National Native Title Tribunal

Registration test decision

Application name	Bigambul People
Name of applicant	Russell Doctor, Elaine Georgetown, Veronica Jarrett, Rhonda Sandow, Roger Knox, Cyril Logan and Gary Woodbridge
NNTT file no.	QC2009/002
Federal Court of Australia file no.	QUD101/2009
Date application made	14 April 2009
Date application last amended	8 May 2014

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

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

Date of decision: 31 October 2014

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Heidi Evans

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 8 August 2014 and made pursuant to s 99 of the Act.

Edited Reasons for decision

Introduction

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

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

Application overview and background

[3] The Registrar of the Federal Court of Australia (the Court) gave a copy of the Bigambul claimant application to the Registrar on 8 May 2014 pursuant to s 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

[4] I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to this claim. This is due to the fact that the application has not been amended as the result of an order of the Court pursuant to s 87A, as is required by s 190A(1A). Further, in my view, s 190A(6A) does not apply due to the fact that the nature of the amendments do not fall within the scope of those amendments described in subsections (i) to (v) of s 190A(6A)(d). For example, Attachment F of the amended application has been revised to include new and additional material.

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

[6] The Bigambul native title determination application was first made on 14 April 2009. It was accepted by a delegate of the Native Title Registrar and its details entered onto the Register of Native Title Claims on 4 June 2014 pursuant to s 190A(6). It has remained on the Register since that time.

[7] On 15 December 2010, Collier J made orders pursuant to an application made under s 66B of the Act that the applicant be replaced. The Tribunal received these orders and made the appropriate changes to the entry on the Register for the application on 20 December 2010.

[8] On 14 April 2014, Rangiah J granted leave for the applicant to amend the application. The amended application was filed in the Court on 8 May 2014 and is now the subject of my consideration pursuant to s 190A(1).

Registration test

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

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

Information considered when making the decision

[11] 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.

[12] 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.

[13] I have set out below the information that I have considered in making my decision:

- amended Bigambul Form 1, filed in the Federal Court on 8 May 2014 (QC2009/002; QUD101/2009);
- previous Bigambul Form 1, filed in the Federal Court on 14 April 2009;
- geospatial assessment and overlap analysis dated 19 May 2014 (GeoTrack: 2014/0772);
- letter from the applicant's legal representative to the case manager dated 19 June 2014;
- 'Bigambul Native Title Determination Application Report: a preliminary anthropological report', by **[Anthropologist 1 – name deleted]**, dated December 2008, provided by the applicant's legal representative as additional material on 19 June 2014;
- affidavits sworn by each of the applicant persons pursuant to s 62(1)(a) and filed in the Court on 14 August 2014;
- decision of Collier J in *Doctor on Behalf of the Bigambul People v State of Queensland* [2010] FCA 1406.

[14] 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.

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

Procedural fairness steps

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

[17] On 15 May 2014, the case manager for the application wrote to the applicant, the State of Queensland (the State) and the representative body for the area, namely Queensland South Native Title Services (QSNTS), advising of the receipt of the amended application.

[18] In the letter to the State, the case manager advised that the Registrar's delegate was considering the applicability of ss 190A(1A) and 190A(6A) to the application, and that the State could provide submissions in relation to the applicability of these provisions within 7 days. The State did not make submissions in this regard.

[19] On 16 June 2014, I caused the case manager to write to the applicant, setting out a number of concerns I had regarding the ability of the amended application to satisfy certain conditions of the registration test. This included particular concerns about the affidavits filed pursuant to s 62(1)(a) of the Act, required to accompany the application.

[20] By letter dated 19 June 2014, the applicant's legal representative responded, including by providing additional material in the form of a report entitled, 'Bigambul Native Title Determination Application Report: A preliminary anthropological report', dated December 2008 (the anthropological report). In that response, the applicant's legal representative advised that new s 62(1)(a) affidavits would be sworn by the applicant persons and filed in the Court to replace the existing non-compliant affidavits.

[21] On 14 August 2014, the applicant filed replacement s 62(1)(a) affidavits in the Court, sworn by each of the applicant persons. These were provided to the Tribunal directly, and the Court confirmed that they were intended to accompany the amended application filed on 8 May 2014.

[22] By email dated 8 September 2014 from the applicant's legal representative, it was confirmed by the case manager that the applicant did not assert confidentiality in relation to any of the additional material provided, comprising the seven affidavits pursuant to s 62(1)(a), the letter from the applicant's legal representative of 19 June 2014, and the anthropological report. Consequently, the additional material was provided to the State by email from the case manager on 10 September 2014. The State was given until Wednesday 24 September 2014 to provide any comments in relation to the additional material.

[23] On Monday 22 September 2014, the State emailed the case manager confirming that the State did not wish to make any comments in relation to the additional material provided.

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.

[24] 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.

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

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

[27] Below I consider each of the particular parts of ss 61 and 62, which require the application to contain details/other information or to be accompanied by an affidavit or other documents.

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

[28] A description of the native title claim group is provided at Schedule A of the application. My understanding of the task at s 61(1) for the purposes of s 190C(2), following the decision in *Doepel*, is that it is only where on the face of the application itself it appears that the group described is a subgroup or part only of, or does not include all of the persons in the native title claim group, that the application will fail to meet the requirement.

[29] Having turned my mind to the description of the native title claim group at Schedule A, I do not consider that there is any part of that description that seeks to exclude persons from the group, or that the description fails to include all of the persons in the group.

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

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

[31] The names of the persons comprising the applicant appear on page 2 of the application, immediately above Part A. The address for service of the applicant appears at Part B of the application.

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

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

[33] The requirement at s 61(4) for the purposes of s 190C(2) I understand to be nothing more than a requirement that the group is either named pursuant to s 61(4)(a), or described pursuant to s 61(4)(b), in the application – *Wakaman People 2 v Native Title Registrar* [2006] FCA 1198 (*Wakaman*) at [34]. I am not to consider the correctness of the information, or whether the description provided is sufficiently clear – *Wakaman* at [43]; *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala*) at [31] to [32].

[34] As above, a description of the native title claim group is contained in Schedule A of the application.

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

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

[36] The amended application was accompanied by affidavits sworn by six of the seven persons comprising the applicant. An affidavit from Gary Woodbridge did not accompany the amended application.

[37] Having considered the statements sworn to by each of the deponents (which were identical in terms), I formed the preliminary view that the affidavits did not comply with s 62(1)(a), specifically that they did not address the subject matter of s 62(1)(a)(v). Accordingly, I wrote to the applicant on 16 June 2014, indicating my view that the affidavits did not meet the requirements of s 62(1)(a) for the purposes of s 190C(2), and seeking an explanation of the absence of an affidavit from Gary Woodbridge. In a letter dated 19 June 2014, the applicant's legal representative advised that Gary Woodbridge was deceased and hence an affidavit had not been sworn by him in relation to the amended application.

[38] On 14 August 2014, the applicant filed in the Federal Court seven affidavits, one sworn by each of the named applicant persons, including Gary Woodbridge. I note that the affidavit sworn

by Gary Woodbridge is in different terms to the remaining six affidavits, which are identical in terms. I have considered all of the affidavits and whether the statements attested to comply with those required by ss 62(1)(a)(i)-(v).

[39] The affidavit sworn by Gary Woodbridge is dated 10 December 2008 and contains 13 paragraphs. Having considered the substance of those paragraphs, it is my view that the affidavit contains statements addressing each of the requirements set out in ss 62(1)(a)(i)-(v). The affidavit is signed and has been competently witnessed.

[40] As above, the affidavits sworn by the remaining applicant persons are all in identical form. Each of those affidavits has been signed, dated and is competently witnessed. The affidavits contain nine [9] paragraphs. In my view, there is no doubt that paragraph [8] contains a statement satisfying the requirements of ss 62(1)(a)(i) and (ii). Paragraph [7] clearly contains the statement required by ss 62(1)(a)(iii), that the deponent 'believe[s] that all the statements contained in the amended Form 1 are true'. Information pertaining to the process of decision-making adopted by the group in authorising the applicant to make the application I consider to be found in paragraphs [4] and [5] of the affidavits. In stating that this was a process agreed and adopted by resolution at the authorisation meeting, whereby decisions were to be made by the majority in attendance at the meeting, I consider that this information satisfies the requirement of ss 62(1)(a)(v).

[41] Regarding the statement required by ss 62(1)(a)(iv), 'that the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it', the affidavit contains a number of relevant statements. Those statements include that:

- 'I attended an authorisation meeting of the claim group for the native title claim' – at [3];
- 'I was authorised by the claim group to be an Applicant' – at [4];
- 'decisions were to be made by the majority of claim group members in attendance' – at [5]; and
- 'As a result of the outcome of the authorisation meeting, I am authorised to prosecute the native title claim and to deal with matters arising in relation to it' – at [6].

[42] I note that the affidavit does not contain a statement that the applicant is authorised by 'all the persons in the native title claim group'. In *Martin v Native Title Registrar* [2001] FCA 16, French J found that the affidavit required by s 62(1)(a) in relation to the application before him did not satisfy the requirement at s 62(1)(a)(v), on the basis that the deponent had 'failed to direct her mind to the matter she must establish'.

[43] In turning my mind to the statements excerpted above that appear in the affidavits, it is my view that the failure to include the words, 'all the persons', is a technical oversight, and does not suggest that the deponents have failed to turn their mind to this matter. I consider that the

statements contained in the affidavits make clear that the deponent was in attendance at a meeting of the members of the claim group, that is, 'all the persons', and that they understand that it was a resolution passed by those persons that resulted in their being 'authorised to make the application and deal with matters arising in relation to it'. In my view, the statements indicate that the deponents fully consider their authority as stemming from a resolution of the entire native title claim group.

[44] Consequently, I am of the view that the affidavits contain a statement of the type required by ss 62(1)(a)(iv).

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

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

[46] Subsection 62(1)(b) requires that the application contain the details specified in ss 62(2)(a) to (h), as identified in the reasons below.

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

[47] A written description of the external boundary of the area covered by the application is contained in Attachment B to Schedule B. Those areas within that boundary that are not covered by the application are set out in Schedule B.

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

[48] A map showing the external boundary of the application area is contained in Attachment C to Schedule C.

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

[49] Details of searches undertaken by the applicant are provided in Schedule D.

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

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

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

[51] Schedule F contains a general description of the factual basis on which it is asserted that the native title rights and interests exist.

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

[52] The activities currently undertaken by the members of the claim group in relation to the land and waters of the application area are listed in Schedule G.

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

[53] Details of other applications covering the area subject to the application are provided in Schedule H.

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

[54] Schedule HA contains details of any such notices relating to the application area.

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

[55] Schedule I contains details of notifications under s 29 issued in relation to the area covered by the application.

Conclusion

[56] 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 section 190A.

[57] It is my understanding of the condition at s 190C(3) that it is only where a previous application meets all of the criteria specified in subsections (a) – (c), that the requirement for me to consider whether there are common claimants is triggered – *Western Australia v Strickland* [2000] FCA 652 (*Strickland*) at [9].

[58] The geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services division and dated 19 May 2014 (GeoTrack: 2014/0772) provides that there is one overlapping claim, namely the Bigambul People claim (QUD101/2009; QC2009/002). I note that this is the subject application, now amended. The geospatial assessment also states that there has been no change to the area covered by the application, and having considered Schedule A of the application before me, and Schedule A of the previous Bigambul application, I note that there has been no change to the description of the Bigambul native title claim group.

[59] Noting that the only application that overlaps the current application is that same application which is now before me, amended, and that it is brought by the same native title claim group as the group on whose behalf the current application is made, it is my view that the

overlapping application cannot satisfy the criteria for a previous application. There cannot, in my view, be any consideration of common members between the claim groups for each of the overlapping applications, because they are, in fact, the same application brought by the same native title claim group.

[60] In light of this, I have not turned my mind to the remaining criteria set out in subsections (b) and (c).

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

Subsection 190C(4)
Authorisation/certification

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

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

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

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

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

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

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

[62] 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.

[63] Schedule R states that the application is not certified by QSNTS. Where an application is not certified, s 190C(5) provides:

(5) If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:

(a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and

(b) briefly sets out the grounds on which the Registrar should consider that it has been met.

[64] Schedule R of the application contains a statement to the effect that 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. Paragraph b) of Schedule R contains a further statement setting out information pertaining to the way in which that requirement has been met. It is my view that this information is sufficient in briefly setting out the grounds on which the Registrar should consider that those requirements are met.

[65] In this way, I consider that the procedural requirement of s 190C(5) is satisfied.

[66] Regarding the requirement at s 190C(4)(b), in *Doepel*, Mansfield J held that 'the Registrar is required to be satisfied of the fact of authorisation by all members of the native title claim group' – at [78]. In reaching this level of satisfaction, I note that I can have regard to information beyond that contained in the application and the s 62(1)(a) affidavits accompanying the application – *Strickland* at [57]. Mansfield J in *Doepel* relevantly commented that s 190B(4)(b) 'clearly involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given' – at [78].

[67] Immediately following the provision of s 190B(4)(b) is a note referring to the definition of 'authorise' in s 251B. That definition is excerpted above. In light of this, I consider that the material must address the requirement of s 251B, and specifically, the process of decision-making used by the group in authorising the applicant.

[68] The information in Schedule R of the application provides that '[t]he Applicants rely on the authorisation meeting of the claim group held on the 5 June 2010'. Further information pertaining to this meeting is contained in an affidavit sworn by claimant **[Claimant 1– name deleted]** on 9 July 2010, and an affidavit sworn by anthropologist **[Anthropologist 2 – name deleted]** on 13 July 2010. Those affidavits provide the following information about the authorisation meeting:

- the meeting took place at Boondall in Brisbane on Saturday 5 June 2010;
- the purpose of the meeting was to determine whether the applicant was authorised to represent the claim group and if not to select a replacement applicant;
- with the approval of those at the meeting, **[Claimant 1– name deleted]** chaired the meeting and had the outcomes of the meeting recorded;
- **[Anthropologist 2 – name deleted]** attended the meeting and was assigned the task of ensuring that persons who attended the meeting and intended to participate were recorded on attendance sheets;
- 146 people attended the meeting all of whom asserted to be members of the Bigambul native title claim group;
- **[Anthropologist 2 – name deleted]** had also attended the original authorisation meeting for the native title determination application and his view is that the number of persons at the meeting on 5 June 2010 was approximately twice the number in attendance at the original

meeting, and that the spread of representation of the descendants of the apical ancestors was about the same at each meeting;

- **[Claimant 1 – name deleted]** recalls that all resolutions at the meeting were passed by overwhelming majority, and where there was dissent, **[Claimant 1 – name deleted]** caused **[Anthropologist 2 – name deleted]** to count the votes;
- an agenda and draft resolutions were provided to those in attendance prior to voting commencing;
- all resolutions were moved and seconded and on each occasion participants were given the opportunity to speak for or against any resolution;
- those in attendance agreed that there was no traditional process of decision-making for decisions of the relevant kind;
- subsequently, those in attendance agreed to and adopted a process for the purposes of making decisions at the meeting;
- that process involved decisions being made by the majority of the claim group members in attendance;
- at the meeting, those in attendance used the agreed to and adopted decision-making process to authorise the applicant to make the application and to deal with matters arising in relation to it.

[69] Certain documents in relation to the authorisation meeting are annexed to the affidavits. These include the attendance sheets for the meeting, and a document entitled, 'Summary of Outcomes for Bigambul People's Authorisation Meeting'. This latter document contains the meeting agenda and minutes of the meeting, including those resolutions that were passed at the meeting.

[70] Paragraph b) of Schedule R also contains information relevant to authorisation. It states that in addition to the authorisation meeting on 5 June 2010, the applicant persons rely on the decision of Justice Collier in *Doctor on behalf of the Bigambul People v State of Queensland* [2010] FCA 1406. Consequently, I have accessed a copy of that decision, and find that it contains various information regarding the authorisation meeting that took place in Boondall on Saturday 5 June 2010. A large proportion of that information is consistent with and merely repeats the facts set out above in relation to the meeting itself, and I have not, therefore, reproduced those facts again. The additional information regarding authorisation set out in Collier J's decision is set out below:

- public notice of the meeting was provided in six relevant newspapers around mid-May;
- the notice invited 'all members of the registered Bigambul People native title claimant group' to attend, and set out the description of the native title claim group as appears in Schedule A of the application;
- the notice stated the purpose of the meeting, namely to authorise a new set of persons to be the applicant;
- the notice also stated that transport assistance and attendance monies would not be provided;

- one of the applicant persons, Russell Doctor, caused notice of the meeting to be posted to members of the group for whom he had the address;
- this mail out took place after the notices appeared in the newspapers;
- that notice was in similar form to the one published in the newspapers, however it did not refer to transport assistance and attendance monies not being provided;
- QSNTS also arranged for notices to be mailed to members of the Bigambul People claim group who were on their mailing list;
- this notice was in the same form as that mailed out by Mr Doctor;
- notices were also hand-delivered to members of the claim group who could not be reached by post;
- it is unclear what form this notice was in, however it was either the same as that published, or that mailed out to members of the group;
- Mr Doctor hired two buses to be available to collect group members from Goondiwindi and Cherbourg who wished to attend the meeting;
- Mr Doctor arranged the buses on the understanding that he would be reimbursed by persons who travelled on the buses to the meeting;
- approximately 30 people from those communities travelled in the buses to the meeting on 5 June 2010.

[71] In *Strickland*, French J found that authorisation 'is a matter of considerable importance and fundamental to the legitimacy of native title determination applications', and is 'not a condition to be met by formulaic statements in or in support of applications – at [57]. In my view, the information before me pertaining to the authorisation meeting is of a relatively detailed nature, and does not rely on formulaic statements as the basis of the applicant's authority.

[72] Regarding whether the substance of that information is sufficient in allowing me to be satisfied of the fact of authorisation, in *Ward v Northern Territory* [2002] FCA 171 (*Ward*), O'Loughlin J considered the information before him pertaining to a meeting of claim group members to replace an applicant pursuant to s 66B, including authorisation of the new applicant persons. In relation to that meeting, O'Loughlin J held that:

> The information concerning the meeting…is wholly deficient. There is no information about that meeting. Who convened it and why was it convened? To whom was notice given and how was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded? – at [24].

[73] His Honour held that it was not essential that these questions be answered on a formal basis, but that their substance must be addressed. Having considered the information before me, I consider that the substance of these questions has been addressed. The material explains the

purpose of the meeting, how it was notified, the agenda, the way in which the meeting proceeded, who chaired the meeting, who attended the meeting (including copies of attendance sheets), how resolutions were passed, what those resolutions were, and how votes in favour and against were recorded.

[74] As set out above, in reaching the required level of satisfaction at s 190C(4)(b), I consider that the material must also address s 251B and the decision-making process used by the group to authorise the applicant. I note that statements within the affidavits sworn by the claim group members, and information contained in the meeting minutes attached to the affidavit of **[Claimant 1 – name deleted]**, provide that the group resolved that there was no particular process of decision-making under traditional laws and customs that must be complied with by them in making decisions about whether to replace the applicant. The information further provides that a process was agreed to and adopted by the group, involving a vote by majority. The process agreed to and adopted by the group also specified that where persons voted against a resolution, those against would be counted and recorded. The minutes of the meeting demonstrate that resolutions were passed at the meeting in accordance with this process, including the resolution to authorise the applicant to make the application and to deal with matters arising in relation to it.

[75] I note that where there is no relevant traditional decision-making process, s 251B(b) does not mandate any one particular decision-making process, only that it be one that is agreed to and adopted by the persons in the native title claim group – see *Fesl v Delegate of the Native Title Registrar* [2008] FCA 1469 at [71]. In light of the information before me regarding the agreement and adoption by the group of the particular process set out at Resolution 3 of the meeting minutes, and the information regarding the way in which the remaining resolutions of the meeting were passed in accordance with this process, I consider that the material satisfies the requirement at s 251B.

[76] Regarding the way in which the meeting was notified, and whether it can be said that the applicant is authorised by 'all the persons in the native title claim group', in *Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land & Water Conservation NSW* [2002] FCA 1517 (*Lawson*), Stone J held that where authorisation was to be by way of an agreed to and adopted decision-making process, it was sufficient that every reasonable opportunity was extended to the members of the group to attend the meeting and participate in the decision. Her Honour held that:

> In s 251B(b) there is no mention of 'all' and in my opinion the subsection does not require that "all" the members of the relevant claim Group must be involved in making the decision. Still less does it require that the vote be a unanimous vote of every member. Adopting that approach would enable an individual member or members to veto any decision and may make it extremely difficult if not impossible for a claimant group to progress a claim. In my opinion the Act does not require such a technical and pedantic approach. It is sufficient if a decision is made once the members of the group are given every reasonable opportunity to participate in the decision-making process – at [25].

[77] I note that the material shows that the meeting was widely notified, both publicly and personally, and that both Mr Doctor and QSNTS played a role in ensuring members of the group had sufficient notice of the meeting. While the public meeting specified that transport assistance was not available, Mr Doctor did hire two buses for the purposes of helping people attend the meeting. The personal notice was silent on the availability of transport to the meeting. I do not consider, however, that this minor discrepancy resulted in a failure by the conveners of the meeting to extend every reasonable opportunity to members of the group to attend the meeting. The material demonstrates that only 30 persons took advantage of the bus transport, and I consider that regardless, the attendance at the meeting overall was strong, being 146 persons. I do not consider that those to whom the buses were made available were placed at any significant advantage over the remaining members of the group, noting that Mr Doctor had informed the travellers that he expected to be reimbursed for the cost of the transport.

[78] The material further indicates that all of the resolutions put forward at the meeting were passed by overwhelming majority, and therefore, I consider that the absence or presence of the 30 persons was unlikely to have any significant effect on the outcome of the meeting. In addition to this, I note that I have not received any information refuting the way in which the meeting was notified, or refuting the applicant's authority in making the application. Consequently, in the circumstances, I am of the view that every reasonable opportunity was extended to the members of the Bigambul People native title claim group to attend the meeting on Saturday 5 June 2010.

[79] In being satisfied that the applicant persons are all members of the native title claim group, I have relied upon the statements sworn by each applicant person in their affidavit accompanying the application pursuant to s 62(1)(a) that they are such a member, and that the statements contained in the application are true.

[80] For the reasons set out above, I am therefore satisfied that the applicant is a member of the native title claim group and is authorised to make the application and to deal with matters arising in relation to it, by all the other persons in the native title claim group.

[81] The application satisfies the requirement of s 190B(4)(b).

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.

[82] Noting the reference within the terms of s 190B(2) to the information contained in the application by way of ss 62(2)(a) and (b), it is my understanding that it is to this information that I must direct my attention in undertaking the task at s 190B(2).

[83] Schedule B of the application refers to Attachment B as containing a description of the land and waters covered by the application. Attachment B is entitled, 'Technical Description – QUD418/08 Bigambul People (QC08/12)', and contains a metes and bounds description of the external boundary of the application area. The description references geographic coordinate points, the NSW-Queensland border and topographic features. It was prepared by the Tribunal's Geospatial Services and is dated 16 January 2009.

[84] Schedule B of the application also contains a number of general exclusion clauses, that is, clauses describing areas within the external boundary that are not covered by the application.

[85] Schedule C refers to Attachment C as containing a map showing the external boundaries of the area covered by the application. Attachment C is entitled, 'A map showing the external boundaries of the claim area', and contains an A4 copy of a map, many of the details of which are illegible in the copy provided.

[86] The geospatial assessment prepared by the Tribunal's Geospatial Services concludes that despite the lack of clarity in the map provided, the map and the written description are consistent and identify the application area with reasonable certainty. In addition to this, the geospatial assessment provides that the area covered by the application has not been amended or reduced, and does not include any areas that have not previously been claimed.

[87] I have considered the map and description in the application before me and agree with the geospatial assessment that the application area is identified with reasonable certainty. I do not consider that there is anything problematic in the use of general exclusion clauses in Schedule B of the application to describe those areas within the application area that are not covered by the application – see for example *Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*) at [50] - [55].

[88] Consequently, I am satisfied that the information and map contained in the application are sufficient for it to be said with reasonable certainty whether the native title rights and interests are claimed in relation to particular land or waters.

[89] 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.

[90] A description of the persons comprising the native title claim group is contained in Schedule A of the application. Schedule A appears as follows:

> The native title claim group ("hereafter the claim group") on whose behalf the claim is made is the Bigambul People.
>
> The Bigambul People are the biological descendants of the following people:
>
> 1. Queen Susan known also known as Granny Susan, also known as Susan of Welltown;
> 2. "Sally", mother of Mary Ann Beng;
> 3. Nellie of Goondiwindi
> 4. Nellie Yumbeina
> 5. Jack Noble
> 6. Sally Murray

[91] In relation to the task at s 190B(3), in *Doepel*, Mansfield J held that the focus 'is whether the application enables the reliable identification of persons in the native title claim group' – at [51]. His Honour further stated that the correctness of the description was not to be the focus of the condition at s 190B(3), and that it would be incorrect for the Registrar to consider whether those persons described do in fact qualify as members of the group – at [37]. This approach was approved by Kiefel J in *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 (*Wakaman*) at [34].

[92] In *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*), in an aspect of the decision not criticized by the Full Court on appeal, Dowsett J adopted a similar approach, finding

that the condition 'requires only that the members of the claim group be identified, not that there be any cogent explanation of the basis upon which they qualify for such identification' – at [33].

[93] Having considered the description set out in Schedule A and excerpted above, it is my view that those persons on whose behalf the application is made are the Bigambul People, and that a person may only be a member of the Bigambul People, if they are a biological descendant of one of the six named apical ancestors. In this way, I understand that to determine whether an individual is a member of the group, one would need to undertake an investigation, or inquiry, as to whether they are biologically descended from one of the named apical ancestors.

[94] In *Western Australia v Native Title Registrar* [1999] FCA 1591 (*WA v NTR*), Carr J similarly dealt with an application where the members of the native title claim group were described by reference to a number of rules or criteria. In applying those rules, His Honour held that the mere fact that there was a need for factual inquiry when ascertaining whether any particular person was in the group 'does not mean that the group has not been described sufficiently'. In reaching this conclusion, Carr J referred to remedial character of the Act and the fact that it should, therefore, be construed beneficially – at [67].

[95] Consequently, while I consider that the identification of those persons falling within the description of the group would take some factual inquiry, I do not consider that this is an obstacle to the application satisfying the requirement at s 190B(3), and am satisfied that the members of the group have been described sufficiently clearly.

[96] 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.

[97] Noting the wording of the condition at s 190B(4), it is my understanding that my consideration is limited to the description contained within the application as required by s 62(2)(d) – *Doepel* at [16]. A description of the native title rights and interests claimed is contained in Schedule E of the application.

[98] In *Doepel*, Mansfield J held that the 'test of identifiablity' at s 190B(4) was whether the claimed native title rights and interests were 'understandable and have meaning' – at [99]. His Honour's comments also indicate that those rights and interests must be able to be understood as 'native title rights and interests' as defined in s 223(1) – at [99]. Despite this reference to the definition at s 223(1) by Mansfield J, in relation to the test at s 190B(4), I have not considered here whether each individual right and interest satisfies that definition, and have reserved that task for

the further merit condition at s 190B(6). My focus at s 190B(4) I consider to be the whole of the description.

[99] This focus is alluded to by Mansfield J in *Doepel* when His Honour approved the approach taken by the Registrar's delegate, stating that 'it was open to the Registrar to read the contents of Schedule E together, so that properly understood there was no inherent or explicit contradiction in Schedule E' – at [123]. Following the description of the native title rights and interests in Schedule E of the application before me, there are a number of qualifications. These include clarifications around the meaning to be applied to certain terms adopted in the description of the rights and interests, and the fact that the rights and interests claimed are subject to valid State and Commonwealth laws.

[100] I have turned my mind to the description contained in Schedule E, and in my view, having read the contents of that description together, including the stated qualifications, the rights and interests claimed are understandable and have meaning, and that there is nothing inherently contradictory in the description. In light of the definition of 'native title rights and interests' in s 223(1), I further consider that the rights and interests claimed can be understood as native title rights and interests.

[101] I note that the description at Schedule E of the application includes a claim to 'a 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 claim group'. In my view, there is nothing within a claim to a right of this nature that offends the condition at s 190B(4) – *Strickland* at [60].

[102] Consequently, I have formed the view that I am 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.

[103] 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.

[104] In my consideration of whether I am satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertions set out at subsections (a), (b) and (c), I have turned my mind to the case law authorities regarding the nature and quality of the material that may be necessary to satisfy those conditions. I note that I am not to approach the material as if it was 'evidence furnished in support of the claim' – *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala 2008*) at [93]; and see *Doepel* at [17]. I can, however, in relying on the statements contained in the affidavits sworn by the applicant persons pursuant to s 62(1)(a), accept the information contained in the application as true – see *Gudjala 2008* at [91] – [92].

[105] In *Gudjala 2008*, the Full Court shed light on the nature of the material required at s 190B(5) when it held that:

> The fact that the detail specified by s 62(2)(e) is described as a "general description of the factual basis" is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course, the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality – at [92].

[106] In this way, therefore, I understand that the information contained in the application and accompanying documents must be more than broad, generalized or formulaic statements, such that it can be seen to have relevance to the particular native title claimed, by the particular group, over the particular area covered by the application – see *Gudjala 2007* at [39].

[107] Finally, in satisfying myself in the terms required at s 190B(5), I understand that I am not restricted to the information contained in the application, and for that purpose, the sources referred to in s 190A(3) may be of relevance. I note that it is not, however, my role to search out material disclosing a factual basis in support of the claim. In *Martin*, French J confirmed that the provision of such material is 'ultimately the responsibility of the applicant' – at [23].

The applicant's factual basis material

[108] A general description of the factual basis on which it is asserted that the native title rights and interests claimed exist is contained in Schedule F. Schedule F refers to Attachment F as containing relevant information, and further states:

> In addition, the Applicant relies on the following reports:
> (a) Anthropological Report of **[Anthropologist 3 – name deleted]** dated 27 June 2011 and
> (b) The Pre-sovereignty Society of the Inland Border River People by **[Anthropologist 2 – name deleted]** October 2012 filed as annexure CSH 1 to the affidavit of **[Lawyer 1 – name deleted]** dated 25 October 2012.

The Applicant also relies on:

(c) Affidavit of **[Claimant 2 – name deleted]** filed 7 December 2011.

[109] I note that a copy of each of these latter three documents does not accompany the application.

[110] Having written to the applicant's legal representative to advise of my preliminary concerns regarding the application's ability to satisfy the test at s 190B(5), on 19 June 2014, the applicant provided additional material, consisting of a letter from the applicant's legal representative (also dated 19 June 2014), and a report entitled, 'Bigambul Native Title Determination Application Report: A preliminary anthropological report', by **[Anthropologist 1 – name deleted]**, dated December 2008 (the anthropological report).

[111] I now turn to consider the requirement in relation to each of the three assertions set out in the three paragraphs of s 190B(5).

Reasons for s 190B(5)(a)

[112] My understanding of the task at s 190B(5)(a), is that where the factual basis material is unable to demonstrate an association with the entire area claimed, the application may not be able to satisfy this condition of the registration test - *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) at [26]. Similarly, where the statements relied upon are generally broad and have no geographical particularity, and/or fail to specify the type of association asserted, the material may be found insufficient – *Martin* at [26].

[113] In *Gudjala 2007*, Dowsett J considered the requirement at s 190B(5)(a) and found that the following types of information may be necessary:

- information pertaining to a present association of the claim group as a whole with the area, although it is not a requirement that all members must have such an association at all times;
- information about an association of the predecessors of the whole group and the area over the period since sovereignty – at [52].

[114] Attachment F and the anthropological report provide the following general assertions pertaining to an association of the claim group and their predecessors with the land and waters of the application area:

- archaeological evidence, including scarred trees, burials, artefact scatters (denoting campsites), rock art, carvings and grinding grooves, indicate human occupation of the area by Indigenous persons, including social and cultural organisation, from as early as 10,000 BP – Attachment F at p 21;
- the first known recording of the name 'Bigambul' to describe those persons occupying the claim area was in 1845 – Attachment F at p 22;
- the first European contact in the area occurred in the late 1830s with pastoralists moving into the area – Attachment F at p 22;

- a historical source dated 1854 gives a distinct account of the Bigambul people with emphasis on 'boundary markers and exclusive possession Bigambul people could claim with regard to their traditional territory' – Attachment F at p 22;
- the historical literature demonstrates that the Bigambul were the land holding group present on the claim area prior to and during the pastoral settlement of the region (1830s to the late 1800s), and that they continued to reside within the region throughout pastoral settlement – Attachment F at p 22;
- the Bigambul apical ancestors are recorded through oral history and government documentation as being born on traditional Bigambul country and continuing throughout their lives to reside in the area, living and working on pastoral stations or in Aboriginal communities – Attachment F at p 23;
- numerous descendants of the apical ancestors also continued to reside and work within the application area – Attachment F at p 23;
- remaining on and working on their traditional country allowed Bigambul people to continue to teach succeeding generations of Bigambul people the traditional law and custom still held by the group as a whole – Attachment F at p 23;
- many members of the claim group continue to reside on the application area today – Attachment F at pp 21 to 24;
- the Bigambul people have had a continuous traditional physical, spiritual and cultural connection to the application area – Anthropological report at p 3;
- descent from a recognised Bigambul ancestor ensures each Bigambul individual has the right to belong to Bigambul country, belong to Bigambul community, and that each Bigambul person has responsibilities to country and authority to speak for country – Anthropological report at p 9;
- the initial phase of European encroachment on traditional Bigambul country was marked by struggles and violence – Anthropological report at p 13;
- following this, a period of cooperation developed, with Bigambul people taking up employment on pastoral properties – Anthropological report at p 13;
- some Bigambul people were removed to missions outside of their traditional country, such as Cherbourg, however, the evidence suggests that such individuals sought to return as soon as possible to that country – Anthropological report at pp 16 to 17;
- claimants today are able to share knowledge of the boundaries of their traditional country, and sites of significance within the application area – Anthropological report at p 9.

[115] In addition to these general assertions, the anthropological report sets out various information pertaining to the particular apical ancestors named in Schedule A of the application, by which the claim group is described. The birth dates and birth places of most of those apical ancestors is provided, along with information about their descendants. For example, the report provides that Granny Susan was at Welltown (within the application area) from 1842 onwards and crowned Queen in 1906. The report also provides that Granny Susan is the great grandmother of one of the members of the claim group. The report goes on to set out asserted facts about the dates of birth and marriage of various descendants of Granny Susan, and the areas with which they were associated, including Welltown, Bugunya and Goondiwindi –

Anthropological report at pp 16 to 17. The anthropological report also states that 'Nellie of Goondiwindi was born on Winton Station near Goondiwindi between 1865 and 1875' – at p 17.

My consideration – s 190B(5)(a)

[116] It is my understanding of the asserted facts set out in the factual basis material, that European contact in the area covered by the application began to occur in the late 1830s, with the arrival of pastoralists. Having turned my mind to the information within the factual basis regarding the apical ancestors, in particular asserted facts regarding dates of birth, death and marriage, and the places with which these events were associated, for each of those named individuals, I consider that the factual basis is sufficient to support an assertion that the apical ancestors of the Bigambul People were present in the application area around the time of European settlement in the area. In forming this view, I have also had regard to information obtained from the Tribunal's iSpatial database, regarding the location of places named in relation to the boundaries of the application area, and am satisfied that the majority of those places referred to fall within, or immediately adjacent to, the boundaries of the application area.

[117] Regarding an association of the predecessors of the Bigambul People with the application area since sovereignty, I note that the asserted facts taken from various historical sources refer to the first known presence of Bigambul People in the area as being in 1845. Prior to this time, including back to the date of British sovereignty and earlier, the material asserts that archaeological evidence demonstrates the use of the area by Indigenous people, and their cultural and social organization within the area. Such evidence includes scarred trees, burials, artefact scatters, rock art and grinding grooves. In addition to this, historical sources referred to in the material speak of the strong territorial ties and boundary markers adhered to in relation to the land and waters of the application area, observed as characteristic of the Bigambul People at European settlement.

[118] In light of this information, and having regard to the fact that prior to European settlement I consider that I can reasonably infer no significant interruption to the Bigambul People's occupation of the area would have occurred, I have formed the view that the factual basis is sufficient to support an assertion that the predecessors of the Bigambul People, from the time of sovereignty to the time at which European settlement took place in the area, maintained a physical association with the application area.

[119] As set out above, the factual basis also contains information about the descendants of the apical ancestors, including assertions that such persons were born, married and buried on the application area, and spent considerable parts of their lives living and working at pastoral stations on the application area. For example, the anthropological report provides that Granny Susan's son William is photographed in the 1890s at Welltown Station in full 'ceremonial regalia', that he married at Welltown in about 1900, and that his own son, William (Jnr) was born at

Bugunya in 1907 and married in 1929 at Goondiwindi – Anthropological report at p 16. I note that all of these locations are within the application area.

[120] Another example is seen where the report provides that the daughter of Nellie of Goondiwindi, Ada, was born around 1887-1889 at Calaguli Station, which is located between Talwood and Bugunya, and that her daughter Hannah was born at Winton Station in 1904. **[Claimant 4 – name deleted]**, one of Hannah's sons, is asserted as still living on country today – Anthropological report at p 17. Further information of this nature relating to the descendants of the other apical ancestors is also provided in the report – pp 15 to18.

[121] In this way, I understand that the material asserts **[Claimant 4 – name deleted]** to be the great grandson of Nellie of Goondiwindi. The anthropological report also provides that Granny Susan is the great grandmother of one of the members of the native title claim group. Noting that all of the apical ancestors are asserted in the material as being present on the area around the time of European settlement in the late 1830s, or in the decade or so following, it is my understanding that the material asserts there to be only three or so generations between the Bigambul apical ancestors and the members of the claim group today.

[122] The factual basis material provides various information pertaining to the association of those predecessors of the members of the group, back to the apical ancestors, with the land and waters of the application area. That information speaks specifically to the physical association maintained through claimants' predecessors working on pastoral stations within the application area. In addition to the information of this nature set out in the anthropological report, the factual basis contains statements from claimants asserting this association of their predecessors. For example, one claimant states:

> The **[Family name – name deleted]** [a Bigambul family] were from Bugunya, not far from Toomelah, but on the Northern side of the river. Their language was Bigambul, close to Gamilaraay and when I was little some of the family lived on Yarrawanna Creek and Welltown Station. I've only just got fleeting memories of them there but I remember being with my mother, **[Descendant 1 – name deleted]**, and some of her brothers and sisters there. And I remember my Great Grandmother, Granny Susan – she was the Queen of Welltown Station – which is a big station…
>
> Apparently, the boss of Welltown Station used to say to her every year; You take your people in there and get whatever they want. Now, whatever you want to get for them, you get anything you want. You just go into the shop, so she goes into the Station store. I remember I was there, and I must have been only four or five and we were going along in this old sulky and a dray. Granny Susan was the focus, everyone was making sure Granny Susan was alright – Anthropological report at p 16.

[123] Regarding an association of the members of the claim group presently with the application area, I consider that the factual basis is sufficient to support such an assertion. In forming this view, in addition to the general assertions that many of the members of the group continue to

reside upon the application area, I have had regard to statements made by claimants included within the application, such as the following statement:

> We took out the nieces, cousins, kids and took my kids out and showed them around the camp… I recently went out on country with my son and showed him the fishing places that I was shown – Attachment F at p 35.

[124] And also:

> I always take my children and grand kids to teach them on their country. I take them to Bugunya, Talwood where our old people are buried. Redbank Creek at Talwood is significant to me as that is where the Bora ground is. I go there often and show my children and grandchildren – Anthropological report at p 11.

[125] The factual basis material also contains information from claimants regarding their childhoods spent at camps and stations within the application area – see for example Attachment F at p 23. In light of the information of this nature, I consider that the factual basis is sufficient in supporting an assertion that the members of the claim group today have a physical association with the application area.

[126] The factual basis material refers to various place-names. Using the Tribunal's iSpatial database, I have mapped these locations, and understand that they are all within, or immediately adjacent to, the border of the application area. In addition to this, I consider that they are roughly spread across the entirety of the area.

[127] Noting my reasons above, I consider the factual basis sufficient to support an asserted association of the apical ancestors of the group with the application area, and of the predecessors of those persons with the area back to sovereignty. I consider the factual basis is also sufficient to support an asserted association of the members of the group today with the area, and of their predecessors with the area, back three or so generations to the apical ancestors at European settlement. Consequently, I am satisfied that the factual basis is sufficient to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the area.

[128] The requirement at s 190B(5)(a) is satisfied.

Reasons for s 190B(5)(b)

[129] In turning my mind to the task at s 190B(5)(b), namely whether the factual basis is sufficient to support an assertion of traditional laws and customs acknowledged and observed by the group giving rise to the claim to native title, I have considered it appropriate that I undertake this task with reference to the definition of 'native title rights and interests' in s 223(1).

[130] In particular, subsection (a) of that definition provides that such rights and interests are 'possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders'. Noting the similarities in terminology with the assertion at s 190B(5)(b), it is my view that my role at this condition of the registration test should be guided by the leading authority in relation to the definition of native title rights and interests at s 223(1), namely the decision of the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (*Yorta Yorta*). In that case, the High Court held that in the context of the *Native Title Act 1993* (Cth), the meaning of the term 'traditional' carried with it two elements. Firstly, that 'the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty' – at [46]. Secondly, that the acknowledgement and observance of those laws and customs has 'continued substantially uninterrupted since sovereignty' – at [87].

[131] Consequently, it is my understanding that the factual basis must demonstrate how the laws and customs currently acknowledged and observed by the group are rooted in the traditional laws and customs of a society that was in existence at the time of sovereignty, or European settlement, and that the acknowledgement and observance of those laws and customs has continued in a substantially uninterrupted manner since that time.

[132] This appears to be supported by the findings of Dowsett J in *Gudjala 2007*, where, in an aspect of the decision not criticized by the Full Court on appeal, His Honour held that asserted facts addressing the following may be required:

- that the laws and customs currently observed have their source in a pre-sovereignty society and have been observed since that time by a continuing society – at [63];
- that there existed at the time of European settlement a society of people living according to a system of identifiable laws and customs having a normative content – at [65], [66] and [81];
- an explanation of the link between the claim group described in the application and the area covered by the application, which process may involve 'identifying some link between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage – at [66].

[133] When His Honour again returned to the requirement at s 190B(5)(b) in *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572, Dowsett J indicated that the factual basis may also need to address the following:

- an explanation of how the current laws and customs of the claim group can be said to be traditional (that is, the laws and customs of a pre-sovereignty society relating to rights and interests in land and waters), and more than a mere assertion that such laws and customs are traditional – at [52], [53] and [72]; and

- details of the claim group's acknowledgement and observance of those traditional laws and customs in relation to the land and waters of the claim area – at [74].

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

[134] The application and additional material set out the following asserted facts regarding the condition at s 190B(5)(b):

- the Bigambul were described by early pastoralists in the area around the 1840s as a linguistic entity with a distinctive socio-territorial identity, who shared commonalities with neighbouring groups in relation to their laws and customs – Attachment F at p 22;
- the Bigambul were characterised by a strict adherence to and observance of boundary markers in relation to their traditional territory, such that no trespassers were allowed into that country – Attachment F at p 22;
- the traditional Bigambul society was distinguished from its neighbouring societies by mutual recognition of their traditional lands – Attachment F at p 24;
- historical literature from the time of early settlement asserts the Bigambul to be the land-holding group present in the application area prior to and during pastoral settlement of the area – Attachment F at p 22;
- oral history and government records support the Bigambul apicals as being born on, and continuing to reside upon throughout their lives, the application area – Attachment F at p 23;
- the Bigambul apical ancestors lived and worked on pastoral properties within the area, or in Aboriginal communities in the area, enabling the Bigambul elders to continue to teach succeeding generations of Bigambul people the traditional laws and customs still held by the group today – Attachment F at p 23;
- the continuing physical presence of the Bigambul on the application area, from the Bigambul apical ancestors to their descendants comprising the claim group today, has enabled the passage of knowledge and traditional law and custom, through time and European settlement – Attachment F at p 24;
- Gwydir District Commissioner of 1848 to 1850, Richard Bligh, recorded details of the marriage laws and classes of the Bigambul – Anthropological report at p 4;
- William Gardener in 1854 recorded details of the way in which territorial boundaries were enforced by the Bigambul and adhered to by neighbouring groups – Anthropological report at p 5;
- in 1855, 1875 and 1878, Reverend William Ridley recorded some of the similarities and differences between the surrounding Kamilaroi group, and the Bigambul society – Anthropological report at p 6;
- Reverend Ridley's research also examined the class names for Bigambul men and women, and the way in which class names were inherited from one's parents – Anthropological report at p 6;

- in 1883 to 1884, James Lalor recorded information about the marriage rules strictly observed by the Bigambul, and also food prohibitions observed by the group – Anthropological report at p 7;
- both Wyndham and Mathews, in 1889 and throughout the 1890s, recorded details of the Bora ceremonies in which the Bigambul participated – Anthropological report at p 7;
- Mathews, in 1904, also recorded the importance of the transmission of knowledge from one generation to the next – Anthropological report at p 11;
- Mathews recorded in 1897 Bigambul people constructing shelters at camps along Warril Creek within the application area – Anthropological report at p 19;
- in 1897 Mathews spoke of Bigambul hunting and fishing on the application area, and gathering various natural resources from their country, including powdered charcoal for the purposes of ceremony – Anthropological report at pp 22 to 25;
- Bigambul people occupying the area around the turn of the last century were recorded by Mathews as having significant knowledge of their country and its resources, and this knowledge is similarly possessed by claimants today, having been passed down to them by their predecessors, most often through being taken out on that country – Anthropological report at pp 21 and 26 to 27;
- in the Bigambul pre-sovereignty society, membership of the group was defined primarily by demonstrated blood relation to an ancestor who was accepted as belonging to a previous generation of Bigambul People – Anthropological report at p 9;
- Bigambul people, at birth, attain membership of the Bigambul community and therefore the whole of Bigambul country, through the rights exercised by their ancestors – Anthropological report at p 9;
- knowledge about country and important places within country held by claimants has been obtained through a generational transmission of knowledge of traditional law and custom where younger generations are taught about and taken to places by their parents or grandparents and then in turn teach their children and grandchildren this knowledge – Anthropological report at p 9;
- interviews with claimants indicate that the 'bloodline' link to country is extremely important to a Bigambul person's concept of self, and also highlight the importance of a member of Bigambul society having knowledge of places within their country important to them by reason of their ancestral connection to those places – Anthropological report at p 9;
- the Toobeah Aboriginal Reserve, located within the application area, is of significance to the Bigambul people, as government records including birth, marriage and death certificates, demonstrate a number of ancestors as living at the reserve at the turn of last century – Anthropological report at p 14;
- few Bigambul predecessors were removed to missions outside of their traditional country – Anthropological report at p 13;

- responsibilities for country continue to be carried out by claimants today through their ongoing involvement in Cultural Heritage management activities on their country – Anthropological report at p 15;
- such activities involve continuing access to the area, visitation of sites, teaching younger generations traditional lore/custom and culture and gathering resources for various purposes – Anthropological report at p 15;
- claimants and their predecessors have continually sought to maintain their physical and spiritual connection to their country – Anthropological report at p 17;
- claimants continue to exercise their right to camp on, and access country, many for the purpose of teaching the next generation traditions regarding the bush and their Bigambul heritage – Anthropological report at p 19.

[135] In addition to the above asserted facts, the factual basis material also contains a number of statements from claimants which address the requirement at s 190B(5)(b), regarding traditional laws and customs of the group giving rise to the native title claim.

[136] For example, one claimant shares her knowledge of stories and dances associated with Bigambul country, law and custom, and the way in which European settlement was incorporated into those traditional stories and dances:

> There's one dance in lingo I can remember, but it's a funny one. It tells the story of the black fellas looking out and seeing this great big ship coming – and it's the landing of Captain Cook. That was the saltwater one. And it was sung at all the dances… But I suppose we just called in the saltwater of the Nagurabi corroboree. The music was mainly the people stamping out the song – Anthropological report at p 13.

[137] Another claimant explains the knowledge she possesses about the location of particular resources within her country:

> I tell people where things are [food resources]. I say go down the road there, want a feed of Naipan go there not there. Don't go past Bugunya, as there are none there – Anthropological report at p 21.

[138] A claimant speaks of the way in which he transmits knowledge to his children and grandchildren:

> I always take my children and grand kids to teach them on their country. I take them to Bugunya, Talwood where our old people are buried. Redbank Creek at Talwood is significant to me as that is where the Bora ground is. I go there often and show my children and grandchildren – Anthropological report at p 11.

[139] And another claimant speaks of the way she was taught on country about places and resources within her country:

> **[Descendant 2 – name deleted]** [brother] must've learnt a lot about hunting because I learnt a lot about getting bait for fishing… what were the best berries and fruit to eat, what was dangerous. And Granny [Susan] used to take us down one side of the river and around the bend and go fishing… The boys were allowed to go hunting a lot more often than the girls were allowed in the bush. We'd go hunting for fruits too you know. But the boys would go out hunting the animals when they were anything from nine up, and even younger than that, some of them could knock a rabbit in one hit with a bundi [throwing stick, men's weapon] – Anthropological report at p 13.

[140] The way in which traditional methods to hunt and fish and cook the catch were passed to the members of the group today is explained by another claimant:

> We were brought up by our old people. Our Uncles would take us out hunting and point things out to us. They gotta take you out, how else are you going to learn? After a couple of times, you would then go out on your own. Mussels, turtles and crayfish. Those things are easy to get. It was the meat that was harder. We used to have dogs and that and run 'em down… **[Descendant 3 – name deleted]** would take us out hunting and fishing, getting honey out of trees, we would use steel axes by then cause the white fella brought that to us. I have cleaned and then cooked porcupine in the ashes of a fire. You cook a carpet snake in the ashes or coals… When we went hunting we would use dogs and a stick and when you hunted rabbits, you'd throw the stick and get him. Kangaroos you would use a snare, we'd use a fence that was there, see where the whole [*sic*] in the fence was then set the snare – Anthropological report at p 23.

[141] Another claimant explains the way in which he continues to carry out his responsibilities to protect his country, and the importance of doing so:

> Always out on country. I go out for cultural heritage reasons so that we can protect our country. There are our medicine plants and trees out there that we are trying to save. We also try and save out artefacts. I also go out to see other families and I try and catch a fish or two! We try to protect what we got – Anthropological report at p 30.

My consideration – s 190B(5)(b)

[142] The starting point for my consideration at s 190B(5)(b) is the existence of an indigenous society at the time of sovereignty, or European settlement, living according to identifiable laws and customs, having a normative content – see *Gudjala 2007* at [65] to [66]. As set out in my reasons above at s 190B(5)(a), the material asserts European settlement to have taken place in the late 1830s, with the arrival of pastoralists in the area. The material refers to various historical sources in which early settlers, including pastoralists, record their observations of the Bigambul people inhabiting the application area at that time, or in the decade or so following.

[143] In referring to such sources, the material clearly asserts that it was the group identified as Bigambul that inhabited the area at the time of settlement. The material asserts that these sources provide considerable detail regarding the normative system of laws and customs acknowledged

and observed by this group. The material dates the sources as early as 1845, and noting that settlement is asserted to have occurred in the late 1830s, I consider it reasonable to infer that these records were made during the time at which settlement was taking place in the application area.

[144] Further aspects of the system of laws and customs acknowledged by the group at European settlement, asserted within the material, include that:

- the Bigambul were a distinct linguistic and socio-territorial group who shared some commonalities with neighbouring groups such as the Kamilaroi;
- the group was characterised by a strict adherence to and enforcement of boundary markers, such that trespassers were not permitted;
- entitlement to membership of the Bigambul community relied primarily upon the bloodline connection of an individual to a known Bigambul ancestor;
- there was a strong emphasis by the group on the inter-generational transmission of knowledge about country, and this primarily involved elders taking younger generations of Bigambul out on country to teach them about laws and customs surrounding hunting, fishing, gathering resources, significant places in their country, and their responsibilities to care for and protect their country;
- the possession of this knowledge was understood by members of the group as underlying or supporting the rights and interests they held in the area;
- pursuant to the group's laws and customs, ceremonies and gatherings on country were common;
- laws and customs relating to marriage and sections/classes were fundamental to social relationships and identity.

[145] Consequently, in light of the material of this nature, I consider that the factual basis is sufficient to support an assertion that there was, at the time of European settlement, a society of indigenous persons, namely the Bigambul people, living according to a system of laws and customs, having a normative content.

[146] I have already discussed in my reasons at s 190B(5)(a) above, that I consider the factual basis to support an assertion that the apical ancestors of the group were persons who were present on the application area at the time of European settlement or in the decade or so following – see at [116] to [117]. In this way, I consider that the material asserts that the apical ancestors were, in fact, members of the Bigambul society occupying the area at European settlement, or that they were born into that society shortly following. In my view, therefore, the factual basis is sufficient to support a link between the apical ancestors and the society at European settlement. Noting that membership of the claim group is defined by demonstrated biological descent from these apical ancestors, and that the apicals are clearly asserted within the material to be persons who occupied the area and possessed territorial rights and interests in

relation to the area, it is my view that the factual basis is sufficient to support an asserted link between the claim group described in the application and the area covered by the application.

[147] As noted above, the factual basis material contains considerable detail of the laws and customs of the Bigambul people at European settlement, and in the decade or so following. With reference to the statements made by claimants and further asserted facts within the material, it is my view that the factual basis also contains considerable detail regarding the laws and customs acknowledged and observed by the members of the claim group today. I note that all of the aspects of the system of laws and customs at European settlement described in historical sources and asserted in the factual basis material are also described by claimants as important aspects of the system acknowledged and observed today. For example, in 1904, Mathews is asserted to have recognized the importance of elders passing on knowledge to younger generations, and describes his observation of such teaching at a bora ceremony. Statements made by a number of claimants (excerpted in my reasons above at [139] to [140]) clearly express the way in which they were taught about their country by their elders, and how, pursuant to their laws and customs, they continue this pattern of teaching, and take their children and grandchildren out on country to impart such knowledge to them.

[148] Having considered all of this material, it is my understanding that the factual basis asserts there to be little change that has occurred in the system of laws and customs acknowledged and observed by the group at European settlement, as compared with the system of laws and customs acknowledged and observed by the members of the group today.

[149] Turning, then to whether the laws and customs acknowledged and observed by the group today can be said to be 'traditional', it is my view that the factual basis is sufficient to support such an assertion. There are a number of factors supporting this view. Firstly, I have already set out above in my reasons at s 190B(5)(a), my understanding that there are only two or three generations separating the Bigambul apical ancestors named in Schedule A and the members of the claim group today. Further, I consider claimants' statements within the material to demonstrate the fact that they possess a living memory of at least one of the Bigambul apical ancestors, and that a number of claimants were, in fact, taught about the group's laws and customs by that ancestor – see for example Anthropological report at pp 12 to 13.

[150] Secondly, having turned my mind to the factual basis in support of the laws and customs of the Bigambul society at European settlement, and the factual basis in support of the laws and customs of the group acknowledged and observed today, it is my view that the factual basis supports an assertion that little change has occurred to the system of laws and customs acknowledged and observed by the group since European settlement.

[151] Thirdly, the material asserts that throughout settlement, and right up until the present time, the Bigambul people have continually been able to acknowledge and observe their traditional

laws and customs due to the fact that they have maintained an ongoing physical connection to their country. The material asserts that this was enabled through the employment of Bigambul predecessors in the pastoral industry, at stations within the boundaries of the application area, and also due to the fact that Bigambul people were relocated to reserves and Aboriginal communities within their country, such as Toobeah.

[152] The final factor I consider to support an assertion of 'traditional' laws and customs is information within the factual basis regarding the fact that one of the most crucial elements of the system acknowledged and observed by the group is the inter-generational transmission of knowledge of that system. This pattern of teaching is asserted by the material as being observed by early settlers in the area, and continued to be observed, as explained by claimants in their statements, throughout the two or three generations following, to today, where it is still upheld by members of the Bigambul group as an important aspect of maintaining their culture, and their laws and customs.

[153] In this way, I understand that there can have been relatively minimal change in the system of laws and customs handed down through these Bigambul predecessors to the claimants today, such that the laws and customs of the group are, in fact, rooted in the laws and customs of the society at European settlement. Consequently, I consider the factual basis is sufficient to support an assertion of traditional laws and customs.

[154] On this basis, and in light of the discussion above, I have formed the view that the factual basis is sufficient to support an assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests.

[155] The application satisfies the requirement at s 190B(5)(b).

Reasons for s 190B(5)(c)

[156] Noting that the assertion at s 190B(5)(c) refers to 'those traditional laws and customs', it is my understanding that the assertion flows directly from the assertion at s 190B(5)(b). In this way, where the factual basis is insufficient to meet the requirement at s 190B(5)(b), it is my view that it cannot be found sufficient to meet the requirement at s 190B(5)(c) – see *Martin* at [29].

[157] I consider that the assertion at s 190B(5)(c), regarding whether the native title claim group have continued to hold their native title in accordance with the traditional laws and customs addressed at s 190B(5)(b), can be equated with the second element of the meaning of 'traditional laws and customs' discussed by the High Court in *Yorta Yorta*. That is, that the native title claim group have continued to hold their native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way – see *Yorta Yorta* at [47] and [87].

[158] In *Gudjala 2007*, Dowsett J held that the factual basis may be required to address the following:

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

[159] In my consideration at this condition, I have drawn on the factual basis material set out above in relation to the requirements at ss 190B(5)(a) and (b).

[160] I have already discussed in my reasons at s 190B(5)(b) above, the reasons for which I consider the factual basis sufficient to support an assertion that there are only two or three generations separating the apical ancestors named in Schedule A, by whom the group is defined, and the members of the claim group today. Information such as the following statement by a claimant about Granny Susan (a Bigambul apical ancestor) provides a basis for me forming this view:

> The **[Family name – name deleted]** were from Bugunya, not far from Toomelah, but on the Northern side of the River. Their language was Bigambul, close to Gamilaraay and when I was little some of the family lived on Yarrawanna Creek and Welltown Station. I've only just got fleeting memories of them there but I remember being with my mother, **[Descendant 1 – name deleted]**, and some of her brothers and sisters there. And I remember my Great Grandmother, Granny Susan – she was the Queen of Welltown Station – which was a big station – Anthropological report at p 16.

[161] The factual basis provides the general assertion that '[t]he continuity of connection of the Bigambul people [to their country] was enabled through, firstly, by not being removed to missions outside of Bigambul country, and secondly, their continual participation in the pastoral industry'. The factual basis further asserts that claimants are able to recall either themselves or their immediate parents or grandparents, working on stations within their country.

[162] Statements made by claimants and included in the factual basis material in my view support these general assertions. For example, one claimant states:

> We were the last family on Turtle Bend [Toobeah reserve] to leave. When we left, Dad went to work on properties and we went with him. So we got to do all the fishing and hunting. Dad worked on Billa Billa and other stations. **[Descendant 4 – name deleted]** worked on Welltown Station. We lived in tents and stuff for years. We never went to school, we just lived in the bush and were taught our type of schooling there – Anthropological report at p 30.

[163] In this way, the material clearly asserts that the Bigambul people and their predecessors, including back to the apical ancestors occupying the area at European settlement, have

maintained a strong physical presence on their traditional country, being the land and waters of the application area. Flowing from this, the material asserts that this has allowed for 'the Bigambul people to continue to teach succeeding generations of Bigambul people the traditional law and custom that is still held by the group as a whole' – Anthropological report at p 14.

[164] As set out in my reasons above at s 190B(5)(b), it is my view that the factual basis material is sufficient to support an asserted system of laws and customs, acknowledged and observed by the group today, which relies heavily on the practice of inter-generational transmission of knowledge. In this regard, statements made by claimants provided in the factual basis material clearly assert the way in which they were taught by their predecessors about the laws and customs relating to their country, while being on that country with those predecessors. In the same way, claimants speak of passing that knowledge onto their own children and grandchildren.

[165] Noting the further material discussed in relation to the assertion at s 190B(5)(c) regarding the continuity of the physical connection of the Bigambul people to the application area, it is my view that the factual basis supports a system of laws and customs that has been handed down in a continuous manner through the prior generations of Bigambul people, from the apical ancestors, to the members of the claim group today. I consider that it is therefore reasonable to infer an assertion within the material that, consistent with this transfer of knowledge, is the continued observance by the group of those laws and customs. It is further my view that the material is sufficient to support an assertion that this observance has continued without substantial interruption.

[166] In addition to this, in light of the asserted facts within the material regarding the fact that comprehensive knowledge of country, and laws and customs relating to country underlie the native title rights and interests held by a Bigambul person, it is my view that the material is sufficient to support the assertion that the group and its predecessors have continued to hold their native title in accordance with those traditional laws and customs.

[167] I consider, therefore, that the application meets the requirement at s 190B(5)(c).

Conclusion

[168] 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.

[169] The standard which forms the basis of the test at s 190B(6) is 'prima facie'. Consequently, I consider that the meaning to be applied to that phrase is central to my understanding of the task at this condition of the registration test. In *Doepel*, Mansfield J approved the meaning that the High Court had adopted in *North Ganalanja Aboriginal Corporation v Queensland* [1996] HCA 2, being the ordinary meaning of the phrase, 'at first sight; on the face of it; as appears at first sight without investigation' – see *Doepel* at [134]. Further to this, Mansfield J held that 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis – at [135].

[170] Noting that the focus of s 190B(6) is 'native title rights and interests', it is my view that in my consideration at this condition, I must have regard to the definition of that term in s 223(1). That definition provides that:

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

[171] In light of this, I consider that the material must demonstrate how the rights and interests claimed are rights and interests held pursuant to traditional laws and customs, are rights and interests held in relation to land and waters, and that they are rights and interests that have not been extinguished over the entirety of the application area.

[172] In my consideration I note that I may have regard to information beyond that contained in the application – see *Doepel* at [16]. I also note that the wording of s 190B(6) makes clear that it is not a barrier to the application satisfying the condition where not all of the rights and interests can be, prima facie established – see *Doepel* at [16].

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

Consideration

Right to exclusive possession

[174] The nature of a native title right to exclusive possession was discussed in some detail by the High Court in *Western Australia v Ward* [2002] HCA 28. In that case, it was held that:

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

[175] In *Griffiths v Northern Territory* [2007] FCAFC 178 (*Griffiths*), the Full Court of the Federal Court found that it was incorrect to approach the question of exclusive possession with concepts of proprietary rights in mind. The Full Court found that:

> [T]he 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 consideration of what the evidence discloses about their content under traditional law and custom. It is not a necessary condition of the existence of a right of exclusive use and occupation that the evidence discloses rights and interests that "rise significantly above the level of usufructuary rights" – at [71].

[176] Further in *Griffiths*, the Full Court held that what is required in order to prove exclusive rights is that the applicant show how, under traditional law and custom, the group may effectively 'exclude from their country people not of their community', as the 'gatekeepers for the purpose of preventing harm and avoiding injury to country' – at [127].

[177] Information regarding the right of claimants under their traditional laws and customs to speak for, and make decisions about their country may also provide a prima facie case for the existence of a right of exclusivity. In *Sampi v State of Western Australia* [2005] FCA 777, the Court held that:

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

[178] The factual basis material provides that a historical source of 1854 refers specifically to 'boundary markers and exclusive possession Bigambul people could claim with regard to their traditional territory', and that such boundary markers could be identified 'in the most imperishable manner that the blacks may have and command'. This source, excerpted in Attachment F, further states that 'it is an understood matter amongst the blacks, that no trespassers are allowed within their boundaries' – see Attachment F at p 22.

[179] Further references to this source are included in Attachment F and appear as follows:

> William Gardener (1854) recorded "Begambul" names for the Condamine and Balonne Rivers and further recorded that the Aboriginal people he observed and with whom he communicated had particular hunting grounds, fishing waters and burial places which 'belonged' to the tribe. He further

> recorded that "each tribe has a particular district allotted to them, this they name their own" (1854:133) and that each tribe had a boundary which was "marked at certain points, and distances, in the most imperishable manner that the blacks may have at command" (1854:133)… — Attachment F at p 27.

[180] In addition to this, I consider that the factual basis further suggests the exercise of rights of exclusive possession at the time of settlement, in assertions that the initial stages of settlement were marked by fierce conflict between the Bigambul people occupying the area at settlement and the early settlers – see Anthropological report at p 13.

[181] There is also an assertion within the material that claimants today continue to exercise their responsibilities to protect their country, and consider these responsibilities an essential part of their cultural identity – see Anthropological report at p 30. In addition to this, statements made by claimants within the material indicate that they understand their traditional country to belong to them – see Anthropological report at p 10. These statements also speak to the way in which Bigambul people do not "walk" on other people's country, as it does not belong to them.

[182] These statements also describe the way in which claimants today seek to exercise control over the use and protection of their country. For example, one claimant states:

> Always out on country. I go out for cultural heritage reasons so that we can protect our country. There are our medicine plants and trees out there that we are trying to save. We also try and save our artefacts. I also go out to see other families and I try to catch a fish or two! We try and protect what we got – Anthropological report at p 18 to 19.

[183] The material further asserts that in accordance with their traditional laws and customs, particular senior claimants explain that they have the right to 'make decisions…with regard to management and protection of [their] country' – Anthropological report at p 31. It is also asserted that another claimant is developing management plans to protect areas of significance to Bigambul people, and that this involves decision-making around fencing off rock wells on a pastoral station to keep stock off the area – Anthropological report at p 31.

[184] In this way, I consider that the material before me does speak to a right possessed by the Bigambul claim group to exclusive possession of the application area, which they understand to be their traditional country. The material speaking to their right to make decisions about the area, and their understanding that they are, in fact, the proper 'owners' of the area under their traditional laws and customs, in my view, supports the existence of this right.

[185] Further to this, it is clear from the material pertaining to the laws and customs of the Bigambul ancestors occupying the area at the time of European settlement, that those persons fiercely defended and enforced the boundaries of their traditional country, pursuant to their responsibilities to care for and protect their country. The material clearly asserts that claimants

continue to feel this sense of responsibility today, and that it is a crucial part of their identity as Bigambul people. In my view, therefore, I consider that the material provides a prima facie case for the right as one that is in accordance with the traditional laws and customs of the group.

[186] Consequently, I consider that prima facie the right to exclusive possession can be established.

Right to live and be present on the application area

[187] I consider that the material contains various information pertaining to a right possessed by the Bigambul people, to live and be present on the application area. As set out in my reasons above at ss 190B(5)(a), (b) and (c), it is my view that the factual basis is sufficient to support an assertion that the group have continued to maintain a physical association with the application area, from the time of the Bigambul ancestors at European settlement, to the members of the group today.

[188] The following statement by a claimant is an example of the material I consider supports such an assertion:

> We were the last family on Turtle Bend [Toobeah Reserve] to leave. When we left, Dad went to work on properties and we went with him. So we got to do all the fishing and hunting. Dad worked on Billa Billa and other stations. **[Descendant 4 – name deleted]** worked on Welltown Station. We lived in tents and stuff for years. We never went to school, we just lived in the bush and were taught our type of schooling there – Attachment F at p 30.

[189] In addition to this, I note that the material asserts that many of the claim group members continue to live within the application area – see Attachment F at p 30.

[190] As to whether the right can be said to be one that is possessed in accordance with the traditional laws and customs of the Bigambul people, there is various information excerpted from historical sources around the time of settlement, that speaks to the way in which the indigenous group identified as Bigambul occupied and inhabited the area. The following excerpt from a historical source dated 1884 is an example of this material:

> The camp was situated on level ground in some heavily timbered forest country on the left bank of Redbank Creek, a small tributary of the Weir River, in the parish of Tallwood [sic], country of Carnarvon, Queensland… The camp of the local tribe, which was the first to occupy the ground, was about seventy yards from the creek, and formed the datum point around which each of the other tribes pitched their camps on arrived. The Goondiwindi and Welltown people camped to the eastward of the local Tallwood [sic] tribe; those from St George on the north-west; the people from Kunopia and Moree on the south; whilst the Moodan, Mungindi and Gundabloui tribe encamped the south-west – Attachment F at p 31.

[191] Further statements within the material speak to the way in which claimants today understand their right to access and be present on the area as consistent with the rights exercised by their predecessors, the Bigambul ancestors – Anthropological report at p 9.

[192] In light of the information of this nature within the application and accompanying material, I consider that the right to live and be present on the application area is established prima facie, as a right pursuant to the traditional laws and customs of the group.

Right to take, use, share and exchange Traditional Natural Resources

[193] Again, I consider there to be numerous examples of material speaking to a right possessed by the claimants to take, use, share and exchange traditional natural resources. Statements made by claimants excerpted within the material speak to the exercise of this right presently, on the land and waters of the application area, and previously, as exercised by their predecessors. The following statement is an example:

> We were brought up by our old people. Our Uncles would take us out hunting and point things out to us. They gotta take you out, how else are you going to learn? After a couple of times, you then would go out on your own. Mussels, turtles and crayfish. Those things are easy to get. It was the meat that was harder. We need to have dogs and that and run 'em down… **[Descendant 3 – name deleted]** would take us out hunting and fishing, getting honey out of trees, we would use steel axes by then cause the white fella bought [sic] that to us. I have cleaned and then cooked porcupine in the ashes of a fire. You cook a carpet snake in the ashes or coals… When we went hunting we would use dogs and a stick and when you hunted rabbits, you'd throw the stick and get him. Kangaroos you would use a snare, we'd use a fence that was there, see where the hole in the fence was then set the snare – Attachment F at p 30.

[194] As to whether the right extends to sharing and exchanging resources, it is my view that the material does speak to this concept. The following excerpt appearing within the material is taken from a historical source, and observes the way in which Bigambul people at around the time of settlement, shared the resources gathered from their country:

> During the day some game has been caught, which is roasted by the guardians at their own camp and a fair share of the best parts of the meat, from which all the bones and sinews have been removed, is taken to the boys at the yard. Some of the old men go around at "feeding time" to see that the food given to the novices is prepared in accordance with traditional custom – Attachment F at p 38.

[195] In this way, I consider that the material provides a prima facie case for the right being one held pursuant to a system of laws and customs rooted in the laws and customs of the society at settlement, and therefore a right held in accordance with 'traditional' laws and customs.

[196] In light of this material before me, I consider that the right is established, prima facie.

Right to conduct burial rites

[197] The right to conduct burial rites is asserted by the material to be one that continues to be exercised by the claimants today – see anthropological report at p 31. There is also reference within the material to historical sources that recorded these rites being performed by Bigambul predecessors in the decades following settlement. The following excerpt from a historical source is an example:

> As soon as the death of an Aborigine is known, the tribe unite in a loud and almost melancholy wail. The next day or in some cases, after two or three in others, they bury the dead body either in a hollow tree or in the ground… They make coffins of bark, and sometimes the ornaments and appendages of these stretch out its length to thirteen feet – Attachment F at p 51.

[198] Noting that the right is one asserted within the material as one exercised by the Bigambul ancestors at around the time of settlement, and one that continues to be upheld by the claimants today, I consider that prima facie the right is shown to be one held pursuant to the traditional laws and customs of the group, and that it is established prima facie.

Right to conduct ceremonies

[199] The material provides a relative amount of detail in relation to this right, as recorded in various historical sources asserting that it was exercised by the Bigambul people around the time of early settlement. For example, the material includes excerpts from sources in which a number of early settlers observed Bigambul people participating in bora ceremonies – see anthropological report at p 7; Attachment F at p 26.

[200] Claimants' statements included in the material suggest that this right is one that continues to be exercised by members of the group today, pursuant to their laws and customs, and was passed down to them by their predecessors on their traditional country. The following statement is an example:

> There's one dance in lingo I can remember, but it's a funny one. It tells the story of the black fellas looking out and seeing this great big ship coming – and it's the landing of Captain Cook. That was the saltwater one. And it was sung at all the dances… But I suppose we just called the saltwater of the Nagurabi corroboree. The music was mainly the people stamping out the song – Anthropological report at p 13.

[201] In light of the material of this nature before me, I consider that the right is established prima facie, as a right held pursuant to the traditional laws and customs of the group.

Right to teach on the area about the physical and spiritual attributes of the area

[202] As discussed in my reasons above at s 190B(5)(b), the material asserts the inter-generational transmission of knowledge about country to be a crucial aspect of the traditional laws and customs of the group giving rise to their claim to native title. From information of the nature set

out below, taken from the application and accompanying material, it is my view that the right to teach on the area about the physical and spiritual attributes of the area is shown prima facie to be one exercised by the Bigambul people at around the time of settlement in the area, and also shown to be one that continues to be upheld and exercised by the claimants today.

[203] The following statement is an excerpt from a historical source dated 1902, describing how younger generations were taught on country about the various features and attributes of that country:

> There were amongst the assemblage [at Gundabloui] a number of young men who had been to one Bora before and attended this one for further instruction, these were called *tuggabillas* and had no guardians, but walked unrestrained with the old men over the Bora ground and everything on it was fully explained to them so that when they become old men they may be able to produce similar figures and explain their meaning to the young men of the tribe, so that their custom and traditional rites and ceremonies may be handed down from one generation to another – Anthropological report at p 11.

[204] The following statement is from a claimant describing how as a child she was similarly taught about her country:

> My mum never taught us much, it was dad and my uncles that taught me all my knowledge. We would camp along the river there on Winton Station boundary and sleep under the stars. But if it was raining we would pull a bough down and anchor it with rocks and then trow [sic] a blanket over the top… All children are taught to respect their elders. I have taught this to my children and grandchildren. You show your respect by calling them auntie and uncle. You always call the eldest auntie or uncle. If you are the same age you call them sister. I still know the right and wrong way to marry. I married right. If I didn't I'd get speared! – Anthropological report at p 11.

[205] Noting the information of this nature before me, and my reasons above, I understand the material to provide a prima facie case for the right being one that exists pursuant to the traditional laws and customs of the group. I consider that the right is established prima facie.

Right to maintain places of importance and areas of significance

[206] I note that the anthropological report includes a list of those places asserted within the material as being of particular importance under the traditional laws and customs of the claim group today, and that some of these places are also asserted as being recorded by early settlers in the area. For example, Kunopia is stated as being the site of an Aboriginal burial ground which was recorded by Mathews in 1897. In this way, I consider that prima facie the material supports that the right to protect such places existed under the laws and customs of the Bigambul people around the time of settlement.

[207] In addition to this, in my view, the material also speaks to the right as being one exercised by the members of the claim group today. The asserted facts within the material clearly set out

that claimants are actively involved in cultural heritage protection on their country. This is seen in the following statement made by a claimant:

> Always out on country. I go out for cultural heritage reasons so that we can protect our country. There are our medicine plants and trees out there that we are trying to save. We also try and save our artefacts. I also go out to see other families and I try and catch a fish or two! We try and protect what we got – Attachment F at p 50.

[208] In light of the material of this nature, I consider that prima facie the right to maintain places of importance and areas of significance is one that exists pursuant to the traditional laws and customs passed down through the generations to the claimants today. I consider that the right is established prima facie.

Right to light fires for domestic purposes

[209] In my view, certain statements made by claimants in the material demonstrate that this is a right that they currently exercise, or have previously exercised. For example, one claimant states that:

> We lived in a tin hut made out of Kerosene tins at the Toobeah camp. Our fire place was a big fire outside and mum had to cook on it. It is rained [sic] we would put a bough sheet (made of bark) up over the top. Everybody in the camp had a bough sheet. I've had Christmas dinner under it. We made a table outside and put it under the sheet and we would eat under it – Anthropological report at p 19.

[210] In addition to this, there are various asserted facts within the material that, in my view, prima facie, support the exercise of the right by the Bigambul ancestors occupying the area at around the time of settlement. The following excerpt is asserted as being taken from a historical source dated 1897:

> During the day some game has been caught, which is roasted by the guardians at their own camp and a fair share of the best parts of the meat, from which all the bones and sinews have been removed, is taken to the boys at the yard. Some of the old men go around at "feeding time" to see that the food given to the novices is prepared in accordance with traditional custom – Anthropological report at p 22.

[211] Consequently, I consider that prima facie the material provides support for the right being one that is held pursuant to the traditional laws and customs of the group that have been passed down through the generations of Bigambul predecessors to the claimants today.

[212] I consider that prima facie the right to light fires for domestic purposes is established.

Right to be accompanied into the claim area by non-claim group members

[213] This particular right is further qualified in Schedule E of the application, and is expressed as the right to:

> (h) be accompanied into the claim area by non claim group members being people required:
>
> (1) by traditional law and custom for the performance of ceremonies or cultural activities;
>
> (2) to assist in observing and recording traditional activities on the claim area.

[214] In my view, the material does speak to a right held and exercised by the Bigambul predecessors in the period following settlement, in including references to historical sources which recorded neighbouring groups being invited onto Bigambul country for ceremonies and gatherings – see anthropological report at p 22.

[215] I note that there is nothing which speaks specifically to non-Bigambul persons coming onto country as invited by claim group members today. There is, however, material that refers to meetings held today on Bigambul country, including birthday celebrations, and meetings about native title and cultural heritage matters. I consider that it is reasonable to infer that non-Bigambul people, for example lawyers, anthropologists, and non-Bigambul people married to Bigambul people, would be required to attend such meetings. Consequently, I accept that the members of the group understand themselves to possess this right to invite non-Bigambul people onto their country, and understand it to be a right they are able to exercise pursuant to their traditional laws and customs.

[216] I consider that prima facie the right to be accompanied into the claim area by non-claim group members is, therefore, established.

Right in relation to water, to take and use the water, and Traditional Natural Resources from the water

[217] The material clearly asserts that in accordance with laws and customs surrounding the rules of membership to the group, Bigambul people understand themselves to have free access to and use of all of the resources within the land and waters of their country – see for example anthropological report at p 9. Further material speaks specifically to the rights exercised by the members of the Bigambul group, and understood by them as being inextricably linked to their identity as Bigambul people, to use particular products and resources occurring within their country, including water and resources from the water.

[218] The anthropological report provides that in 1897 Mathews recorded that 'water for camp use was obtained from a waterhole in Redbank creek', and elsewhere that he recorded that, 'the people obtained water from a dam in Warril Creek, about 100 yards above the camp' – anthropological report at p 24. I consider that prima facie the material provides support for the

right being one that was held and exercised by the Bigambul people occupying the application area following the period of early settlement.

[219] Regarding the existence of the right today, I consider that prima facie there are various statements made by claimants that provide support. One example is where a claimant states:

> We caught yabbies on a line like we were taught and I still teach the kids. The men taught the boys how to make fish traps. They still know how to do that today. We used to make nets to catch the yabbies. We don't use the traps now as it is illegal and we are trying to rebuild the river system and the stock for future use – Anthropological report at p 25.

[220] Having considered this material, I am of the view that prima facie the right in relation to water, to take and use the water, and Traditional Natural Resources from the water, is one held pursuant to the laws and customs of the Bigambul people that have been passed down to the claimants today, and that it is established.

Conclusion

[221] 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.

[222] In *Gudjala 2007*, Dowsett J commented on the approach of the delegate at s 190B(7) in the case before him in the following way:

> The delegate considered that the reference to 'traditional physical connection' should be understood as denoting, by the use of the word "traditional", that the relevant connection was in accordance with laws and customs of the group having their origin in pre-contact society. This seems to be consistent with the approach taken in Yorta Yorta. As I can see no basis for inferring that there was a society of the relevant kind, having a normative system of laws and customs, as at the date of European settlement, the Application does not satisfy the requirements of subs 190B(7) – at [89].

[223] Consequently, it is my understanding that the material addressing the requirement at s 190B(7) must show how the physical connection asserted is in accordance with the laws and

customs of the group which have their origin in the laws and customs of a pre-sovereignty society. It flows from this, that where the factual basis is insufficient to support the assertion at s 190B(5)(b), it may be that the material is unable to show the traditional physical connection required at s 190B(7).

[224] In *Yorta Yorta* (at [184]), the High Court indicated that an actual presence on land may be required at s 190B(7), and I note that this is supported by the explanatory memorandum to the Native Title Amendment Bill 1997, which provides that the connection 'must amount to more than a transitory access or intermittent non-native title access' – at [29.19].

[225] Mansfield J, in *Doepel*, gave further guidance to the task of the Registrar's delegate at 190B(7), when His Honour held that '[s]ection 190B(7) imposes a different task upon the Registrar. It does require the Registrar to be satisfied of a particular fact or particular facts. It therefore requires evidentiary material to be presented to the Registrar' – at [18]. Further, His Honour held that such material was not to be approached as evidence at a hearing, but merely that the condition requires 'some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration' – at [18].

[226] In my consideration at s 190B(7), I note that I am not restricted to the material contained in the application, and therefore additional material supplied by the applicant may be relevant – see *Doepel* at [16].

[227] Noting that the focus of the condition is to be upon the relationship of at least one member of the native title claim group with some part of the application area, I have turned my mind to the material in support of the connection of a particular claim group member with part of the application area, being **[Claimant 3 – name deleted]**.

[228] I am satisfied that **[Claimant 3 – name deleted]** is a member of the native title claim group, noting the statement within the material that she is a 'direct descendant of Nellie of Goondiwindi and Nellie of Yumbeina', two of the Bigambul apical ancestors named in Schedule A of the application.

[229] Regarding an asserted traditional physical connection that **[Claimant 3 – name deleted]** has, or had, with some part of the application area, the factual basis material provides that:

- **[Claimant 3 – name deleted]** lives at Goondiwindi – Attachment F at p 23;
- she grew up on Toobeah Reserve, and she and her family were not at any stage removed from their traditional country – Anthropological report at p 15;
- today, **[Claimant 3 – name deleted]** regularly takes Bigambul people out on country to teach them about natural resources and plant varieties – Attachment F at p 36;

- **[Claimant 3 – name deleted]** has considerable knowledge about her country, including resources within the land and waters of the area, and sites of significance to the Bigambul people – Attachment F at pp 44 and 47;
- she is an elder who can speak for country, and in accordance with this role, she is actively involved in decisions regarding protection of her country, and sites of significance – Attachment F at p 51;
- she is currently employed as a Project Officer with the Queensland Murray Darling Committee, and as part of that role has established a database of Bigambul cultural heritage sites within the region – Attachment F at p 49.

[230] The material contains a number of statements by **[Claimant 3 – name deleted]**, which I consider to speak to her traditional physical connection with the application area. The following statement is an example:

> In September this year all the family came together to celebrate my sister's 60th birthday. On the day of her birthday we did a cultural tour with the family to Toobeah reserve. We took out the nieces, cousins, kids and took my kids out and showed them around the camp. I'm teaching my daughters and my niece to teach their daughters and others. I am teaching them about women's roles and other stuff so they can pass it on to others and their kids. My niece has spent a lot of time with me. My mother and Nanny would do the same for me. Mum's brothers taught the boys how to hunt and trap and everything. We were lucky that we were able to stay on country. My Bigambul line has always been born on country. We were the last family on Turtle Bend [Toobeah reserve] to leave. When we left, Dad went to work on properties and we went with him. So we got to do all the fishing and hunting. Dad worked on Billa Billa and other stations. **[Descendant 4 – name deleted]** worked on Welltown Station. We lived in tents and stuff for years. We never went to school, we just lived in the bush and were taught our type of schooling there. **[Descendant 4 – name deleted]** didn't teach me anything, it was my mother who taught me about the tucker and medicine. It was women's business. I recently went on country with my son and showed him the fishing places that I was shown. He wanted to know about bush tucker. I don't normally do that, I just teach women, but he needs to know so I took him out as well – Anthropological report at p 12.

[231] From the information of this nature within the application and accompanying material, I have formed the view that I am satisfied that **[Claimant 3 – name deleted]** currently has, and previously had, a traditional physical connection with the application area. It is clear from the material that **[Claimant 3 – name deleted]** continues to reside upon the application area, and that she grew up on the application area with her family. I consider that I can be satisfied, therefore, that she has maintained a physical connection with the area throughout her life.

[232] There are a number of aspects of the physical connection asserted that, in my view, allow me to consider that it is 'traditional' in nature. Firstly, noting my reasons above at s 190B(5)(b) regarding the fact that the inter-generational transmission of knowledge is a key element of the traditional laws and customs of the group, I consider that the material speaking to the way in

which **[Claimant 3 – name deleted]** spends time on the application area today, teaching her children and her niece about their country, indicates that the connection is a traditional one.

[233] Secondly, noting my reasons at s 190B(6) regarding the right held by the claim group members pursuant to their traditional laws and customs to protect sites of significance being established prima facie, I consider that the material speaking to **[Claimant 3 – name deleted]** actively seeking protection of cultural heritage sites in her role as elder of the Bigambul people, and formally, with the Queensland Murray Darling Committee, supports a traditional physical connection.

[234] Thirdly, I discussed in my reasons above at s 190B(5)(b) the way in which the material asserts that one aspect of the traditional laws and customs of the Bigambul people, passed down to the claim group by their predecessors, is that knowledge of Bigambul country is closely associated with one's identity as a member of the group. I note that the material clearly sets out the extensive knowledge **[Claimant 3 – name deleted]** has about her country, including plants and resources available and sites of significance. In this way, again, I consider that the physical connection she has with the area is shown to be traditional in nature.

[235] Consequently, I am satisfied that at least one member of the native title claim group currently has, or previously had, a traditional physical connection with some part of the application area.

[236] The application satisfies the condition of s 190B(7).

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

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

Section 61A provides:

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

(2) If:

(a) a previous exclusive possession act (see s 23B) was done in relation to an area; and

(b) either:

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

(ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23E in relation to the act;

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

(3) If:

(a) a previous non-exclusive possession act (see s 23F) was done in relation to an area; and

(b) either:

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

(ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23I in relation to the act;

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

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

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

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

[237] 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)

[238] Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title. The geospatial assessment provides that there are no determinations of native title falling within the area covered by the application as at 19 May 2014. To verify that this remains the case, I have produced an overlap analysis from the Tribunal's iSpatial database, as at the date of this decision. This analysis confirms that there have not been any determinations of native title in the area since the date of the geospatial assessment.

Section 61A(2)

[239] Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply. Schedule B sets out those areas within the external boundary that are not covered by the application. I note that in describing those excluded areas, paragraphs [1] and [2] of Schedule B adopt the definition of a previous exclusive possession act from s 23B of the Act. Consequently, I am satisfied that the claimant application is not made over areas covered by a previous exclusive possession act.

Section 61A(3)

[240] Section 61A(3) provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done, unless the circumstances described in s. 61A(4) apply. Paragraph [3] of Schedule B states that 'exclusive possession is not claimed over areas which are subject to valid previous non-exclusive possession acts done by the Commonwealth or State of Queensland'. Consequently I am satisfied that this condition is met.

Conclusion

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

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

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

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

Section 190B(9)(a)

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

Section 190B(9)(b)

[244] Schedule P of the application provides that the application does not include a claim by the group to exclusive possession of all or part of an off-shore place.

Section 190B(9)(c)

[245] Having considered the terms and substance of the application and accompanying documents, I do not consider that there is anything indicating that the native title rights and interests claimed have otherwise been extinguished.

Conclusion

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

[*End of reasons*]