

[90] I note that the right to light fires in onshore areas of the application area where exclusive possession cannot be recognised, at paragraph 2(f), is qualified in Attachment F/M to be for 'domestic purposes, but not for the clearance of vegetation' — at [36].

[91] In respect of the right at paragraph (2)(l), I understand that this right ensures that members of the native title claim group are not prevented from carrying out any activity that is undertaken as part of, or in connection with exercising one of the rights at paragraphs (2)(a) to (k). However, I am unable to understand how this right has meaning specifically as a native title right or interest. Attachment F/M, in my view, does not elucidate its meaning for the purposes of s. 190B(4).

**Conclusion**

[92] In my view, the right and interest at paragraph (2)(l) is not understandable or has meaning. This does not mean that this right does not exist. I am however unable to understand how this right and interest is claimed in relation to the land and waters of the application area and the

material within the application, specifically Attachment F/M, does not provide any clarification. For the purposes of s. 190B(4), I am not satisfied that this right and interest is readily identifiable.

[93] In respect of the remaining rights and interests, including the qualification to the right at (2)(f), I am satisfied that they are understandable and have meaning.

[94] I note that although the claim to exclusive possession is broadly asserted, I am of the view that it does not offend the requirements of this provision — *Strickland* at [60].

[95] I have considered the description of the native title rights and interests claimed and find that, with the exception of (2)(l), the rights and interests claimed are sufficient to fall within the scope of s. 223 and are readily identifiable as native title rights and interests.

[96] 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.

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

### The requirements of s. 190B(5) generally

[98] Whilst assessing the requirements of this provision, I understand that I must treat the asserted facts as true and consider whether those facts can support the existence of the native title rights and interests that have been identified — *Doepel* at [17] and *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [57], [83] and [91].

[99] Although only a general description of the factual basis is required, the Full Court in *Gudjala FC* noted that 'the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar … and be something more than assertions at a high level of generality' — at [92].

[100] Accordingly, although the facts asserted are not required to be proven by the applicant, I consider the factual basis must provide sufficient detail to enable a 'genuine assessment' of whether the particularised assertions outlined in subsections (a), (b) and (c) are supported by the claimant's factual basis material. Further, I note that where the applicant's material contains assertions that 'merely restate the claim' or 'is really only an alternative way of expressing the claim or some part thereof', that material 'does not assist in building the factual basis necessary

for assessing the application' — *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*) at [28] and [29] and *Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal* [2012] FCA 1215 at [43] and [48].

[101] I am therefore of the opinion that the test at s. 190B(5) requires adequate specificity of particular and relevant facts within the claimants' 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).

[102] The factual basis material is contained in Attachment F/M. The applicant has also submitted directly to the Registrar the following additional material in support of the factual basis:

- Attachment F/M with additional references not included in the application;
- the affidavit of [name deleted] affirmed on 31 October 2013;
- the affidavit of [name deleted] affirmed on 18 October 2013;
- the affidavit of [name deleted] affirmed on 10 August 2013; and
- the affidavit of [name deleted] affirmed on 31 August 2013.

[103] I proceed with my assessment of the sufficiency of the factual basis material by addressing each assertion below.

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

*The requirements of s. 190B(5)(a)*

[104] In *Gudjala 2007*, Dowsett J indicated that the condition at s. 190B(5)(a) required 'evidence [of] an association between the whole group and the area', although not 'all members must have such association at all times' — at [52]. His Honour also commented that 'there must be evidence as to such an association between the predecessors of the whole group and the area over the period since sovereignty' — at [52].

[105] The factual material must also be sufficient to support an asserted association with the entire claim area, rather than an association with only a part of it, and must contain more than 'very broad statements', which for instance have no 'geographical particularity' — *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) at [26]; see also *Corunna v Native Title Registrar* [2013] FCA 372 at [39] and [45] where Siopis J cited the observations of French J in *Martin* with approval.

*Information provided in support of the assertion at s. 190B(5)(a)*

[106] Attachment F/M provides the following relevant information:

- Aboriginal people were first observed in the application area around 1770 — at [5].
- The first record of Europeans visiting the application area occurred in 1865. They landed in the south of North Keppel Island (northern region of the application area) — at [6].
- In the 1860s, leases were obtained over North Keppel Island and Great Keppel Island (southwestern region) — at [7]. Fishing and pastoralism on the Keppel Islands saw European contact with the claim group on a more systematic basis from the 1870s onwards — at [8].

- Early accounts from 1867 describe the Woppaburra people as seafaring people. Today the claim group members continue to describe themselves as salt water or ocean people. Marine skills and knowledge of claim members were passed down by their predecessors and continue to be practiced by the current members — at [19].
- In 1898, conflicts between the Aboriginal people and pastoralists and regional fishermen in the claim area were reported in the Rockhampton regional press — at [9]. Anthropological and ethnographic material from that time included references to the '*Wop-pa-burra'* living on the Keppel Islands and the '*wappobura'* being the people from the Great Keppel Island — at [10]. The records indicate that they utilised the natural resources to make nets, fish hooks, harpoons, bags and baskets, oyster picks, nulla nullas (clubs), bark strippers and jewellery — at [62]. They hunted fish, turtles and dugong for food. Archaeological studies reveal the importance of shellfish, particularly oysters, fish and smaller mammals to the predecessors — at [62].
- Archaeological studies since 1979 indicate that the smaller islands, rocky outcrops and surrounding areas within the application area would have been exploited for their marine based resources — at [18].
- Between 1900 and 1902, the Woppaburra predecessors were removed from the application area and relocated to various missions. Many members of the claim group were relocated to Fraser Island and one to Yarrabah where they continued to observe and acknowledge their traditional laws and customs as well as other aspects of traditional lifestyle derived from their island and marine environment — at [13].
- Although removed to various missions, the Woppaburra people maintained their social identification and continued a strong association with their kin who relocated elsewhere. For instance, the great granddaughter of apical ancestor Fanny Lohse/Singh recalls the granddaughter of apical ancestor Yulowa visiting her family— at [11].
- Apical ancestor Yulowa '*Weerobilling*' was born around 1837 and was the headman or the doctor of the claim group. He, along with his wife, his son and his son's wife, were removed from the application area in 1902 — at [25].
- Apical ancestor Nellie '*Ooroong-ooran*' was born around 1868. She worked for the pastoralists on the application area around 1900 and was removed from the application area in 1902. Her granddaughter lodged the initial Aboriginal Land Application over the Keppel Island and her great grandson has been involved in site protection, promotion of Woppaburra cultural identity and other Woppaburra business since the 1980s — at [25].
- Fanny Lohse/Singh, another apical ancestor, was born around the 1860s (according to my recounting of the history). Her son was removed from the application area in 1902 at the age of eight — at [25]. He was a revered seaman and passed on the skills and knowledge he had learnt from an early age growing up in the application area to his descendants.
- Apical ancestor Oyster Maggie was born around the 1850s (according to my recounting of the history). She had four children who were all born at a traditional birthing place near [place name deleted] on North Keppel Island. She died around 1901 in the application area.

- Her eldest child, [name deleted], was born around 1885 and was removed from the application area in 1902 at the age of 18. She had ten children and taught her traditional language to at least her eldest two children. [Name deleted] died in 1973 and her eldest child became a significant Woppaburra elder who regularly visited other Woppaburra families and taught traditional language and knowledge.
- Her son, [name deleted], was born around 1887 and was removed from the application area in 1902 at the age of 15. He was close to the son of apical ancestor Fanny Lohse/Singh, and passed on traditional Woppaburra knowledge and skills pertaining to the ocean to his descendants — at [25]. [Name deleted] and his grandson returned to the application area in the late 1940s or early 1950s, which was the first time a Woppaburra person returned since the forced removals — at [54]. He would speak about their ancestors making and using canoes to travel to the mainland and that he would show his grandsons how to make canoes — at [63]; see also affidavit of [name deleted] at [112] to [113]. He would also speak of eating lizard, snakes, bird's eggs and bandicoots from the islands — Attachment F/M at [78]; see also affidavit of [name deleted] at [119] to [121].
- Her daughter, [name deleted], was removed from the application area in 1900 — Attachment F/M at [25].

- In 1984, 40 members of the claim group visited North Keppel Island — at [55].
- Claim members continue to make regular visits to the application area, sometimes travelling large distances, for the purposes of continued spiritual, cultural and physical ties to the application area — at [14].
- They continue to identify *mugga mugga*, the humpback whale as the group's totem, which connects the Woppaburra People to their dreaming — at [19]. The whale is described as their life source and helps keep their dreaming alive — affidavit of [name deleted] at [56]. The Woppaburra People are also said to share the water lily dreaming with the Darumbal People — at [80]. The Darumbal People are a sister clan to the Woppaburra People who live on the mainland — at [80] and [81].
- Current members continue to hunt and fish on the application area — Attachment F/M at [65] and [66]. They collect shells in the application area and make jewellery the same way their ancestors did — at [67] and affidavit of [name deleted] at [104]. They continue traditional burial rites, for instance a claim group member speaks of scattering her grandchild's ashes into the ocean of the application area and other members have repatriated the remains of their ancestors to the application area that had previously been held in museums using traditional burial rites including a smoking ceremony — Attachment F/M at [70] and [73].
- Current members have knowledge of places of significance, such as mythological places, ceremonial places, burial sites, middens, campsites and initiation sites — at [79] and [82]. For instance, the streams on North Keppel Island and the middens at [place name deleted] and [place name deleted] on Great Keppel Island are sacred places which current members of the claim group have visited after being told about those places by their predecessors — at [80], [81] and [83]. A claim group member says that she knows where,

having been told by her aunts and uncles, the initiation sites are located on the Great Keppel Island and North Keppel Island — at [82]; see also affidavit of [name deleted] at [33].

[107] The affidavits also contain information relevant to the association of the ancestors and their predecessors. For instance, in her affidavit [name deleted] states that:

> I am a Woppaburra Elder. I am the oldest surviving [descendant, the granddaughter,] of Nellie [Ooroong-ooran] a traditional woman from the Keppel Island.
>
> …
>
> The first time I set foot on the Island [in 1984, the same year as the reunion,] was overwhelming. I had a feeling that this is where your ancestors come from, they were there living on the Islands. I honestly did not expect to have such powerful feelings, I now understand these experience as part of our ongoing spiritual link to our land. I believe the ancestors recognised me and welcomed me home. I had this overwhelming feeling of how our people were taken away and that I was now being welcomed back.
>
> I stayed on Great Keppel Island for a week and walked around and fished and absorbed the place. It was a very powerful experience. After that I had to keep going back, I could not stay away. I went back pretty much every year for several weeks if not a month for many years after that.
>
> …
>
> I visited the middens along [place name deleted] and the ones along [place name deleted] and [place name deleted] [all these places are located in the south-west region of the application area]. I also visited the middens at [place name deleted] and the old camp site there [located in the centre of the application area].
>
> I visited the little caves around near [place name deleted] and those on [place name deleted]. It was the process of walking in the footsteps of my ancestors and understanding how they lived and moved around the Island.
>
> I found places where my ancestors sharpened their stone axes. I have a photo taken in the 1980's of one these places near Wreck Beach on Great Keppel Island. …
>
> The second trip was the first time I went to North Keppel. North Keppel or Konomie is mainly where we go for our Woppaburra meetings and business on the Island. The first time there I did the same thing I did on Great Keppel Island. We anchored off the beach and every day I walked the Island and visited its places.
>
> …
>
> I go back to the Islands for Woppaburra meetings and other business …
>
> It was when I was living on the yacht that I also found a dam that my ancestors built on Great Keppel Island. Our people knew it was there but no one could find it. But I found it. It was around there on Long Beach near the hill now called Mount Wyndham [mid-south region of application area]. Rocks had been piled up to dam to catch the water coming down. It is not too far from the beach. I have some photos of this place. …
>
> My ancestors used fish traps. There are the remnants of one at the end of Leekes Beach on Great Keppel Island. Most of it has washed away or been buried in the sand because there was no one left to maintain it.
>
> …

> I understand Grandma Nellie's tribal name was *oorangarang*. I also know Konomie means north wind and is the name of North Keppel Island. The north wind is significant probably because it ties the Islands together. It is the prevailing wind that ended up taking Captain Cook past our doorstep. I read that his ships anchored there and they saw our people waving and bellowing out in language to them.
>
> …
>
> [Name deleted] was a young woman when she was removed and [had] a lot of stories that she passed down to her family. …
>
> I try to pass down all that I know to my kids and grandkids. It is important for them to carry it on. It is important that they know where we come from. Despite having been removed, our people are part of that place. Our ancestors are still there to guide us and we need to be proud of who we are as a People — at [3], [29], [30], [32] to [35], [40], [41], [70], [72], [80], [81].

[108] In his affidavit, [name deleted] states that:

- His grandfather passed knowledge of the ocean from his early life in the application area to the younger generations. He says that they are 'sea people' and that the sea is in their blood — at [11] and [27].
- Woppaburra country is all the islands and the surrounding water — at [27].
- He learnt many things from his grandfather and his uncles, including how to make and set different types of nets depending on the types of fish that were around that time of the year, what the nets were used for and how to read the water to see where the fish were — at [27] and [28].
- They lived off the sea and ate everything they caught, including fish, shellfish, oysters and squid. He would go out to the sea with his uncles for a week at a time — at [29].
- He first went to the application area in 1979. An archaeologist was excavating a midden at that time. The archaeologist found a descent shaped fishhook that was later dated over five hundred years old, showing the period his ancestors were present on the islands — at [14] and [15].
- He speaks of being able to 'feel' his ancestors when he goes to the application area and always addresses them when there — at [18]. Growing up, the older generations were always talking about the spirits and the ancestors — at [45].
- He has eaten fish and shellfish from the application area, including the oysters off the rocks on North Keppel Island. The oysters were a traditional food source of his ancestors and that ancestor Oyster Maggie was given her name because she could quickly open oysters — at [32] and [33].
- His ancestors ate possums in the application area — at [39].
- The Woppaburra totem is the *mugga mugga* or whale — at [42].
- He says the traditional name for North Keppel Island is *Konomie*, which means the north wind and is a traditional woman's name handed down in many families. His grandfather's traditional name was [text deleted] — at [44].

[109] [Name deleted] says in her affidavit:

- She first went to the application area in the early 1980s — at [23].
- In 1982 or 1983, she took her aunt to the application area. She said that her aunt reminisced that it was where her dad and her ancestors were from and where they walked — at [24].
- She visited the application area with her aunt about three times and '[e]ach time was a very moving spiritual experience' — at [25].
- She went to the application area in 1984 for the big reunion, where 40 Woppaburra people gathered, and has returned countless times since then with her cousins, children and grandchildren. She tries to go back every year. When they visit the application area, they go where their 'ancestors were, along the beaches, up into the rainforest, and deep into the hills' — at [26] and [27].
- She has walked all over Great Keppel Island and North Keppel Island, including all the middens on Great Keppel Island. She says her grandfather had a special connection to Long Beach on Great Keppel Island and she always tries to go to there when she visits the Island — at [28].
- When she is on country, she talks to her ancestors, lets them know who she is and what she is doing. Her grandfather taught her to do this. She believes her ancestors are still present there and speaks to them to show her respect to them — at [29].
- She speaks of a drowning cave on a beach on Great Keppel Island, which is a men's site. She says that these places, and traditional burial and initiation sites, have become avoidance places that should not be disturbed — at [30] to [33].
- When on the application area, they eat anything they can catch such as oysters, pipis and crabs. They sit around a 'fire at night, cook it up and have a big feed'. When she is with her cousins they tell stories and sing. She says she can feel her ancestors watching them — at [34] and [35].

*Consideration*

[110] In *Gudjala 2007*, Dowsett J noted the necessity for the Registrar 'to address the relationship which all members claim to have in common in connection with the relevant land' — at [40]. In my view, this criterion should be considered in conjunction with his Honour's statement that the 'alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)' — at [39]. I consider that these principles are relevant in assessing the sufficiency of the claimant's factual basis for the purpose of the assertion at s. 190B(5)(a) as they elicit the need for the factual basis material to provide information pertaining to the identity of the native title claim group, the predecessors of the group and the nature of the association with the area covered by the application. In that regards, I consider that the factual basis material clearly identifies the native title claim group and acknowledges the relationship the Woppaburra people have with their country, being both of a spiritual and physical nature. The factual basis reflects the knowledge the claim group members have of traditional Woppaburra land and waters including the sites of significance, the dreaming stories for the waters of the area and the spirits that are present on and protect country.

[111] There is also, in my view, a factual basis that goes to showing the history of the association that those members of the claim group have, and that their predecessors had, with the application area—see *Gudjala 2007* at [51]. The factual basis indicates that the Woppaburra people have been present in the application area for at least five hundred years — affidavit of [name deleted] at [15]. The factual basis also contains references to the presence of the apical ancestors within the application area prior to sustained European contact on Woppaburra country, which I understand from the factual basis to have occurred around the 1870s. The asserted facts indicate that the apical ancestors were born in the claim area from around the 1830s to 1870s and that one of the ancestors, Oyster Maggie, died in the application area before 1902 when the remaining Woppaburra people were removed from their country. There are also references to the children of each of the apical ancestors, being the grandparents or great-grandparents of current members, being present on the claim area around the time of sustained European occupation of the area. For instance, ancestor Oyster Maggie's children were all born at a traditional birthing site near [place name deleted] on North Keppel Island. Subsequent generations of the Woppaburra families have all been present on the application area at various times, whether to visit or for other reasons.

[112] The factual basis also contains references to early ethnographic records which indicate that the predecessors utilised the natural resources of the application area to make nets, fishhooks, harpoons, bags, baskets, oyster picks, clubs, bark strippers and jewellery and hunted fish, turtles and dugong for food. Archaeological studies reveal that the ancestors used the smaller islands, rocky outcrops and surrounding areas within the application area for their marine based resources. When they returned to their country after the forced removal in the early 1900s, claim group members have continued to travel to the claim area, as individuals or in larger groups, and camp, visit sites, hunt, fish and utilise the natural resources of the application area for such purposes as making jewellery.

[113] The factual basis also demonstrates the spiritual association the Woppaburra people have with the application area and the history of that association. The Woppaburra people have knowledge of the dreaming stories and the associated whale and water lily totems which connects them to the dreamings. For instance, the whale is associated with a dreaming story and their presence in the waters provides a mythic connection linking the claim group to the dreaming and their country. The asserted facts also indicate that the predecessors of the claim group performed secret men's and women's business on sacred locations, such as the birthing location on North Keppel Island being a sacred woman's place, and burial rites with traditional burial sites being present on Great Keppel Island.

[114] The dreaming stories, spiritual beliefs, ceremonies and rituals have been passed down through the generations so that the younger generations continue to have a spiritual association with their country. Current claim group members speak of learning stories about their ancestors from their grandparents, parents and other family members and say that they continue to tell these stories to their children. They are told about and continue to believe in the presence of their ancestor's spirits on country and other spirits on North Keppel Island and Great Keppel Island that protects these islands from harm. For instance, the grandson of ancestor Oyster Maggie told his descendants dreaming stories, and taught them how to understand a person's spirit for the purposes of recognising their totem and giving them a traditional name, and how to read messages from their ancestors through animals and birds — see my reasons at s. 190B(5)(b)

below. In my view, this transfer of knowledge and belief system demonstrates the history of the spiritual association the Woppaburra people have with the application area.

[115] In my view, the factual basis provides information that is sufficient to support the assertion that the ancestors were associated, both spiritually and physically, with the application area prior to European contact. It is also, in my view, sufficient to support the assertion that this association has been continued by their descendants through to the current members of the claim group. The factual basis demonstrates the intergenerational transfer of knowledge about the dreaming stories and stories about their ancestors, sacred places, ceremonies, beliefs and other traditional practices.

[116] The Woppaburra people continue to travel and camp across the application area, visit sites and continue to have a spiritual connection to their ancestors and country. The Woppaburra people continue to acknowledge and observe their beliefs and practices regarding the spiritual dimension of their people and lands and the relationship between the group and their country — see my reasons at s. 190B(5)(b) below. In my view, these examples reveal a continuing association with the area covered by the application.

[117] For the purposes of s. 190B(5)(a), I must also be satisfied that there is sufficient factual material to support the assertion of an association between the group and the whole area. The factual basis predominantly contains references to locations on North Keppel Island and Great Keppel Island. Both of these islands are located in the western region of the application area. Attachment F/M and the affidavits contain references to the ancestors being in these areas and using its natural resources and the asserted facts provide that their descendants, including current claim members, visit, travel across, camp, hunt, fish and gather the natural resources of these islands.

[118] I note that the application area is relatively small. The vast majority of this area is comprised of the waters surrounding the islands. Apart from the two larger islands, there are a number of smaller rocks and islands within the claim area. Of relevance are some smaller islands and rocks in the eastern region of the application area, including Barren Island (or First Lump) and The Child. There is one general reference to these islands in the factual basis material, namely Attachment F/M provides that archaeological studies reveal that the ancestors used the smaller islands, rocky outcrops and surrounding areas within the application area for their marine based resources. There are no specific references of a current association to these islands and rocks. However, I note that these islands are not very large. Specifically, the larger of these islands, Barren Island, is approximately one $km^2$ and The Child is about 0.01 $km^2$. The distance from these islands to Great Keppel Island is about nine kilometres. The asserted facts indicate that current members of the claim group travel to and visit the islands in the application area and fish, hunt and gather resources there. Attachment F/M indicates that the members travel vast distances across the application area. The affidavit material also contains references of the claimants travelling in the waters of the application area to the islands. I infer that current members also travel to these smaller islands in the eastern region of the application area and use the surrounding waters. In addition, given the size of these islands/rocks, the proximate location to Great Keppel Island where current claim group members camp and visit sacred locations, and that it is asserted that they travel to and visit all the islands, I consider that there is a sufficient factual basis for the assertion of an association with these areas.

[119] I also consider that the claim group has a spiritual association with the whole of the country given that all the islands and rocks are surrounded by waters, particularly the eastern region, and the claimants believe that their dreaming and the associated whale totem is present in their waters. In my view, this dreaming provides a mythic connection linking the claim group to their country.

[120] From the above information, I consider that the factual basis is sufficient to support the assertion of an association, both physical and spiritual, 'between the whole group and the area' — see *Gudjala 2007* at [52]. In my view, the factual basis material provides sufficient examples and facts of the necessary geographical particularity to support the assertion of an association between the whole group and the whole area.

[121] Given the information before me, I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(a).

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

*The requirements of s. 190B(5)(b)*

[122] The definition of 'native title rights and interests' in s. 223(1) provides at subsection (a) that those rights and interests must be 'possessed under the traditional laws acknowledged, and traditional customs observed,' by the native title holders. Noting the similar wording between this provision and the assertion at s. 190B(5)(b), I consider that it is appropriate to apply s. 190B(5)(b) in light of the case law regarding the definition of 'native title rights and interests' in s. 223(1). In that regard, I have taken into consideration the observations of the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] 214 CLR 422; HCA 58 (*Yorta Yorta*) about the meaning of the word 'traditional' — see *Gudjala 2007* at [26] and [62] to [66].

[123] In light of *Yorta Yorta*, I consider that a law or custom is 'traditional' where:

- 'the origins of the content of the law or custom concerned are to be found in the normative rules' of a society that existed prior to sovereignty, where the society consists of a body of persons united in and by its acknowledgement and observance of a body of law and customs — at [46] and [49];
- the 'normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty' — at [47];
- the law or custom has been passed from generation to generation of a society, but not merely by word of mouth — at [46] and [79];
- those laws and customs have been acknowledged and observed without substantial interruption since sovereignty, having been passed down the generations to the claim group — at [87].

[124] I note that in *Gudjala 2009,* Dowsett J also discussed some of the factors that may guide the Registrar, or her delegate, in assessing the asserted factual basis, including:

- that the factual basis demonstrate the existence of a pre-sovereignty society and identify the persons who acknowledged and observed the laws and customs of the pre-sovereignty society — at [37] and [52];

- that if descent from named ancestors is the basis of membership to the group, that the factual basis demonstrate some relationship between those ancestral persons and the pre-sovereignty society from which the laws and customs are derived — at [40]; and
- that the factual basis contain an explanation as to how the current laws and customs of the claim group are traditional (that is laws and customs of a pre-sovereignty society relating to rights and interests in land and waters). Further, the mere assertion that current laws and customs of a native title claim group are traditional because they derive from a pre-sovereignty society from which the claim group is said to be descended, is not a sufficient factual basis for the purposes of s. 190B(5)(b) — at [29], [54], and [69].

*Traditional laws and customs regarding kinship and group identity*

[125] Attachment F/M provides that the claim group have a complex traditional cosmological belief system that prescribes modes of behaviour, rules and customs — at [26]. The members of the claim group are custodians of their ancestors' country and there is, therefore, an inherent connection between the group, being those descended from or belonging to the application area, and the obligations, responsibilities and appropriate behaviour to be exercised in the application area, and to the kin from that country. In this way, the rights and interests arising from this belief system are held communally among the families and descent groups and are attended by associated obligations — at [28].

[126] The claimants are bound together through Woppaburra songs, dances and language, history, places of significance, and the passing on of knowledge, law and custom — affidavit of [name deleted] at [29], [42] and [44]. The claimants identify as being Woppaburra and say Woppaburra is 'about being from the Keppel Islands' — see affidavit of [name deleted] at [24]. They know that their traditional country includes all the islands and all the water around them — at [27]. The claimants are aware of their ancestry and have been told stories by their grandparents, parents, aunts and uncles. They recognise other people as being Woppaburra if their ancestors came from the Keppel Islands and the surrounding waters — at [25]. It is therefore accepted that membership of the group is through descent from a Woppaburra apical ancestor and that people are bound to their identity through their responsibilities to the application area — affidavit of [name deleted] at [3] and [11]. The claimants say that Woppaburra people are 'sea', 'salt water' or 'ocean' people. They have been taught by their predecessors about the sea and traditional practices associated with it, such as how to catch fish and live off the waters surrounding their traditional country — at [28] and [32].

[127] The claimants continue their cultural practices in relation to Woppaburra language and system of respect for elders. For instance, a Woppaburra elder, who traces her ancestry back to apical ancestor Oyster Maggie, speaks of the importance of language in keeping Woppaburra 'culture alive' and says that apical ancestor Oyster Maggie's daughter and grandson spoke it and she herself knows some words and phrases which she has taught her children —at [1] and [68]. Her sister did a speech in Woppaburra language when the Woppaburra Land Trust was handed back on Great Keppel Island in 2007 — at [69]. She attests that a 'basic tenant of Woppaburra culture is the need to show respect to the elders' — at [77]. Respect is shown by asking permission and keeping the elders informed — at [76] and [77]. She has been told by her elders about the spirits associated with certain places in the claim area and about sites associated with women's

business. She was also taught the rules and responsibilities to country that ensure respect for her ancestors. She passes her knowledge to the younger generation — at [30], [47], [48] and [94].

[128] The claimants speak of the system of marriage that was followed by their predecessors, and is based on a person's parents and group classification — affidavit of [name deleted] at [109]. They say that the system is not strongly followed now because of the decline in the number of Woppaburra families — at [110]. However, claimants are still told by their elders, parents and grandparents if 'a love interest was too close', that they cannot marry a person because they are related, and that relationships between first and second cousins are not permitted — affidavits of [name deleted] at [35] and [name deleted] at [57].

*Traditional laws and customs regarding rights to country*

[129] Attachment F/M provides that the rights, responsibilities and interests held by the Woppaburra People in relation to their country are founded in their cosmological belief system — at [26]. Within this distinct belief system of rules and knowledge of their country's physical, spiritual and cultural landscape, their country has socio-political, economic and spiritual dimensions — at [27]. Rights to country are exercised by claim group members through descent from the ancestors who were in occupation of the application area — at [32].

[130] Many Woppaburra traditional laws and customs are derived from the need to manage the spiritual forces located within their environment. Such practices include avoiding specific places, site protection, announcing arrival and intended activity on country and providing an appropriate burial for the deceased — at [31].

[131] The affidavits refer to the importance of following rules and obligations regarding rights to country. A Woppaburra elder speaks of the system of permission required to access country, which the claim group and other Aboriginal groups continue to practice — affidavit of [name deleted] at [106] and [107]. She has knowledge of the many sacred and significant sites on the Great Keppel Island and North Keppel Island including the locations of dreaming sites and women's or men's places — at [47] and [55]. Her grandfather told her about the sacred streams and about the caves in the hills where there were burials — at [50]. The claimants have used these places for the repatriation of remains. She also speaks of burial places in the roots of the trees. These sacred sites are places of avoidance and can only be accessed with permission and respect — at [53]. Her grandfather told her that those sites need to be protected and she has knowledge of the protocols for protecting them. She has told her children about those places, the protocols and that they will have the responsibility to let their children know how to look after those places — at [130].

[132] Another claimant also knows the locations of their traditional burial grounds and initiation places and says that these places, which have now become avoidance places, must 'be treated with care and respect' — affidavit of [name deleted] at [33]. She says that the old homestead and drowning cave on Great Keppel Island are avoidance places that only men can visit — at [30] to [33].

[133] The claimants also speak of the importance of caring for country. They have knowledge of the plants and animals in the land and waters and how they behave. They have knowledge of the food on the land and waters of the application area and know how much to take, the seasons for

different foods, and how to fish and hunt. They also know how to protect and use the available resources — affidavit of [name deleted] at [119] to [122].

*Traditional laws and customs regarding spiritual and cultural knowledge*

[134] The alleged facts provide that the claim group's belief system comprise of rules and knowledge of their country's physical, spiritual and cultural landscape — Attachment F/M at [27]. The asserted facts also state that the claim group members continue to believe that their ancestors send them specific messages through 'message' birds, animals and the weather. Children continue to be given traditional names from country with associated characteristics. These and other practices situate the Woppaburra People within the cosmological system — at [30].

[135] The affidavits refer to dreaming stories for the claim area, in particular, the stories of the whale and water lily dreamings — see affidavit of [name deleted] at [56] and [80]. The claimants speak of their totems, have knowledge of the totems of their grandparents, parents and children and the customs and obligations associated with them — at [3], [4], [72], [73] and [76].

[136] The claimants consider that they are spiritually and physically connected to their country and their ancestors. They believe that their ancestors are still with them. They are able to feel the spirits of their ancestors on country and are able to call on the spirits for guidance when they need advice — affidavit of [name deleted] at [94]. When they visit the application area, the claimants talk to their ancestors, let them know who they are and what they are doing there, and they believe their ancestors welcome them — at [94]; see also affidavit of [name deleted] at [29]. They believe that the ancestors recognise them as their kin and that is why they can feel their spirit — affidavit of [name deleted] at [30]. The claimants speak of their ancestors appearing in dreams and taking them on spiritual journeys, reinforcing their cultural knowledge. The claimants pass the messages from their ancestors to appropriate claim group members or convey the message through other means such as art — at [29] and [129].

[137] Elders continue to give individuals traditional names by recognising a part of that person. There is a 'very spiritual dimension to this practice because you have to be able to really feel who they are' — at [12]. A traditional name describes a person's character and spirit and is the person's totem — at [72] and [73]. One claimant speaks of how she was given the name [text deleted] by her grandfather. She believes that she has a special connection to crows as they bring her messages from the spirit world. Her grandfather gave her this name 'because he could see these characteristics in [her] being' — at [3]. His traditional name was [text deleted] — at [4]. She was taught by her grandfather how to give traditional names and now as an elder she can give names to her children and grandchildren — at [72]. She says that a Woppaburra elder gave her daughter her traditional name, [text deleted] because the elder saw her daughter's creative spirit — at [74]. Her daughter has passed this name to her daughter and her daughter's son was given the traditional name [text deleted] — at [74]. Her daughter sought permission to use her grandfather's name [text deleted] for her son — at [76].

[138] The claimants believe they and their ancestors have a connection to birds and are taught by their parents and grandparents how to interpret the messages when they are seen — at [97]. At the reunion on the application area in 1984, curlews came from everywhere and were singing — at [91]. They believed it was the old people welcoming them back. This happened again when they went to the islands to repatriate the remains. A claimant says that every time she has gone to

the application area, she has seen a rare black cockatoo — at [96]. She believes it is her grandfather welcoming and watching over them. When her grandchildren see a crow, they say 'Nanny's watching us' as her name means crow woman and when they see ten crows, they know a whole mob is watching them — at [98]. She has taught her children and grandchildren to understand the signs given by birds — at [98].

[139] The claimants speak of the importance of burial on country and to repatriate their ancestor's remains on the application area because they were originally taken from there. They have knowledge of traditional burial rites and have repatriated 22 remains since the early 1990s. One claimant speaks of performing burial rites on country when her grandchild died and says that her scarf disappeared during the ceremony which she believes to be a sign that her grandchild will always be with her — at [99] to [101].

*Other traditional laws and customs*

[140] The claimants are taught how to hunt and fish the traditional way and how to make canoes, spears, carriers and nets like their ancestors did — affidavit of [name deleted] at [113], [118], [121] and [122]. Parents teach their children how to gather resources from country and make jewellery like their ancestors — at [102] to [104].

[141] I note that the information extracted in my reasons for s. 190B(5)(a) are also relevant to my consideration of the assertions made under subsection (b).

*Consideration*

[142] In my view, in order to support the assertion that the relevant laws and customs are 'traditional' in the *Yorta Yorta* sense, the factual basis must include factual details of:

- the relevant pre-sovereignty society from which the claim group is descended and the persons who acknowledged and observed the laws and customs of the pre-sovereignty society;
- the connection between the apical ancestors of the native title claim group and the pre-sovereignty society from which the laws and customs are derived; and
- the connection between the laws and customs acknowledged and observed by the pre-sovereignty society and those of the current claim group.

[143] In my view, the factual basis identifies a relevant pre-sovereignty society in the application area which consisted of the predecessors of the native title claim who acknowledged and observed a body of laws and customs. Attachment F/M sets out the nature, extent and the laws and customs of that society. The asserted facts provide that the Woppaburra People are a distinct and identifiable society that have a complex cosmological belief system that prescribes modes of behaviour, rules and customs and from which the rights, interests and responsibilities in relation to kin and country arise. Within this belief system, their country is said to have socio-political, economic and spiritual dimensions. The factual basis provides that the pre-sovereignty society acknowledged and observed a body of laws and customs regarding, amongst other things, rights to country, respect for elders, system of marriage, belief in their dreaming stories and totems, and practices such as burial rights, hunting, fishing and gathering resources for various purposes.

[144] I infer from the factual basis that the apical ancestors identified in Schedule A were likely to have been, given the time around which they were born, part of, with or without others, the pre-

sovereignty society at or around the time of sustained European occupation of the application area. In my view, the factual basis also identifies those ancestors as being within the application area where the pre-sovereignty society existed, prior to European contact — see my reasons at s. 190B(5)(a) above. From the affidavits, I understand the current claim members are descendants of these ancestors.

[145] I am also of the view that there is information contained within the factual basis material from which the current laws and customs can be compared with those that are asserted to have existed at sovereignty. The Woppaburra people observe a landholding system in which rights, responsibilities and interests are exercised by the descendants of the ancestors named in Schedule A. The asserted facts provide that they are the custodians of their traditional country and therefore many of their traditional laws and customs are derived from the need to manage and protect country, such as laws and customs regarding avoiding specific places, protecting sites, announcing arrival and intended activity on country to their ancestors, and burial rites. The factual basis demonstrates that claim group members have knowledge of sacred sites and places of avoidance on country, such as birthing and initiation sites and burial places. They continue to protect sites of significance and perform traditional burial rites on country. The younger generations learn these laws and customs through stories about their country and are shown traditional practices from their predecessors.

[146] The factual basis contains some information which speaks to the way the claim group continues to speak and preserve their language, have attempted to maintain a system of marriage, know traditional songs and dances and perform traditional practices such as hunting, fishing, gathering natural resources for various purposes such as making canoes and jewellery the traditional way — see also my reasons at s. 190B(5)(a) above. This in my view demonstrates that the laws and customs currently observed are relatively unchanged from those acknowledged and observed by their predecessors, and that they have been passed down the generations to the claimants today.

[147] The factual basis also contains references to current observance and acknowledgement of laws and customs of a spiritual nature. The claimants continue to talk to the spirits of their ancestors on country and continue to believe in the presence of spirits on North Keppel Island and Great Keppel Island that protect those islands. Current members have knowledge of traditional naming practices, which involves selecting a name after recognising the person's character, spirit and totem. For instance, an elder gave a current claim member the traditional name [text deleted] because the elder was able to see her creative spirit. They believe that this claim member has a gift which allows her ancestors to communicate directly with her and she creates art from those dreaming journeys. The claim members speak of their continued belief that their ancestors convey messages to them through animals and birds. For instance, the sightings of a black cockatoo in the application area is believed to be predecessor [text deleted] welcoming and watching over his descendants. The claim group members also speak of a system of respect where they acknowledge and speak to their ancestors' spirits when on country, seek permission from their elders for practices such as selecting traditional names and the responsibility of protecting sites of significance in the application area. They also speak of the need to seek permission from their elders for travelling across the application area, which is still practiced by other Aboriginal groups.

[148] The factual basis, in my view, is sufficient to support the assertion that the relevant laws and customs, acknowledged and observed by this society, have been passed down through the generations, by word of mouth and common practice, to the current members of the claim group, and have been acknowledged by them without substantial interruption. I infer that, given the level of detail in the continued acknowledgement and observance of the group's cultural traditions, and the fact that there are references to the children and grandchildren of the apical ancestors teaching their descendants the laws and customs, the apical ancestors would have also practiced these modes of teachings. It follows that, in my view, the laws and customs currently observed and acknowledged are 'traditional' in the *Yorta Yorta* sense as they derive from a society that existed at the time of European contact.

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

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

[150] This condition 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 accordance with their traditional laws and customs.

[151] In *Martin*, French J held that:

> [u]nder s. 190B(5)(c) the delegate had to be satisfied that there was a factual basis supporting the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs. This is plainly a reference to the traditional laws and customs which answer the description set out in par (b) of s. 190B(5) — at [29].

[152] Accordingly, meeting the requirements of this condition relies on whether there is a sufficient factual basis to support the assertion at s. 190B(5)(b) that there exist traditional laws and customs which give rise to the claimed native title rights and interests. 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.

[153] 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:

> [c]lear 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].

*Consideration*

[154] There is, in my view, information within the factual basis material that goes to explaining the transmission and continuity of the native title rights and interests held in the application area in accordance with relevant traditional laws and customs.

[155] In their affidavits, the claimants say that the younger generations are told stories and taught practices from their predecessors about what they have learnt from their early life growing up on the application area or from their own predecessors who may have grown up there. The claimants speak of their direct predecessors, namely their parents and grandparents, and other family members telling stories about their ancestors and the land and waters of their country.

Their predecessors told them stories about their dreaming and totems, that the ancestor's spirits are present on country and that other spirits protect the islands in the application area, such as North Keppel Island. The predecessors taught their descendants about respect, traditional naming practices and totems, traditional language, sites of avoidance and other significant sites in the application area and showed traditional practices such as how to fish and hunt the traditional way. The predecessors told the claimants that they have a responsibility to protect their significant sites and taught them the protocols of protecting them. The claimants speak of telling these stories, teaching the laws and customs and showing these practices to their own children and grandchildren — see affidavits of [name deleted] and [name deleted].

[156] In reaching my view in relation to this requirement, I have also considered my reasons above in relation to s. 190B(5)(b) and in particular that:

- the relevant pre-sovereignty society has been clearly identified and some facts in relation to that society have been set out;
- there is some information pertaining to the acknowledgement and observance of laws and customs by previous generations of Woppaburra people in relation to the application area;
- the factual basis was sufficient to support an assertion of a pre-sovereignty society acknowledging and observing a normative system.

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

**Conclusion**

[158] 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.

[159] The claimed native title rights and interests that I consider can be prima facie established are identified in my reasons below.

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

[160] The requirements of this section are concerned with whether the native title rights and interests, identified and claimed in this application, can be *prima facie* established. Thus, 'if on its face a claim is arguable**,** whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis' — *Doepel* at [135]. Nonetheless, it does involve some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed' — at [126], [127] and [132].

[161] I note that this section is one that permits consideration of material that is beyond the parameters of the application — at [16].

**Native title rights and interests**

[162] In *Gudjala 2007*, Dowsett J stated that the requirements of s. 190B(6) are to be considered in light of the definition of 'native title rights and interests' at s. 223(1) — at [85]. His Honour further noted the observations of the High Court in *Yorta Yorta* that the claimed native title rights and interests:

> must nonetheless be rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the peoples in question. Further, the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs. For the reasons given earlier, "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 — *Yorta Yorta* at [86], cited in *Gudjala 2007* at [86].

[163] I must, therefore, consider whether, prima facie, the individual rights and interests claimed:

- exist under traditional law and custom in relation to any of the land or waters in the application area;
- are native title rights and interests in relation to land or waters; and
- have not been extinguished over the whole of the application area.

[164] The 'critical threshold question' for recognition of a native title right or interest under the Act 'is whether it is a right or interest "in relation to" land or waters' — *Western Australia v Ward* [2002] HCA 28 (*Ward HC*) per Kirby J at [577]. His Honour noted that the phrase 'in relation to' is 'obviously very broad'. That phrase was also considered by the Full Federal Court stating '[t]hat the words 'in relation to 'are of wide import' — *Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [93].

[165] Having examined the native title rights and interests set out in Schedule E of the application, I am of the opinion that they are, prima facie, rights or interests 'in relation to land or waters.'

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

> [n]ative title *owes its existence and incidents to traditional laws and customs*, not the common law. The role of the common law is limited to the recognition and protection of native title. That recognition and protection *depends on native title not having been extinguished* and its not having incidents that are repugnant to the common law. Thus … s 223(1)(c) "requires examination of whether the common law is inconsistent with the continued existence of the rights and interests that owe their origin to Aboriginal law or custom" [emphasis added] — at [110].

[167] Further, whilst the exercise of native title rights and interests 'may constitute powerful evidence' of both the existence and content of those rights and interests, the statutory scheme (including s. 223(1)(a)) is directed towards their possession, not their exercise, pursuant to the

traditional laws and customs. The 'continuity of the chain of possession' may also be relevant — *Yorta Yorta* at [84] to [85].

[168] I am therefore of the view that a claimed native title right and interest can be prima facie established if the factual basis is sufficient to demonstrate that they are possessed pursuant to the traditional laws and customs of the native title claim group.

[169] I also note that I consider that Schedules B and E of the application sufficiently address any issue of extinguishment, for the purpose of the test at s. 190B(6).

[170] Before I consider the rights and interests claimed, I note that my reasons at s. 190B(6) should be considered in conjunction with, and in addition to, my reasons and the material outlined at s. 190B(5).

**Rights prima facie established**

*Over areas where a claim to exclusive possession can be recognised, the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the Woppaburra People*

[171] The majority of the High Court in *Ward HC* considered that '[t]he expression "possession, occupation, use and enjoyment … to the exclusion of all others" is a composite expression directed to describing a particular measure of *control over access to land* [emphasis added]' — at [89]. The High Court further noted that expression, collectively, 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 [93].

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

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

[173] I also note the Full Court's observations in relation to control of access to country that:

> [i]f control of access to country flows from spiritual necessity because of the harm that "the country" will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive. The relationship to country is essentially a "spiritual affair". It is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people. The question of exclusivity depends upon the ability of the [native title holders] effectively to exclude from their country people not of their community. If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have … an exclusive right of possession, use and occupation — at [127].

*Consideration*

[174] The above paragraphs point to the nature of this right in land and waters. In examining whether the claimants' material prima facie establishes its existence, I am of the view that this right materialises from traditional laws and customs that permit the native title claim group to exhibit control over all others in relation to access to the land and waters.

[175] The factual basis is such that it is asserted that at the time of sustained European contact, there existed an association between the Woppaburra people and its land and waters — see my reasons at s. 190B(5)(a) above.

[176] Attachment F/M provides information in relation to the right of the Woppaburra people to speak for and make decisions about country including that:

- this right is an integral part of the traditional system of law and customs observed by the claim group and is inextricably linked to the right to be consulted and acknowledged as the traditional owners with decision-making rights over country — at [39] and [44];
- they maintain their right to be consulted about matters arising in relation to their country and that only they can speak for Woppaburra country — at [40]; and
- under their traditional laws and customs, the Woppaburra people consult their elders and appropriate senior members with knowledge on any matters affecting country even those of a trivial nature — at [49].

[177] In his affidavit, [name deleted] says that:

> As far as I am concerned as a Woppaburra … I only have a claim to the Keppel Islands and all the water that surrounds them. To be Woppaburra your ancestors have to have come from that place.
>
> If it is other Woppaburra People who are not doing the right thing on the Keppel Islands by making a mess of the place, giving other people permission without talking to the elders, taking too much – all that sort of thing – then that is a Woppaburra issue to be sorted out by the Elders and between the Woppaburra families. We have not had an issue like that. It [*sic*] always been our people fighting for the recognition as the Traditional Owners for that country with Council, government and developers — at [25] and [35].

[178] [Name deleted] says that:

> If someone was to come from the Torres Strait or maybe Western Australia and wanted to hunt turtle or dugong around the Keppel Islands, they need to ask permission from the Woppaburra People first — at [68].

[179] [Name deleted] says that:

> According to our law and culture, anyone who is not Woppaburra should ask permission from Woppaburra People before enter [*sic*] Woppaburra country. Obviously, since settlement, that practice has not been respected by the non-Aboriginal society.
>
> Now it is only other Aboriginal people who ask permission when they want to access someone else's country. It is in our culture. It is something we know to do. …
>
> I would not take something from another person's country because I know it is wrong. I need permission to take something from someone else's country, just as they need permission to be on and take something from Woppaburra country. Many non-Indigenous People do not

> always use respect for country and take sacred objects. Some have got very sick until the sacred objects have [been] returned — at [106] to [108].

[180] I am of the view that the factual basis material asserts that current members of the native title group maintain vast knowledge of their country. The knowledge of the laws and customs of the current members, as owners of their traditional land and waters, elicit that other people should seek permission from their elders or appropriate senior Woppaburra to access their country. In my view, such control flows from a right to speak for country and a spiritual necessity to protect country from harm and from country harming others. For instance, people who have taken sacred objects from the application area have fallen sick until the objects have been returned.

[181] I consider that this right is prima facie established.

*Onshore Areas: Over areas where a claim to exclusive possession cannot be recognised, the Woppaburra People claim the following rights and interests, being:*

*a. the right to travel over, to move about and to have access to those areas;*

*e. the right to live, to camp and erect shelters and other structures on those areas;*

[182] Attachment F/M indicates that the Woppaburra predecessors who were present on the application area at the time of sustained European contact enjoyed and asserted their proprietary rights to the lands and waters of the application area. Archaeological studies reveal the presence of middens, campsites, stone tools, scarred trees and burials sites which indicate that the application area was occupied and used by the predecessors — at [53].

[183] A claimant speaks of travelling across the application area visiting the old middens, campsites, caves and the dam that her ancestors built on the Great Keppel Island as well as climbing its hills and cliffs — affidavit of [name deleted] at [40]. She returns to the application area every year for several weeks — at [30] to [34]. She also speaks of her son constructing walkways on the application area — at [60].

[184] In my view, this right is prima facie established.

*b. the right to hunt and to fish on the land and waters of those areas;*

[185] The claimants speak of hunting, fishing and eating turtles, turtle eggs and oysters from the land of the application area and provide details of their ancestors eating turtle, turtle eggs, oysters and possums there — affidavits of [name deleted] at [32] and [33] and [name deleted] at [54].

[186] I consider this right to be prima facie established.

*c. the right to gather and to use the natural resources of those areas such as food, medicinal plants, timber, stone and resin;*

[187] [Name deleted] speaks of gathering resources in the claim area in accordance with traditional laws and customs:

> Our women were very good with their hands. I can weave too. I once brought a lot of long grass back from Konomie to make a basket.

> When I go to the Keppel Islands, I often collect the shells and make jewellery with them. It was just that really white shell that is large and circular, called a Nautilus. I've made lots of necklaces out of them.
>
> I believe that they are the same one[s] my ancestors used to make because you see them in some of the old pictures that were taken of our old people from before they were removed from the Islands. Our old people used to make necklaces, bangles, and other adornments out of them. [M]y parents showed us how to do it as kids when we'd all go to the beach — at [102] to [104].

[188] In my view, this right is prima facie established under Woppaburra traditional laws and customs.

*d. the right to take and to use the natural water on those areas;*

[189] The asserted facts indicate that there were sacred streams on North Keppel Island that were used by the ancestors. The claimants speak about places in the application area where fresh water can be found. I consider that the claim members would have used the natural waters of the application area whilst camping, hunting and gathering food such as pipis and oysters off the rocks. For instance, a Woppaburra elder says that they would 'get the pipis on the beach and boil them up in the kettle' — affidavit of [name deleted] at [122].

[190] I consider this right to be prima facie established.

*f. the right to light fires;*

[191] I note that this right has been qualified in Attachment F/M to be the right to 'light fires on the Application Area for domestic purposes, but not for the clearance of vegetation' in accordance with their traditional laws and customs. [Name deleted] speaks of visiting the application area and sitting around fires at night, cooking what they have hunted — at [34]. I infer that the ancestors of the native title claim group would have also exercised this right in a similar manner.

[192] I am of the view that the factual basis material prima facie establishes that this right, subject to the qualification specified above, is possessed pursuant to the traditional laws and customs of the native title claim group.

*g. the right to conduct and to participate in the following activities on those areas:*

*i. cultural activities;*

*ii. cultural practices relating to birth and death, including burial rites;*

*iii. ceremonies;*

*iv. meetings;*

*v. teaching the physical and spiritual attributes of sites and place on those areas that are of significance under law and custom;*

[193] The claimants speak of travelling to the application area for Woppaburra meetings and business — affidavit of [name deleted] at [35] and [40]. They speak of the importance of being buried on country and speak of burial trees and caves in the application area. They speak of performing burial rites and say that they have repatriated many remains of their ancestors that had previously been held in museums. The claim members speak of their direct predecessors

teaching them about men's and women's business and sites. For instance, a claim group member speaks of learning stories told about the spirit protecting North Keppel Island, which is a woman's dreaming place — affidavit of [name deleted] at [82].

[194] I am of the view that this right is prima facie established pursuant to the traditional laws and customs of the native title claim group.

*h. the right to maintain and to protect sites and places on those areas that are of significance under their traditional laws and customs;*

[195] The factual basis material indicates that the claimants inspect their sacred sites, participate in cultural heritage clearances and other community business, and conduct activities to protect those sites — Attachment F/M at [85] and [86]. For instance, a claim group member has constructed walkways to protect the middens — affidavit of [name deleted] at [60]. They speak of the importance of passing on knowledge to younger generations about where sacred sites are and the protocols for protecting those places — affidavit of [name deleted] at [130].

[196] In my view, this right is prima facie established under Woppaburra traditional laws and customs.

*i. the right to share and exchange subsistence and other traditional resources obtained on or from those areas;*

[197] A Woppaburra elder speaks of claim members sharing fish that they have caught in the application area. He says that 'that is … what our People do, we share what we have' — affidavit of [name deleted] at [33]. Another elder says, although in the context of the requirement of seeking permission to access country, that:

> [i]n some circumstances if someone asks permission, it is not right to say no. For instance, if someone needs a feed then it would not be right to tell them not to fish or hunt. The respect has to go two ways. Often it is appropriate to share. If you catch a turtle you share, if you catch a good feed of fish you share but you don't take too much — affidavit of [name deleted] at [69].

[198] I consider that this right is prima facie established under Woppaburra traditional laws and customs.

*k. the right to make decisions about the use and enjoyment of the areas by Aboriginal People who recognised themselves to be governed by the law and customs acknowledged by the Woppaburra People;*

[199] The way this right is expressed, in my view, exerts a degree of control indicating a level of exclusivity. I therefore consider that the case law in relation to this right is closely linked to that involving 'the right to determine use and enjoyment' of land. The High Court expressed some concern in *Ward HC* of non-exclusive rights expressed in exclusive terms and stated that 'without a right [as against the whole world to possession of land], it may be greatly doubted that there is any right to control access to land' — at [52].

[200] In *De Rose v South Australia* [2002] FCA 1342 (*De Rose*), however, O'Loughlin J recognised the non-exclusive right to make decisions about access to the application area for Aboriginal people who were *bound* by the traditional laws and customs of the native title holders — at [553]. In the consent determination in *Mundraby v Queensland* [2006] FCA 436 (*Mundraby*), the Court

recognised the non-exclusive right to 'make decisions in accordance with traditional laws and customs concerning access thereto and use and enjoyment thereof by aboriginal people who are *governed* by the traditional laws acknowledged, and traditional customs observed by, the native title holders [emphasis added]' — at [3(c)(ii)]. I also note that in another consent determination, the Full Federal Court held that:

> there is a clear distinction between a right to control access … and a right to make decisions about the use and enjoyment of land by Aboriginal people who recognise those decisions and observe them pursuant to their traditional laws and customs. The continued presence of the former is compatible with a pastoral leasee entitling the pastoral leasee to determine who has access to the land; the latter is not — *Ward v WA* [2006] FCAFC 283 at [27].

[201] In light of the case law cited above, I consider that there is a willingness for courts to uphold such non-exclusive rights in situations where those rights are qualified to be against persons who are *bound by the laws and customs of the native title holders*. The right being claimed here is, in my view, qualified or limited this way. I consider that where the material supports the prima facie existence of the right, it will be able to be recognised for the purposes of s. 190B(6).

[202] In my view, the factual basis demonstrates that claim group members continue to seek permission from their elders or other senior Woppaburra people with knowledge prior to accessing the application area — see, for instance, affidavit of [name deleted] at [36].

[203] In my opinion, this right is prima facie established under Woppaburra traditional laws and customs.

*Offshore Areas: In relation to the land and waters seaward of the high water mark, the nature and extent of the native title rights and interests that are possessed under the traditional laws and customs of the Woppaburra People are, subject to the traditional laws and customs that governed the exercise of such rights and interests, rights to access to, and use and enjoyment of resources in or on those areas, being:*

*a. the right to fish, hunt, gather and use living and plant resources, including the right to hunt and take turtle and dugong, for personal, domestic, non-commercial and communal uses;*

[204] The factual basis contains details of the Woppaburra predecessors and the current members hunting and fishing in the waters of the application area. Attachment F/M contains details of the anthropological and ethnographic material from the 1890s indicate that the Woppaburra ancestors utilised natural resources to make nets, fish hooks and harpoons and that they hunted fish, turtles and dugong — at [62]. Archaeological studies reveal that the smaller islands and rocky outcrops would have been exploited for their marine based resources — at [18].

[205] I consider that this right is prima facie established pursuant to Woppaburra traditional laws and customs.

*b. the right to access, move about in and on and use and enjoy those areas including:*

*i. for religious, spiritual or cultural purposes or to engage in religious, spiritual or cultural practices; or*

*ii. maintain sites, places and areas of religious, spiritual or cultural significance.*

[206] The claimants speak of swimming and travelling in the waters of the application area. They continue to believe in the dreamings that exist in the waters of their country creating a mythic

connection to country. They also say they perform traditional burial rites on country by throwing the ashes of the deceased in the waters so that the deceased are with their ancestors.

[207] I consider that this right is prima facie established under Woppaburra traditional laws and customs.

**Rights prima facie not established**

[208] I note that the provisions of s. 190(3A) of the Act are available to the applicant if there is further information which would support a decision under that section to include rights that are not prima facie established on the Register.

*Onshore Areas: Over areas where a claim to exclusive possession cannot be recognised, the Woppaburra People claim the following rights and interests, being:*

*j. the right to be accompanied on to those areas by persons who, though not native title holders, are:*

*i. people required by traditional law and custom for the performance of ceremonies or cultural activities on the area;*

*ii. people who have rights in relation to the areas according to the traditional laws and customs acknowledged by the estate group members;*

*iii. people required by the estate group members to assist in, observe, or record traditional activities on the areas;*

[209] I note that the Court allowed by consent a similarly worded right in *King v Northern Territory* [2011] FCA 582 (*King*) — at [8(j)].

[210] I consider that the factual basis primarily provides examples of current observance of this right. For instance, a Woppaburra elder speaks of his experience being accompanied on the application area by an archaeologist conducting studies on the application area:

> I first went to the Keppel Islands in 1979. It was an amazing experience. [An] archaeologist who has done so much work with our People on the Keppel Island was there doing a dig. I think it was some of his first work on the Island.
>
> The impression that stayed with me was of the crescent shaped fish hook [he] showed me from the midden excavation that was underway — affidavit of [name deleted] at [14] and [15].

[211] In my view, the factual basis material is not sufficient to indicate that this right is one that is held under the laws and customs passed down through the generations to the claimants. I am therefore unable to be satisfied that this right is traditionally based.

*l. the right to conduct activities necessary to give effect to the rights referred to in (a) to (k) hereof*

[212] I refer to my reasons under s. 190B(4) above, and consider that as this right and interest is not readily identifiable, it follows that it cannot be prima facie established.

**Conclusion**

[213] As I am satisfied that at least one of the native title rights and interests claimed has been prima facie established, 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.

[214] I consider the High Court's decision in *Yorta Yorta* and the Federal Court's decision in *Gudjala 2009* to be of primary relevance in interpreting the requirements of s. 190B(7). In the latter case, Dowsett J observed that it 'seems likely that [the traditional physical] connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs' — at [84]. In interpreting connection in the 'traditional' sense as required by s. 223 of the Act, the members of the joint judgment in *Yorta Yorta* felt that:

> the 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].

[215] I understand that for the purposes of s. 190B(7), I must be satisfied of a particular fact or facts, from the material provided, namely that at least one member of the claim group has or previously had the necessary traditional *physical* association with the application area — *Doepel* at [18].

[216] I refer to my reasons above at s. 190B(5)(b) that I am satisfied there is a sufficient factual basis to support the assertion that the Woppaburra people acknowledge and observe the traditional laws and customs of the pre-sovereignty society.

[217] I consider that the affidavits contain some facts that show a traditional physical association of the Woppaburra people with the application area. For instance, a Woppaburra claim member says:

> I first went back to the Keppel Islands in the early 1980s …
>
> In 1982 or 1983, I took my mum's oldest sister … to the Keppel Islands. It was an incredibly emotional experience. I still remember how she put her feet on the beach on Great Keppel Island and she sat down and cried. She picked up a handful of sand and just let it fall through her hands watching it. …
>
> I went over to the Keppel Islands probably three times with [my aunt] …

> I went back to the Keppel Islands in … 1984 for the big reunion of all the families whose ancestors had been removed. It was particularly significant because it was the largest gathering of Woppaburra People on the Islands since our old people were removed in 1902. There were around 40 of us.
>
> Since then I have been to Keppel Islands with my cousins, my children and now my grandchildren. I have been there countless times. I try to get back there every year. When we go, we walk all over the Island. We go where our ancestors were, along the beaches, up into the rainforest, and deep into the hills.
>
> I have walked all over Great Keppel Island and North Keppel Island. I understand that my grandfather had a special connection to Long Beach on Great Keppel Island. I always try to [go to] Long Beach when I go over there. I have walked through all the middens there.
>
> When I go on country I talk to my ancestors and let them know who I am and what I am doing. I was taught to do this from my grandfather. I think my cousins also do this. …
>
> When we go over to the Keppel Islands we eat oysters, pipis, crabs and anything we can catch. We sit around the fire at night, cook it up and have a big feed.
>
> When I am with my cousins, we sit around, tell yarns and sing — affidavit of [name deleted] at [23] to [29], and [34] to [35].

[218] Given the above, I am satisfied that at least one member of the claim group currently has or previously had a traditional physical connection with any land or waters within the application area.

[219] 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, and
>
> (b) either:
>
> (i) the act was an act attributable to the Commonwealth, or
>
> (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act;
>
> a claimant application must not be made that covers any of the area.
>
> (3) If:

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

(b) either:

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

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

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

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

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

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

[220] 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)**

[221] The geospatial assessment states that no determinations of native title fall within the external boundaries of the application area. The results of my own search of the Tribunal's mapping database confirm that there is no overlap with any native title determination at the time of making this decision. It follows that the application is not made in relation to an area for which there is an approved determination of native title.

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

**Section 61A(2)**

[223] The application is not made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply — see Schedules B and L.

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

**Section 61A(3)**

[225] I am satisfied that 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 that is, or has been, subject of a previous non-exclusive possession act, except to the extent that ss. 47, 47A or 47B of the Act may apply — see Schedules B, E and L.

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

## Conclusion

[227] In my view the application **does not** offend any of the provisions of ss. 61A(1), (2) and (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.

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

### Section 190B(9)(a)

[229] Schedule Q of the application provides that the native title claim group does not claim ownership of minerals, petroleum or gas wholly owned by the Crown.

[230] The application **satisfies** the subcondition of s. 190B(9)(a).

### Section 190B(9)(b)

[231] Schedule P of the application provides that the native title claim group does not claim exclusive possession over all or part of an offshore place.

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

### Section 190B(9)(c)

[233] There is nothing, in my view, within the application or accompanying documents which indicate that the native title rights and interests claimed have otherwise been extinguished.

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

### Conclusion

[235] The application **satisfies** the condition of s. 190B(9), because it **meets** all of the three subconditions, as set out in the reasons above.

*[End of reasons]*

# Attachment A

# Information to be included on the Register of Native Title Claims

| | |
|---|---|
| Application name | Woppaburra People |
| NNTT file no. | QC2013/008 |
| Federal Court of Australia file no. | QUD738/2013 |

In accordance with ss. 190(1) and 186 of the *Native Title Act 1993* (Cwlth), the following is to be entered on the Register of Native Title Claims for the above application.

## *Section 186(1): Mandatory information*

**Application filed/lodged with:**

Federal Court of Australia

**Date application filed/lodged:**

6 November 2013

**Date application entered on Register:**

7 March 2014

**Applicant:**

John Cummins, Lesley Barney, Joh-ann Coates, Samala Cronin, Yasmin Green, Nerak Morris, Robert Muir Snr, Robert Muir Jnr and Vincent Singleton

**Applicant's address for service:**

As appears on the extract from the Schedule of Native Title Applications

**Area covered by application:**

As appears on the extract from the Schedule of Native Title Applications

**Persons claiming to hold native title:**

As appears on the extract from the Schedule of Native Title Applications

**Registered native title rights and interests:**

1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where sections 238, 47, 47A or 47B of the Native Title Act 1993 (Cth) apply), the Woppaburra People claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the Woppaburra People.

*Onshore Areas*

2. Over areas where a claim to exclusive possession cannot be recognised, the Woppaburra People claim the following rights and interests, being:

   a. the right to travel over, to move about and to have access to those areas;

   b. the right to hunt and to fish on the land and waters of those areas;

   c. the right to gather and to use the natural resources of those areas such as food, medicinal plants, timber, stone and resin;

   d. the right to take and to use the natural water on those areas;

   e. the right to live, to camp and erect shelter and other structures on those areas;

   f. the right to light fires on the Application Area for domestic purposes, but not for the clearance of vegetation;

   g. the right to conduct and to participate in the following activities on those areas:

      i. cultural activities;

      ii. cultural practices relating to birth and death, including burial rites;

      iii. ceremonies;

      iv. meetings;

      v. teaching the physical and spiritual attributes of sites and place on those areas that are of significance under law and custom;

   h. the right to maintain and to protect sites and places on those areas that are of significance under their traditional laws and customs;

   i. the right to share and exchange subsistence and other traditional resources obtained on or from those areas;

   k. the right to make decisions about the use and enjoyment of the areas by Aboriginal People who recognised themselves to be governed by the law and customs acknowledged by the Woppaburra People; and

*Offshore Areas*

3. In relation to the land and waters seaward of the high water mark, the nature and extent of the native title rights and interests that are possessed under the traditional laws and customs of the Woppaburra People are, subject to the traditional laws and customs that governed the exercise of such rights and interests, rights to access to, and use and enjoyment of resources in or on those areas, being:

a. the right to fish, hunt, gather and use living and plant resources, including the right to hunt and take turtle and dugong, for personal, domestic, non-commercial and communal uses;

b. The right to access, move about in and on and use and enjoy those areas including:

i. for religious, spiritual or cultural purposes or to engage in religious, spiritual or cultural practices; or

ii. maintain sites, places and areas of religious, spiritual or cultural significance.

4. The native title rights and interests are subject to:

a. The valid laws of the State of Queensland and the Commonwealth of Australia; and

b. the rights conferred under those laws.

5. The native title rights and interests do not include the ownership of any minerals, petroleum or gas that are wholly owned by the Crown.

*[End of document]*