National Native Title Tribunal

Registration test decision

Application name	Wulli Wulli and Wakka Wakka Peoples
Name of applicant	Robert Clancy, Elizabeth Law, Erica Gyemore, Brian Clancy, Elizabeth Blucher, Ashley Saltner, Christine Bosworth, Jennifer Wragge, Julieanne Eisemann
NNTT file no.	QC2011/005
Federal Court of Australia file no.	QUD311/2011
Date application made	23 September 2011
Date application last amended	7 August 2014 as per order of the Federal Court of 4 August 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* (Cwlth).

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* (Cwlth).

Date of decision: 3 October 2014

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Nadja Mack

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

Edited Reasons for decision

Introduction

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.

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

Application overview and background

The Registrar of the Federal Court of Australia (the Court) gave a copy of the Wulli Wulli and Wakka Wakka Peoples claimant application (formerly referred to as Wulli Wulli People # 2) to the Registrar on 8 August 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.

As outlined in Schedule S of the application, the amendments made to this claim are the removal of a person from the list of named applicants, being **[Person 1 – name deleted]**, a reformulation of the claim group description which removes three apical ancestors and notes that the claim is brought on behalf of persons who, amongst other criteria, identify themselves as Wulli Wulli and Wakka Wakka persons, the reduction of the claim area, the correction of certain typographical errors, the updating of certain information contained in Schedules O and H and the provision of additional authorisation material which relates to the authorisation of the making of this amended application.

I note in relation to the removal of **[Person 1 – name deleted]** from the list of named applicants, that such removal was provided for by order of the Court of 4 August 2014, i.e. prior to the lodgment of this application. Order 1 states that 'pursuant to s 66B of the *Native Title Act 1993* (Cth), **[Person 1 – name deleted]** is removed as one of the persons comprising the First Applicant'.

Given the nature of the amendments, and the fact that no order was made by the Court under s. 87A, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to this claim.

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

Registration test

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

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

Information considered when making the decision

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

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

The documents that I have considered in reaching my decision are as follows:

- Form 1, including attachments and s. 62(1) affidavits as filed with the Court on 7 August 2014 as per order of 4 August 2014.
- Tribunal's Geospatial Services 'Geospatial Report and Overlap Analysis' (the Geospatial Report), dated 25 August 2014, being an expert analysis of the external and internal boundary descriptions and mapping of the application area and an overlap analysis against the Register, Schedule of Applications, determinations, agreements and s. 29 notices and equivalent.
- Submissions received from **[Lawyer 1 – name deleted]**, Just Us Lawyers, the legal representative for the applicant, dated 11 September 2014, including attachments.
- Geospatial database iSpatialView search results of the application area, dated 3 October 2014.

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

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

Procedural fairness steps

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

- On 14 August 2014 the State was provided with a copy of the application summary and invited to comment in relation to the registration testing of the application. No submission was received from the State.
- On 5 September 2014 the State was informed by the Tribunal of the proposed decision timeframe.
- On 18 September 2014 the State was advised that a submission was received by the applicant. The State advised that it did not seek to receive copies of the material and did not intend to make submissions.

Procedural and other conditions: s. 190C

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

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

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

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

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.

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)**

As noted above, my role in considering the current application against the requirements of s. 61(1) for the purposes of s. 190C(2), is a procedural one only, and seeks to ensure that a claim, 'on its face, is brought on behalf of all members of the native title claim group' – *Doepel* at [35]. Mansfield J in *Doepel* held that the delegate was merely to consider whether the application sets out the native title claim group in the terms required by s. 61, and that it was only where the

description indicated that not all persons in the group were included, or that the description was in fact a subgroup of the native title claim group, that the application would fail to meet the condition of s. 190C(2) – at [35] and [36]. I note that the task at s. 190C(2) does not require me to look beyond the information provided in the application – *Doepel* at [16].

Schedule A of the application provides the description of the native title claim group. There is nothing on the face of the application that leads me to conclude that the description of the native title claim group does not include all of the persons in the native title group, or that it is a subgroup of the native title claim group. I am therefore satisfied that the description meets the requirements of s. 61(1) for the purpose of s. 190C(2).

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

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

Part B of the application contains the address for service of the applicant. Those nine named persons jointly comprising the applicant are listed immediately above Part A of the application.

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

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

In undertaking the task at s. 61(4) for the purposes of s. 190C(2), I note that the provision does not require me to be satisfied of the correctness of the information in the application describing the persons in the native title claim group – *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 (*Wakaman*) at [34]. The requirement is not whether the description is sufficiently clear, but merely that a description is provided – *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [31] and [32]. An assessment of the merits of the description is, in my view, to be undertaken at the corresponding condition of s. 190B(3).

I am therefore satisfied, for the purposes of s. 190C(2), that the application contains the description of the native title claim group as required by s. 61(4).

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

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

The application is accompanied by affidavits from each of the nine persons who comprise the applicant. The affidavits are signed and competently witnessed and make all the statements required by this section including that the applicant is included in the native title claim group.

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

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

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)*

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

Attachment B to Schedule B of the application contains a written description of the external boundary of the area of land and waters covered by the application. Attachment B also provides that the application does not include the land and waters subject of the native title determination applications, QC00/7—Wulli Wulli People—QUD6006/00 (Wulli Wulli People) as accepted for registration on 31 March 2010 and QC97/55—Iman People 2—QUD6162/98 (Iman People 2) as accepted for registration on 26 July 2002. Areas within the boundary identified in Attachment B that are not covered by the application are listed in Schedule B by reference to general exclusion clauses.

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

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

Attachment C to Schedule C of the application contains a map showing the boundaries of the area covered by the application.

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

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

Schedule D of the application states that no searches have been carried out by the applicant.

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

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

Schedule E contains a description of the native title rights and interests claimed by the applicant in relation to the land and waters covered by the application. It is more than a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished.

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

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

In providing the general description of the factual basis on which it is asserted the native title rights and interests exist, Schedule F of the application refers to Attachment F. Attachment F is title, 'Native Title Application: Anthropologists Report', produced by **[Anthropologist 1 – name deleted]**, and dated 19 September 2011 (the report).

I have only considered whether the information regarding the claimants' factual basis contained in Attachment F, in a general sense, addresses each of the particular assertions at s. 62(2)(e)(i) to (iii) and have not undertaken an assessment of its sufficiency. Any 'genuine assessment' of the details/information contained in the application at s. 62(2)(e), is to be undertaken by the Registrar when assessing the applicant's factual basis for the purposes of s. 190B(5)—*Gudjala FC* at [92].

Activities: s. *62(2)(f)*
The application contains all details and other information required by s. 62(2)(f).

Schedule G of the application contains details of the activities currently carried out by the native title claim group in relation to the land and waters subject of the application.

Other applications: s. *62(2)(g)*
The application contains all details and other information required by s. 62(2)(g).

Schedule H of the application provides that, as the result of amendments made to the Wakka Wakka People # 3 application (pursuant to leave granted on 8 August 2014) which wholly overlapped this application, there are no applications that have been made in relation to the area covered by this application that the applicant is aware of.

Section 24MD(6B)(c) notices: s. *62(2)(ga)*
The application contains all details and other information required by s. 62(2)(ga).

Schedule HA of the application states that the applicant is unaware of any notifications under paragraph 24MD(6B)(c).

Section 29 notices: s. *62(2)(h)*
The application contains all details and other information required by s. 62(2)(h).

Attachment I to Schedule I of the application is a Memorandum prepared by the Tribunal's Geospatial Services, titled 'Proposed Wulli Wulli People #2 Geospatial overlap analysis'. The analysis provides that thirty-eight (38) s. 29 notices, as notified to the Tribunal, fall within the external boundary of the application as at 5 September 2011. The Geospatial Report received by me indicates that there are three (3) current s. 29 notices, which were in notification as at 25 August 2014. None of these notices are listed in Schedule I.

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

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

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

The requirement that the Registrar be satisfied in the terms set out in s. 190C(3) is only triggered if all of the conditions found in ss. 190C(3)(a), (b) and (c) are satisfied—*Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*)—at [9]. Section 190C(3) may involve the Registrar addressing information 'otherwise available'—*Doepel* at [16].

I have considered the Geospatial Report which identifies that there were no previously registered applications in relation to the area covered by this application at the time it was made (i.e. the date the application was filed in Court—*Strickland FC* at [44] and [45]).

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

Subsection 190C(4)
Authorisation/certification

> Under s. 190C(4) the Registrar/delegate must be satisfied that either:
> (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
> (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
>
> Note: The word ***authorise*** is defined in section 251B.
>
> Section 251B provides that for the purposes of this Act, all the persons in a native title claim group authorise a person or persons to make a native title determination application . . . and to deal with matters arising in relation to it, if:
> a) where there is a process of decision–making that, under the traditional laws and customs of the persons in the native title claim group, must be complied with in relation to authorising things of that kind—the persons in the native title claim group . . . authorise the person or persons to make the application and to deal with the matters in accordance with that process; or
> b) where there is no such process—the persons in the native title claim group . . . authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision–making agreed to and adopted, by the persons in

> the native title claim group . . . in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.

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

(a) includes a statement to the effect that the requirement in s. 190C(4)(b) above has been met, and
(b) briefly sets out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

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

For the reasons set out below, I am **satisfied** that the requirements set out in s. 190C(4)(b) are met.

Schedule R provides that the application has not been certified by QSNTS, the relevant Representative Body for the area covered by the application. Consequently, it is the requirements of s. 190C(4)(b) to which I must turn my mind. In reaching the level of satisfaction necessary at s. 190C(4)(b), I am also to ensure the application contains the information required by s. 190C(5).

The requirements of s. 190C(5)

I have firstly considered whether the application contains the information required by s. 190C(5), and note that whilst there may be compliance with this condition, it does not necessarily follow that the information provided regarding authorisation will be sufficient to allow me to reach the level of satisfaction required by s. 190C(4)(b). As held by Mansfield J in *Doepel*, 'the interactions between s. 190C(4)(b) and s. 190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s. 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given' – at [78].

The applicant's authorisation material is contained in Schedule R, Attachment R and in the affidavits accompanying the application required by s. 62(1)(a). I am of the view that I am able to accept all of the statements contained in the application as true – *Doepel* at [17] and *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [91] to [92].

In relation to authorisation, the affidavits accompanying the application from each of those persons jointly comprising the applicant state the following:

> 5. I am authorised by all of the persons in the native title claim group to make this application and to deal with matters arising in relation to it.
> 6. I am authorised by all persons in the native title claim group to make this application and to deal with matters arising in relation to it in accordance with a decision-making process involving simple majority decisions by show of hands and approved by those members at a meeting held in Mundubbera on 13 June 2011, as set out in Schedule R of this application.

Schedule R of the application relevantly states:

> The persons who constitute the applicant are members of the claim group and are authorised to make this application and deal with matters in relation to it by all the other persons in the claim group.
> The applicant is authorised to make the application in accordance with a decision-making process agreed to and adopted by the persons in the claim group there being no decision-making process mandated by the laws and customs of the claim group for authorising things of this kind. The applicant was appointed at a meeting specially convened for the purpose which was attended by members of the claim group. Further details are provided in the affidavit of **[Person 2 – name deleted]** and of **[Person 3 – name deleted]** contained in ATTACHMENT "R".

I am satisfied that the information contained in the application meets the requirements of s. 190C(5). I note the comment of French J in *Strickland,* that 'the insertion of the word "briefly" at the beginning of [s. 190C(5)(b)] suggests that the legislature was not concerned to require any detailed explanation of the process by which authorisation is obtained' – at [57]. The application contains a statement to the effect that the requirement set out in s. 190C(4)(b) has been met, and briefly sets out the grounds on which I am able to consider that it has been met.

The requirements of s. 190C(4)(b)

I now turn to consider the requirements imposed by s. 190C(4)(b). The role of the delegate in being satisfied of the fact of authorisation was discussed in *Strickland*, where French J held that authorisation 'is a matter of considerable importance and fundamental to the legitimacy of native title determinations', and that 'it is not a condition to be met by formulaic statements in or in support of applications' – at [57].

In reaching the required level of satisfaction at s. 190C(4)(b), there are two issues to which I must turn my mind. Firstly, whether the applicant is a member of the native title claim group, and secondly, whether the applicant has been authorised by all members of the native title claim group to make the application and to deal with matters arising in relation to it. As held by the Court in *Doepel*, I am to be 'satisfied of the fact of authorisation' – at [78]. The note in the legislation following the provision of s. 190C(4)(b), indicates that the applicant's authorisation material is also to address the definition of 'authorise' provided in s. 251B.

Second limb of s. 190C(4)(b)—the applicant is authorised by all the other persons in the native title claim group

I note that the term 'authorise' as used in s. 190C(4)(b) is defined in s. 251B. That is, an applicant's authority from the rest of the native title claim group to make the application and deal with related matters must be given in one of two ways:

- in accordance with a process of decision-making that must be complied with under the traditional laws and customs of the persons in the native title claim group; or

- where there is no such process, by a process agreed to and adopted by the group.

There is a long line of authority that an agreed and adopted process can only be used where there is no traditional process mandated for authorising 'things of that kind' (i.e. authorising an applicant to make a native title determination application)—see for example *Evans v Native Title Registrar* [2004] 1070 at [7] and [52].

Doepel at [78] is authority that s. 190C(4)(b) 'involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given'. What may be required to satisfy the Registrar in this regard will often depend on the circumstances of a particular matter. Relevant case law may also provide a guide as to the kind of information and level of detail that may be necessary to satisfy the Registrar that the requirements of s. 190C(4)(b) have been met.

In that regard, it has been held that the word 'all' in the context of authorisation pursuant to s. 251B, has 'a more limited meaning than it might otherwise have.' In *Lawson v Minister for Land and Water Conservation* (NSW) [2002] FCA 1517 (*Lawson*), Stone J held in relation to s. 251B(b) that it is not necessary for each and every member of the native title claim group to authorise the making of an application, but rather '[i]t is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision making process'—Lawson at [25]. A reasonable opportunity to participate, in such circumstances, may be reflected in material demonstrating that an authorisation meeting was well-attended and appropriately advertised or communicated to all members of the native title claim group—Lawson at [27].

More specifically, where authorisation occurs in the context of an organised meeting of the native title claim group (as is purported to have occurred in this instance), the decision in *Ward v Northern Territory* [2002] FCA 171 (*Ward*), may also provide some guidance as to the kind of information that may be required to satisfy the Registrar that the applicant is authorised in accordance with s. 251B. His Honour, O'Loughlin J observed that details as to the notice given to members of the claim group of the meeting, who attended the meeting and the authority of those who attended, the agenda, and the particular resolutions or decisions made at the meeting were the kind of pertinent facts that may be required—at [24].

In summary, the test under s. 190C(4)(b) requires me to ascertain from the material before me whether the claim group has a mandated traditional decision-making process and if this is the case, whether this mandated process was followed. If there is no mandated process that must be complied with, then I must consider whether the persons in the native title claim group agreed to and adopted a decision-making process and that they then followed it in authorising the applicant.

Attachment R consists of material that relates to the authorisation of the original application as well as this amended application. In addition, in response to questions put by me to the legal representative of the applicant via the case manager, the applicant has provided further

information about the event that occurred after the authorisation meeting held on 10 August 2013, which I have summarised below.

In summary, **[Person 3 – name deleted]** , consultant engaged to assist the Wulli Wulli People in relation to their application, states in her affidavit the following about the 10 August 2013 authorisation meeting:

- She has a long history working with the Wulli Wulli People and has attended all authorisation meetings for the Wulli Wulli People and Djaku-nde Jangerie Jangerie claims since 2004 except the meeting of 13 June 2011 at which the making of the original application was authorised.
- She provided the solicitor for the claim group, in late June 2013, with a database containing the contact details of 242 Wulli Wulli People, which was used previously to notify them of authorisation meetings.
- She was informed by the solicitor for the claim group that letters had been sent to all persons on the database on 21 June 2013, advising them of community information meetings and the proposed authorisation meeting scheduled for 10 August 2013. She was also advised that notices for the meetings had been placed in the Courier Mail, the South Burnett Times and Koori Mail (copies of the letter and the notices are attached to the affidavit).
- 11 community meetings were held leading up to the authorisation meeting. These meetings were 'generally well attended' (attendance sheets for each of the meetings are attached to the affidavit).
- The authorisation meeting on 10 August 2013 was held in Mundubbera and 155 persons registered their attendance and were entitled to vote at the meeting (the attendance list and minutes of the meeting are attached to the affidavit).
- The meeting passed a resolution that there is no particular traditional decision-making process that must be followed for making decisions about the claimant application and the claim group agreed to and adopted a process to make decisions. The relevant resolution was passed unanimously.
- Two further resolutions were passed with substantial majorities, confirming that only members of the Wulli Wulli # 2 claim group could vote on any changes to the claim group description and that the people who had registered as such were in fact descendants of the relevant Wulli Wulli ancestors.
- A substantial majority authorised the applicant in Wulli Wulli # 2 to remove certain named ancestors from the list of apical ancestors which describes the claim group.
- With one abstention, the attendees authorised the applicant to amend the application by removing certain lands and waters from the claim area so that the Boyne River forms the South-Eastern external boundary.
- Having attended five or six authorisation meetings by the Wulli Wulli People, the decision-making process at the authorisation meeting was consistent with the process agreed to and adopted at previous meetings.

I note from the meeting minutes attached to **[Person 3 – name deleted]** affidavit the following:

- Details of the agreed to and adopted decision-making process are set out at para 17 which includes the wording of Resolution 3. I note that whilst the process provides for decisions to

be made by a vote, it does not state when a decisions is made (e.g. by majority vote, consent). I can see, however, that decisions have been made at the meeting by majority vote. In *Noble v Mundraby* [2005] FCAFC 212 (*Noble v Mundraby*) the Full Court who said that s. 251B does not require proof of a system of decision–making beyond proof of the process used to arrive at the particular decision in question—at [18]. The Court went on to say that s. 251B does not require a formal agreement to the process adopted for the making of a particular decision and agreement within the contemplation of s. 251B may be proved by the conduct of the parties—at [18]. In my view, there is evidence, similar to the circumstances described in *Noble v Mundraby*—at [18], that the claim group conducted itself at the meeting in question on the basis that it agreed to a vote by the members of the group to determine authorisation and that decisions are made by majority vote. All present voted in favour of the motion. Nobody is recorded as leaving the meeting or refusing to vote or in any other way conducting themselves to indicate dissent from the course adopted. I further note that the decisions made at the meeting in relation to this amended application were made at least by a 'substantial majority', as outlined below, and as such, in my view, the decision-making process agreed to and adopted at the meeting has been followed.

- In particular,
  - Resolution 4, which was passed by 123 persons with one person recorded as having voted against it, clarified who was entitled to vote at the meeting.
  - Resolution 5, passed by 123 persons with 4 against, states that the meeting accepts that the persons who have signed the attendance book as descendants of one of the apical ancestors listed in Resolution 4, are descendants of those ancestors.
  - Resolution 6 authorised the applicant to amend the claim group description of this application. 104 persons voted in favour and 35 against it.
  - Resolution 7, which was supported by 129 persons with one abstaining, authorised the applicant to amend the claim area of this application by removing an identified area, referred to as the 'withdrawn area'.
  - Resolution 8 clarified that the applicant was not authorised to change the name of the application. This resolution was supported by 114 persons.
  - Resolution 9 stated that amendments to this application are only to be made after the Wakka Wakka # 3 claim was either withdrawn or dismissed. 100 voted in favour of this resolution, 2 persons abstained.

I note that this application does, contrary to Resolution 8, change the name of the application from Wulli Wulli # 2 to Wulli Wulli and Wakka Wakka Peoples. Contrary to Resolution 9, this application has also been brought despite the fact that the Wakka Wakka # 3 claim has not been withdrawn and dismissed.

As noted above, I have asked the case manager for this matter to ask the legal representative questions about the apparent deviation from the resolutions. In response the legal representative provided me with further information, including the following documents 'filed and relied upon in support of the application to the Court for leave to make the amended application: submissions filed on 30 July 2014, affidavit of Edward Besley, filed on 16 July 2014 and affidavit of **[Person 3 –**

name deleted], affirmed on 11 July 2014 (a copy of which is attached to the this application in Schedule R).

From this additional material I understand that the applicant's position in relation to the 'amendment to the Court heading and Schedule A' from 'Wulli Wulli # 2' to 'Wulli Wulli and Wakka Wakka Peoples' to be as follows:

- It was within the applicant's terms of authority and not a matter required by law to be authorised by the claim group;
- The 11 August 2013 [sic] meeting did not alter or vary the authority conferred on the applicant when first appointed;
- The claim group were not asked to consider an inclusive name such as that agreed at the mediation [the Federal Court case management conference] but were instead asked to consider a "neutral name" with no language-group names that allowed people to identify as either Wulli Wulli and/or Wakka Wakka. What the claim group rejected at the 11 August 2013 meeting was the use of a "neutral" name;
- The name change was considered by applicants and elders at the mediation, and was agreed upon as a pragmatic way in which to overcome the overlap between the Wulli Wulli # 2 and Wakka Wakka # 3 claims; and
- The composition of the claim group remains unchanged; no additional persons are included in the claim group by virtue of the amendment made to Schedule A. Some of the descendents of three of the listed apical ancestors, **[Ancestor 1 – name deleted]**, **[Ancestor 2 – name deleted]** and **[Ancestor 3 – name deleted]**, identify as Wakka Wakka rather than Wulli Wulli people. The amendments now acknowledge, by noting that members of the claim group self-identify as Wakka Wakka or Wulli Wulli people, that some members of the claim group identify as Wakka Wakka people. Descendants of those ancestors attended the information sessions and the authorisation meeting.

I also understand the applicant's position in relation to Resolution 9 to be as follows:

> Justice Greenwood made an order on 4 August 2014 in relation to the Wakka Wakka # 3 and the Wulli Wulli # 2 claims which removed the geographical overlap between the two applications. With the Wakka Wakka # 3 claim now withdrawn from the area covered by Wulli Wulli # 2 the amended application gives effect to resolution 9. In any event, resolution 9 should be understood in the context of the registration test and the requirements of s. 190C(3).

For the above reasons I am of the view that the decision-making process agreed to and adopted at the meeting was followed by those who attended the authorisation meeting in accordance with the requirements of s. 251B(b).

I am of the view that the requirements of s. 190B(4)(b) are **met**.

Merit conditions: s. 190B

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

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

The information required by ss. 62(2)(a) and (b) is provided at Schedule B, Attachment B and Attachment C to Schedule C of the application. In undertaking the task at s. 190B(2), I must be satisfied that the information and the map are sufficient for it to be said with reasonable certainty whether the native title rights and interests are claimed in relation to particular land and waters. I note that in reaching the required level of satisfaction, it is primarily the information contained in the application that I am to have regard to – *Doepel* at [16].

The description of the application area is found in Schedule B of the application which refers to Attachment B. Attachment B describes the application area as a metes and bounds description referring to cadastral boundaries, roads, watercourses, local government areas, catchment boundaries and coordinate points to six (6) decimal places referenced to the Geocentric Datum of Australia 1994 (GDA94).

Schedule C refers to Attachment C. Attachment C is a colour copy of a map titled "QUD311/2011 Wulli Wulli People #2 (QC2011/005) – Amended" prepared by the National Native Title Tribunal dated 3 July 2014 and includes:

- The application area depicted by a bold blue outline;
- Cadastral boundaries shown and colour coded by tenure type;
- Topographic features shown and labelled;
- Scalebar, northpoint, coordinate grid; and
- Notes relating to the source, currency and datum of data used to prepare the map.

The areas not covered by the application, in addition to the excluded native title determination application areas referred to in the written description, are described in Schedule B as a list of general exclusions. This approach to describing areas not covered by the application has been accepted by the Court on a number of occasions as sufficient for the purposes of s. 190B(2) – See for example *Western Australia v Strickland* [2002] FCA 652 (*Strickland FC*) at [23] and [26]; *Queensland v Hutchison* [2001] FCA 416 (*Hutchison*) at [28] to [35].

The Geospatial Report concludes that the description and the map are consistent and identify the application area with reasonable certainty. It also states that the application area has been reduced as a result of the amendments and does not include any areas which have not previously been claimed in the original application.

I too, am of the view that the information and map required by ss. 62(2)(a) and (b) contained in the application are sufficient for it to be said with reasonable certainty whether rights and interests are claimed in relation to particular land or waters.

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.

Section 190B(3) prescribes two methods by which the claim group can be identified. The description at Schedule A does not name the persons in the claim group. Therefore the conditions of s. 190B(3)(b) apply.

The task of the delegate at s. 190B(3)(b) was discussed by Mansfield J in *Doepel*, where he stated that 'the focus of s. 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group.' Mansfield J also held that the focus of the test was not upon the correctness of the description, but upon its adequacy in allowing for group members to be ascertained – at [51] and [37]. This approach was confirmed by the Court in *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 at [34] and *Gudjala 2007* at [33].

The description of the native title claim group at Schedule A is as follows:

> The claim group are persons:
> 1. who are recognised by other members of the claim group as being descended (which may include by adoption) from a deceased person who they recognise as having been a member of the aboriginal land holding group for the application area depicted in ATTACHMENT "C" ("an apical ancestor"); and
> 2. who is a descendant of an apical ancestor and identifies himself or herself as being a Wulli Wulli or Wakka Wakka person.
>
> It is accepted that adoption may take place and where adoption has occurred it confers upon the adoptee the right to identify as a member of the claim group.
>
> The following deceased persons are recognised as having been apical ancestors from whom claim group members are descended:
>
> Bojimba & Narrygn
> Ginalene, the mother of Ernest Pope
> Tilly, the mother of Harry Blucher
> Grace, the mother of Fanny Joyce
> Jack, the father of Jack Hornet
> Thomas Clancy

Jessie Fuller
Maria, the mother of Isabella Hooper
Amy, the wife of John Bond
Billy and Selena, parents of Jacob
King Billy & Maria of Boondooma
Billy McKenzie
Maggie West
Jackanapes
Jinnie, the mother of Ranji Logan
Rosie Ah Sue
Mergwin Button
Kitty of Boondooma
Maggie Hart
MiMi

The description contains two conditions by which group members are able to be identified. The first is that a person must be a descendant of one of the named apical ancestors and must be recognised by other group members as such. The second condition is that the person must self-identify as a Wulli Wulli or Wakka Wakka person.

Describing a claim group by reference to named apical ancestors is one method that has generally been accepted as satisfying the requirement of s. 190B(3)(b) – See *Western Australia v Native Title Registrar* [1999] FCA 1591 (*WA v NTR*) at [67]. Recognition by others and self-identification as conditions of group membership have been the considered in *Ward v Registrar, National Native Title Tribunal* [1999] FCA 1732 (*Ward*). In that case, the ancestors of the group had not been named and the Court held that it was open to the delegate to find that she was not satisfied for the purposes of s. 190B(3)(b). The delegate also had concerns regarding the lack of factual basis material pertaining to the traditional laws and customs relevant to the claim group description criteria – at [11] to [28].

Similarly, a description based on self-identification without a set of rules or principles explaining the operation of the description was commented upon unfavourably by Kiefel J by way of obiter in *Wakaman People #2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198. Her Honour stated:

> The registration process is concerned with the clarity of the description of persons making up a claim group, so that it may be determined whether a person is a member of it. A requirement of self identification would not appear to meet such an objective and might be thought to provide grounds for refusal of registration... At a practical level it cannot be known whether descendants will or will not identify with the group – at [38].

I further note that Dowsett J, in *Aplin on behalf of the Waanyi Peoples v State of Queensland* [2010] FCA 625 (*Aplin*), whilst not specifically addressing s. 190B(3), provided comment on the considerable complexities and issues involved in determining the persons comprising the native title claim group for particular land and waters:

> For the purposes of the Native Title Act, it is the claim group which must determine its own composition... The claim group must assert that, pursuant to relevant traditional laws and customs, it holds Native Title over the relevant area. It is not necessary that all members of the claim group be identified in the application. It is, however, necessary that such identification be possible at any future point in time. A claim group cannot arrogate to itself the right arbitrarily to determine who is, and who is not a member. As to the substantive matters concerning membership, the claim group must act in accordance with traditional laws and customs – at [256].

His Honour suggests that recognition by other members of the group may only be an appropriate criteria where it is exercised in accordance with traditional laws and customs.

Attachment F to Schedule F is a report by **[Anthropologist 1 – name deleted]**. The report at parts 9.0 and 10.0 contains considerable factual basis material which speaks to the traditional laws and customs held by the claim group relating to the criteria by which group members are ascertained.

Further, the report clearly supports that descent from a named apical ancestor is the basis of group membership, under the claimants' laws and customs, as illustrated by the following statements provided in the report by claimants:

> Grandfather's country – it's Redbank, where he's born, and the Dawson – He knew the Dawson – I go on my grandfather – **[Ancestor 4 – name deleted]** – he's a Wulli Wulli person – I know grandfather **[Ancestor 4 – name deleted]** was a Wulli Wulli because he used to tell stories, and sang blackfellow songs – He (grandfather) told me about Gyranda Mountain and sing that song; and Mum **[Ancestor 5 – name deleted]** did too. I learnt about that Dawson country myself – I've worked all over it. Who else belongs to that area? – depends on their parents – where they come from – if they belong to that land – they'd be Wulli too. To claim this is your country – you have to belong to the land! You have to really belong – been born and bred as they say! Look – white people can come along and say they know all about that country or they can learn about it – but they don't really belong there – they came from somewhere else. You have to belong there, to claim the land. Look – my father **[Ancestor 6 – name deleted]** is a Wakka but my mother [**[Ancestor 5 – name deleted]**, a daughter of **[Ancestor 4 – name deleted]** and **[Ancestor 7 – name deleted]**] is a Wulli – I claim through her – at [para 104].
>
> You have to be descended from an ancestor that comes from this country. I pass them [these rights and interests] to my children – through the bloodline. We know who the ancestors are because our old people told us who they were. My Granny always told us her grandparents **[Ancestor 8 – name deleted]** and **[Ancestor 9 – name deleted]** were buried on Narragin [Narayen] Mountain – at [para 128].
>
> I have rights and interests in this area because I belong to this area and I know I belong to this area because I have the connections, as my mother is from that [Application] area. I know from seeing how my mother connected to that area – I knew that she was part of that land, that country – that she belonged to that area. My children have these rights and interests too, because they are my children and they are the ancestors of the future – at [para 128].

The above statements demonstrate that self-identification, including the ability to identify through either the mother's or father's bloodline, is a criteria by which members of the native title claim group are able to be ascertained. The use of the word 'and' in the description at Schedule A makes it clear that both the criteria of recognition and the criteria of self-identification must be found to apply in order for a person to fall within the claim group description. It is my view that the combined application of both criteria, where descent from one or more of the named apical ancestors underlies the operation of each, is able to rectify any lack of clarity that may result from the operation of either on its own, and that with some factual inquiry, those persons comprising the claim group are able to be ascertained.

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.

The description of the native title rights and interests claimed is set out in Schedule E as follows:

> 1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s238, ss47, 47A or 47B apply), the claim group claims the right to possess, occupy, use and enjoy the land and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group.
>
> 2. Over areas where a claim to exclusive possession cannot be recognised, the claim group claims the non-exclusive right to:
> (a) live and be present on the application area;
> (b) take, use, share and exchange Traditional Natural Resources for personal, domestic and non-commercial, communal purposes;
> (c) conduct burial rights;
> (d) conduct ceremonies;
> (e) teach on the area about the physical and spiritual attributes of the area;
> (f) maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places and areas from physical harm;
> (g) light fires for domestic purposes including cooking but not for the purposes of hunting or clearing vegetation;
> (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; and
> 2) to assist in observing and recording traditional activities on the claim area; and
> (i) in relation to Water, take and use:

1) Traditional Natural Resources from the Water for personal, domestic and non-commercial communal purposes; and
2) for personal, domestic and non-commercial, communal purposes.

3. For the purposes of 2. Above:
"Live" means to reside and for that purpose erect shelters and temporary structures but does not include a right to construct permanent structures;
"Traditional Natural Resource" means:
"animals" as defined in the Nature Conservation Act 1992 (Qld);
"plants" as defined in the Nature Conservation Act 1992 (Qld);
"charcoal, shells, and resin; and
"clay, soil sand; ochre; gravel or rock on or below the surface;
"Water" means water as defined by the Water Act 2000 (Qld);

4. The native title rights and interests are subject to:
(a) The valid laws of the State of Queensland and the Commonwealth of Australia; and
(b) The rights conferred under those laws.

In undertaking the task at s. 190B(4), it is the information prescribed by s. 62(2)(d) that I am to turn my mind to. The requirements of s. 190B(4) must be met by what is contained in the application – *Doepel* at [16]. Mansfield J stated in *Doepel* that the test of identifiability merely requires that the rights and interests are understandable and have meaning – at [99].

It is my view that the native title rights and interests as claimed in the application are understandable and have meaning. The description is sufficient to allow the native title rights and interests to be readily identified.

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.

The task at s. 190B(5)
The role of the delegate at s. 190B(5) has most comprehensively been addressed by the Court in the decisions of Dowsett J in *Gudjala 2007* and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*), and in the Full Court's decision in *Gudjala FC*. The Full Court described the correlation between the requirements of s. 62(2)(e) and s. 190B(5) in the following way:

> Accordingly, the statutory scheme appears to proceed on the basis that the application and accompanying affidavit, if they, in combination, address fully and comprehensively all the matters specified in s. 62, might provide sufficient information to enable the Registrar to be satisfied about all matters referred to in s. 190B...

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. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based – at [90] to [92].

In reviewing the approach of Dowsett J in *Gudjala 2007*, the Full Court found that His Honour had, in his consideration of the application, applied a 'more onerous standard than the NTA requires' (*Gudjala FC* at [7]) by incorrectly concluding that the information, contained in an anthropological report comprising the factual basis material for the application, was no more than 'opinions and conclusions rather than any alleged factual basis for such opinions and conclusions' – *Gudjala 2007* at [52]. The Full Court did not, however, criticise Dowsett J's characterisation of what would amount to a sufficient factual basis – at [96]. Similarly, the *Gudjala 2009* decision continues to provide assistance in relation to what a sufficient factual basis must address for each of the three particular assertions at s. 190B(5).

The applicant's factual basis material is contained in the report in Attachment F. The detailed and extensive document draws on research conducted by **[Anthropologist 1 – name deleted]** undertaken intermittently between 2003 and 2011 regarding the region within which the application is situated, and information extracted from the published and unpublished materials of early observers and previous researchers in the area. Further information about the factual basis is contained in additional information received from the applicant's legal representative on 11 September 2014 in response to questions I put to the representative via the case manager for this matter. As noted above, the response includes submissions made in this matter filed in court on 30 July 2014 and an affidavit by **[Lawyer 1 – name deleted]**, filed on 16 July 2014.

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

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

The Court discussed the requirements of the factual basis material at s. 190B(5)(a) in *Gudjala 2007*, where it held that the following kind of information may be necessary to support the assertion:

- that the claim group as a whole presently has an association with the area, although it is not a requirement that all members must have had an association at all times; and
- that there has been an association between the predecessors of the whole group and the area over the period since sovereignty—at [52].

I note that in *Gudjala 2007*, Dowsett J commented in relation to the above, that 'even if it be accepted that all members of the claim group are descended from people who had an association with the claim area at the time of European settlement, that says nothing about the history of such association since that time. Some members of the claim group and their predecessors may be, or may have been, so associated, but that does not lead to the conclusion that the claim group as a whole, and their predecessors, were similarly associated'—at [51].

[Anthropologist 1 – name deleted] , in part 15.0 of her report, which constitutes a summary, states at para 243 that '[m]y consideration of the written records and oral histories found that they provide prima facie evidence that the claimants have maintained their physical connection and spiritual affiliation to the Application area from since the time of effective sovereignty.'

The report provides details pertaining to the association of the claim group and its predecessors to the area covered by the application, under various headings. In summary the reports states that:

- the application area is associated with a landholding group known as the 'Wulli Wulli People', which is comprised of several locality and/or language groups including those named 'Jangerie Jangerie', 'Dakundair', and 'Willill-lee' (or variants of these names) – at [para 40 to 41];
- 'Wulli Wulli' is a polysemic term (depending on context, it can refer to an area, group, social category or language)– at [para 231];
- claimants use the term 'Wulli Wulli' for the people, the language and the country of the application area. This is notwithstanding their use of the term 'Djakunda' for Boondooma and the south-east part of the application area and the term 'Jangerie Jangerie' for the broader Hawkwood-Narayen region. An elderly claimant is quoted as follows "I come from Djakunda and Jangerie Jangerie country – it's Wulli Wulli country – all the Wulli Wulli mob belong there – my mum is a Wulli Wulli – we also say 'Willi-Willi' – and some of her country is called 'Jangerie Jangerie'" – at [para 31];
- older claimants clearly recall these names and associate them with particular places within the application area – at [para 40];
- oral information given by elderly claimants descended from various apical ancestors associates those ancestors and their descendants as being of particular language and locality groups, as well as being Wulli Wulli People – at [para 31];
- historical records demonstrate that all 26 apical ancestors are associated with places within the application area (as well as some association with areas outside this claim area) – [see table 3 on page 71] and these associations are consistent with the oral traditions of their descendants – at [para 103]; [I note in relation to the reference to 26 apical ancestors in the report, that the list of apical ancestors was amended by removing three ancestors following the outcome of three case management sessions held by the Federal Court, including two

conferences of experts held in July 2012 and February 2013, including **[Anthropologist 1 – name deleted]**, who considered, and attempted to reach agreement on, the apical ancestors for the area which includes the claim area; agreement was reached at the third case management conference held in March 2013 which was attended by the applicant for the Wakka Wakka People # 3 and the Wulli Wulli # 2 claim as well as their legal representatives];

- based on estimated birth dates compiled from historical records, more than half of the apical ancestors were born prior to European settlement in the area (1849-1850), with the remainder born in the immediate post-sovereignty period (1851-1870) – at [para 100];
- historical records support the claimants' accounts of their long histories of living at particular places in the application area, while undertaking casual work such as ringbarking, land clearing, fencing and mustering for various pastoralists – at [para 138];
- today, although many claimants reside in Chinchilla, Mundubbera, Eidsvold and Monto (which are near the application area) and in Cracow and Theodore (which are located within the Wulli Wulli QUD6006/2000 application area), they move regularly through the application area to visit relatives, to attend social events and to access the facilities and services in these towns. Claimants also camp at Auburn Falls within the application area – at [para142];
- in addition, part 11.0 of the report, which deals with the exercise of native title rights and interests, sets out numerous locations which claimants are, and their forebears were, associated with in the exercise of their native title rights and quotes claimants in relation to their activities on the claim area.

I have asked the case manager for this matter to seek clarification from the legal representative of the applicant on the following:

> The amended claimant group description in Schedule A describes the members of the claim group as descendants of listed apical ancestors who identify themselves as a 'Wulli Wulli or Wakka Wakka' person.
> The amended application is brought on behalf of the 'Wulli Wulli and Wakka Wakka Peoples' (cover page).
> Schedule F refers to Attachment F in relation to a general description of native title rights and interests claimed. Attachment F is a report of **[Anthropologist 1 – name deleted]** dated 19. September 2011.
> **[Anthropologist 1 – name deleted]** report, in section 1.0 *Identity of the pre-sovereignty land-holding group*, states that the land-holding group for the original Wulli Wulli # 2 claim area (which included the area currently under claim by Wakka Wakka # 3) is the Wulli Wulli language-named land-holding group which is to be distinguished from the Wakka Wakka language-named landholding group (e.g. at paragraphs 41 and 42).
> The material provided in support of Schedule F does not appear to address the issue of why it is now said that the amended claim is brought on behalf of both groups and how the requirements of s. 190B(5) are addressed in light of this amendment.

On 11 September 2014 the applicant's legal representative advised, in response, that:

- the amended application is not brought on behalf of both the Wakka Wakka and Wulli Wulli claim groups as described in QUD621/2011 (Wakka Wakka # 3) and QUD311/2011 (this application).

- Rather, it is brought on behalf of the descendants of named apical ancestors, some of whom today choose to identify as either Wulli Wulli or Wakka Wakka people.
- The amended application simply acknowledges the contemporary reality that descendants of three apical ancestors, which are included in the description in Schedule A, namely **[Ancestor 1 – name deleted]** , **[Ancestor 2 – name deleted]** and **[Ancestor 3 – name deleted]**, self-identify as Wakka Wakka rather than Wulli Wulli people. This contemporary reality was a reason for the overlap of the Wakka Wakka # 3 and the Wulli Wulli # 2 claims, which has now been resolved by recognising this difference in self-identification.
- The land-holding group itself remains unchanged – in the sense of a group of people, the apical ancestors, who are acknowledged as having had a traditional association with the claim area and from whom native title holders may be descended.
- In paragraph 42 of the report, **[Anthropologist 1 – name deleted]** opines that pre-sovereignty social formations 'may have split to form the two language-named land holding groups distinguished today as Wulli Wulli and Wakka Wakka'. However, **[Anthropologist 1 – name deleted]** then states that, irrespective of language-named identifiers (such as Wulli Wulli and Wakka Wakka), 'the apical ancestors who describe the claim group and/or their immediate descendants have associations with places throughout the Application area and that there has been intermarriage between some of them and/or some of their descendants. As discussed below (section 7.0), such connections underlie the long histories of consociation between members of the descent groups that comprise the claim group (emphasis added)'. **[Anthropologist 1 – name deleted]** findings that the land-holding group for the claim area is identified at the 'language-named group level' as Wulli Wulli should be considered along with her finding at para 51 that the traditional laws and customs of the pre-sovereignty society with respect to succession to 'rights-holding territorial group(s)' were based on 'notions of consubstantiality, cognation and filiation'. Rights and Interests held by the pre-sovereignty land holding group were conferred upon members reckoned primarily by descent, not language group affiliation.
- The Full Federal Court in *Sampi on behalf of the Bardi and Jawi People v Western Australia* found that the central consideration as to whether a group constitutes a society is 'whether the group acknowledges the same body of laws and customs relating to rights and interests in land and waters'. Further, the Courts have found that the relevant society or land holding group can be comprised of people from different language groups or groups linked to specific areas within a broader area.

In my view, the above quoted material possesses sufficient geographical particularity to support an assertion of an association held by the claim group members and their predecessors with locations within this claim area.

The material provides information about the association of at least some of the ancestors listed in Schedule A with the claim area around the time of European settlement which is said to have begun in 1849-1850 or in the period shortly after.

I am further of the view that the material is sufficient to support an assertion of an association between the whole group by providing some tangible examples, originating from some members

of the claim group, of how the whole group and its predecessors have been associated with the area over the period since sovereignty.

I find that I am satisfied on the material before me that the application provides a sufficient factual basis to support the assertion that the group as a whole have, and the predecessors of the group had, an association with the claim area.

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

In being satisfied that the applicant's factual basis material supports the assertion at s. 190B(5)(b), I have to have regard to the definition of 'native title rights and interests' in s. 223(1). This definition was considered in some detail in the decision of *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (*Yorta Yorta*), where the High Court looked at the content of 'traditional laws and customs'. The Court held 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 by the British Crown'. The High Court also found that the nature of the rights and interests is that they must be 'rights and interests rooted in pre-sovereignty traditional laws and customs' – at [46] and [79].

Dowsett J in *Gudjala 2007* and *Gudjala 2009* also gave considerable guidance as to what was required by s. 190B(5)(b), including 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, and that there is a link between the apical ancestors and any society existing at sovereignty – *Gudjala 2007* at [65] and [66].

[Anthropologist 1 – name deleted], in part 15.0 of her report, which constitutes a summary, states at para 245 that '[m]y research has led me to form the preliminary opinion that the claimants' assertions of rights and interests in the area covered by the Application derive from the traditional laws and customs that prevailed in this region at the time of effective sovereignty and that there has been no change since pre-sovereignty in the basic tenets that underlie these laws and customs. The research found that the claimants hold a consubstantial identification with the Application area and that membership of the claimant group is contingent on filiation to the parent or grandparent who his/herself is recognised as holding rights in the area covered by the Application, and that this same principle underlay the membership of land-holding groups in this region at the time of effective sovereignty. ... according to the laws and customs upheld by the claimants, only those who are rightfully connected to the land are entitled to hold a proprietary/beneficial right to the Application area. Under the claimants' customary law, such connection is established, as it was in the past, through filiation to a parent or a grandparent who is recognised as descended from an ancestor associated with the landholding group for the area. The genealogical research... found evidence that the claimants have such connections. My research also found that claimants have continued to uphold traditional beliefs and practices in

relation to the use of the Traditional Resources of their land and waters, and the care and management of its sites, albeit with adaptions.'

The report provides the following relevant information pertaining to the laws and customs observed and acknowledged by the claim group and their predecessors:

- European settlement in the area covered by the application occurred during 1849 to 1850, when the land was taken up in pastoral runs – at [para 4]; as noted above, based on estimated birth dates compiled from historical records, more than half of the apical ancestors were born prior to European settlement in the area (1849-1850), with the remainder born in the immediate post-sovereignty period (1851-1870) – at [para 100];
- observations of early recorders describe the way in which south-east Queensland was inhabited by various land-holding groups whose members' lives were regulated by region-wide laws and customs that determined firstly how the population was organised into territorial, social, political and religious units; secondly the rights and interests of those units, and thirdly, the rights and interests of those units' members – at [para 43];
- the pre-sovereignty land-holding group for the application area is the one identified at the language-named group level as 'Wulli Wulli' – at [para 41];
- each group's area and its resources belonged to all members of that group, but at the same time, certain members had rights and interests in particular areas and/or resources located on the territory of that group – at [para 52];
- members of the pre-sovereignty land-holding groups were entitled to exercise what are termed core proprietary beneficial rights in relation to the territory of the land-holding group to which they were affiliated and to particular places and resources within that area. Four clusters of core rights can be distinguished: occupation and economic rights, control and management rights, rights concerned with speaking for country and maintaining the cultural estate, and rights to determine membership of the land-holding group and to resolve disputes among members – at [para 56].

In response to a question about the landholding society, the legal representative of the applicant noted that despite the application now being referred to as the 'Wulli Wulli and Wakka Wakka Peoples' native title claim, 'the land holding group remains unchanged – in the sense of a group of people, the apical ancestors, who are acknowledged as having had a traditional association with the claim area... and from whom native title holders may be descended. In paragraph 42 of her September 2011 report, **[Anthropologist 1 – name deleted]** opines that pre-sovereignty social formations "may have split to form the two language-named land holding groups distinguished today as 'Wulli Wulli' and 'Wakka Wakka''. The legal representative further notes that '**[Anthropologist 1 – name deleted]** findings that the land-holding group for the claim area is identified at the 'language-named group level' as Wulli Wulli should be considered along with her finding at paragraph 51 that the traditional laws and customs of the pre-sovereignty society with respect to succession to 'rights-holding territorial group(s)' were based on 'notions of consubstantiality, cognation and filiation'. Rights and Interests held by the pre-sovereignty land

holding group were conferred upon members reckoned primarily by descent, not language group affiliation'.

In addition, the legal representative submits that the 'Full Federal Court in *Sampi on behalf of the Bardi and Jawi People v Western Australia* found that the central consideration as to whether a group constitutes a society is 'whether the group acknowledges the same body of laws and customs relating to rights and interests in land and waters'. Further, the Courts have found that 'the relevant society or land holding group can be comprised of people from different language groups or groups linked to specific areas within a broader area'. Case law is quoted in support of this submission.

Further, part 6.0 of the report sets out 'other pre-sovereignty laws and customs pertaining to the pre-sovereignty land-holding group', the Wulli Wulli People. The outline is based on **[Anthropologist 1 – name deleted]** research of historical records as well as oral accounts of claimants. The outlined pre-sovereignty laws and customs relate to:

- Decision making and authority structures
- Social organisation and structure
- Social relations
- Spiritual beliefs
- Ceremonies
- Relations between sexes
- Relations with other indigenous groups
- Relations with other indigenous groups
- Language
- Collection and dissemination of knowledge
- Use of materials and technologies
- Change of traditional laws and customs

In summary, part 6.0 relevantly states the following:

- decision-making and authority structures for the pre-sovereignty land-holding group included separate Bora councils for men and women and also a regional Tribal Council, which dealt with matters affecting the 'tribe as a whole', such as serious disputes, decisions about marriages and the readiness of young people for initiation – at [para 64];
- apical ancestor **[Ancestor 8 – name deleted]**, as well as his son **[Ancestor 10 – name deleted]**, were 'headmen'/'tribal leaders'/'chief'/'king' of their respective smaller socio-territorial groups and dealt with minor maters that concerned the particular group but not maters that concerned the tribe as a whole and were obeyed to a certain extent and looked upon as being endowed with great wisdom – at [para 65];
- social relations were underpinned by a kinship system that allowed for the classification of all members of the land-holding group into distinct categories and the extension of these categories beyond the land-holding group – at [para 69];
- a focal feature of the cosmology of the pre-sovereignty society of south-east Queensland was a belief in a sacred Creator Being (Ngiyeran or Ngayeran in Wulili language), held to be

responsible for establishing the society's laws and customs at some time in the distant past, and another Being, the Rainbow Serpent (Dhakkan or Gauwar) – at [para 70 to 73];
- records report that those persons inhabiting the application area participated in a region-wide ceremonial system, where ceremonies were conducted jointly, cosmological views shared, and the same burial practices adopted – at [para 76];
- marriage was prescribed between classificatory cross-cousins and prohibited between parallel cousins. Marriage was also regulated by the region-wide system of moieties and sections. Marriage was arranged by the bora and strict avoidance was practiced between men and their mother-in-law. Intermarriages between tribal groupings were common – at [para 78 to 81];
- large gatherings of Aboriginal people for economic, religious and juridicial matters in the region are described in the historical records, which were under the authority of the Tribal and Bora Councils, with each council having an appointed head or chief. Young men passed through a series of initiation ceremonies which were held at fixed places and marked in the landscape by bora rings, such as Dykehead in the application area – at [para 84];
- the harvesting of bunya trees was a major regional event, where groups from across the application area came together. This was also an occasion where other significant ceremonies such as initiations, betrothals, settlement of quarrels and trading took place – at [para 85];
- men and women of the groups within the application area were taught behavioural practices and rules during their formal training at the time of reaching adulthood. Members of pre-sovereignty land-holding groups were expected to acquire such knowledge through observation and rote learning – at [para 93].

In addition, part 10.0 of the report provides **[Anthropologist 1 – name deleted]** opinion as to whether the present day claim group can be said to generally observe and acknowledge the laws and customs of the pre-sovereignty land-holding group relating to occupation and use of the application area. Relevantly, this part of the report states that claimants state that under their traditional laws and custom only those persons descended from apical ancestors who are recognised as belonging to the application area are entitled to speak for the application area and to assert native title rights and interests in the area. Claimants further state that they were taught by their parents and older relatives to respect their land, its resources and all things belonging to their ancestors and that they teach these traditional laws and customs to their descendants. Claimants believe that those who transgress these rules run the risk of incurring serious punishment either to themselves or close family members. Claimants further state that they have learnt from their parents and older relatives about significant sites in the application area such as Mt Narayen, the Auburn Falls and the Bunya Mountains and that they impart this knowledge to their children and other younger relatives.

The above factual basis material identifies the relevant pre-sovereignty society, being the Wulli Wulli land-holding group, which is one of various land-holding groups in southeast Queensland and regulated by region-wide identifiable laws and customs. The apical ancestors of the claim group are said to have been members of this land-holding group and had an association with the claim area at the time of sovereignty or shortly thereafter. As such, the factual basis material explains the link between the claim group and the claim area and identifies the relevant pre-

sovereignty society from whom it is asserted the claim group's laws and customs derive. The material describes the traditional laws and customs of the pre-sovereignty land-holding group and also sets out how they have been continuously acknowledged and observed by past and current members of the claim group.

For the above reasons I am of view that the factual basis material is sufficient to support the assertion that there exist traditional laws acknowledged, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests.

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

Section 190B(5)(c) requires me to be satisfied that the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the claimed native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way. This is the second element to the meaning of 'traditional' when it is used to describe the traditional laws and customs as giving rise to claimed native title rights and interests; see *Yorta Yorta* at [47] and also at [87].

As provided above, the application has thoroughly addressed the requirements of ss. 190B(5)(a) and (b). French J in *Martin* held that the assertion in s. 190B(5)(c) is 'plainly a reference to the traditional laws and customs which answer the description set out in par (b) of s 190B(5)' – at [29]. Having been satisfied that the application sufficiently addresses the requirements of s. 190B(5)(a) and (b), the information which may assist me in reaching the required level of satisfaction at s. 190B(5)(c), was suggested by Dowsett J in *Gudjala 2007* as being information demonstrating that there has been a continuity in the observance of traditional law and custom going back to European settlement – at [82].

In **[Anthropologist 1 – name deleted]** expresses the opinion in her report that 'despite the constraints associated with European settlement in the Application area, there is prima facie evidence that the claimants continue to observe and acknowledge laws and customs of the pre-sovereignty land-holding group that relate to the Aboriginal ownership, use and occupation of the area covered by the Application – at [para 133].

I refer to my summary of part 10.0 of the report above which addresses the requirement of s. 190B(5)(c) under the heading 'Observance and acknowledgement of laws and customs of pre-sovereignty land-holding group'.

Part 14.0 of the report deals with 'Continuity of law and custom'. There **[Anthropologist 1 – name deleted]** states that her research has led her to form the opinion that the laws and customs upheld by the claimants are essentially the same as the laws and customs upheld by their predecessors and that there has been no change in their basic tenets and principles.

In addition, the report includes statements by claimants which support the assertion that the native title claim group have continued to hold native title in accordance with those traditional laws and customs, such as:

> My father's generation used to make boomerangs, spears, didgeridoos – I saw this when I was a child. Now, my family mostly use the ochre – my son uses ochre for his dance troupe, which came to open the Keeping Place at Cracow [in the Wulli Wulli QUD 6006/2000 area]. He asked the Elders' permission to use the ochre – at [para 150].
>
> I have rights and interests in this area because I belong to this area and I know I belong to this area because I have the connections, as my mother is from that [Application] area. I know from seeing how my mother connected to that area – I knew that she was part of that land, that country – that she belonged to that area. My children have these rights and interests too, because they are my children and they are the ancestors of the future – at [para 128].
>
> We know our ancestors are all there in the land and if you do something wrong you'll be punished – either you or a member of your family – we believe that. We were taught to look but don't touch – must not take ancestors' things. Young so-and-so found a stone axe and he took it home. I told my brother to tell him to take it back because now anything could happen to a family member. I told him, it needs to go back – at [para 129].
>
> We grew up with food restrictions. Grannie would not let us kids eat possum – she said the meat was too strong for kids. Only older people eat possum. We still don't let our children eat possum. And we were never allowed to eat the back of a porcupine – there is a belief that this will give children a humpy back – and we were never allowed to eat goanna tail – it's the best part – and only the older people ate it – we kids were told it would make our hair grey – we were not allowed to eat pregnant fish – we had to throw them back in the water and we were never allowed to eat turtle – Grannie told us "its stink meat!" – only the short necked one is eaten and only by adults – and when we ate, Grannie and Grandfather were always the first to eat, and then the children – We still keep these rules and I teach these things to my children. – at [para 144].

In my view, the above information provides a sufficient factual basis to support the assertion that there has been continuity in the observance of traditional laws and customs held by a pre-sovereignty society, and also that the acknowledgement and observance of such laws and customs since that time has occurred in a substantially uninterrupted way. Consequently, I am satisfied that the applicant's factual basis material supports the assertion at s. 190B(5)(c).

Conclusion

The application **satisfies** the condition of s. 190B(5) because the factual basis provided is **sufficient** to support each of the particularised assertions in s. 190B(5).

Subsection 190B(6)
Prima facie case

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

The application **satisfies** the condition of s. 190B(6).

To meet the requirements of s. 190B(6) only one of the native title rights and interests claimed needs to be established prima facie. Only established rights will be entered on the Register—see s. 186(1)(g) and the note to s. 190B(6).

In relation to the consideration of an application under s. 190B(6) I note Mansfield J's comment in *Doepel*:

> Section 190B(6) requires some measure of the material available in support of the claim—at [126].
> On the other hand, s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s 190B(6)—at [127].
> Section 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed—at [132].

The definition of 'native title rights and interests' in s. 223(1) guides my consideration of whether, prima facie, an individual right and interest can be established. In particular, I take account of the interpretation of this section in:

- *Yorta Yorta* (see s. 190B(5) above) in relation to what it means for rights and interests to be possessed under the traditional laws acknowledged and the traditional customs observed by the native title claim group; and
- the High Court's decision in *Western Australia v Ward* (2002) 213 CLR 1 [2002] HCA 28 (*Ward HC*) that a 'native title right and interest' must be 'in relation to land or waters'.

I also need to consider the case law relating to extinguishment when examining each individual right and interest claimed. Any rights that clearly fall prima facie outside the scope of the definition of 'native title rights and interests' in s. 223(1) cannot be established.

The registration test is an administrative decision—it is not a trial or hearing of a determination of native title pursuant to s. 225, and therefore it is not appropriate to apply the standards of proof that would be required at such a trial or hearing. It is also not my role to draw definitive conclusions from the material before me about whether or not the claimed native title rights and interests exist, only whether they are capable of being established, prima facie.

In summary, s. 190B(6) requires me to carefully examine the asserted factual basis provided for the assertion that the claimed native title rights and interests exist against each individual right and interest claimed in the application to determine if I consider, prima facie, that they:

- exist under traditional law and custom in relation to any of the land or waters under claim;
- are native title rights and interests in relation to land or waters (see chapeau to s. 223(1)); and

- have not been extinguished over the whole of the application area.

In my consideration of the individual rights and interests claimed:

- I take into account information contained in the application on activities conducted by the members of the claim group. While current activities by claimants in the claim area which are said to be in exercise of the claimed native title rights and interests are not determinative of the existence of a right and interest, they can be supportive of it; and
- I have grouped together rights which appear to be of a similar character and therefore rely on the same evidentiary material or rights which require consideration of the same law as to whether they can be established.

I have considered each of the rights and interests claimed and the asserted factual basis material in support of those rights and interests below.

Consideration

Exclusive right to possession

I first consider the claim to 'exclusive possession' as expressed in Schedule E of the application:

> 1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s 238, ss47, 47A or 47B apply), the claim group claims the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole word, pursuant to the traditional laws and customs of the claim group.

Ward HC is authority that the 'exclusive' rights can potentially be established prima facie in relation to areas where there has been no previous extinguishment of native title or where extinguishment is to be disregarded as a result of the Act. The majority in *Ward HC* considered that '[t]he expression "possession, occupation, use and enjoyment… to the exclusion of all others" is a composite expression directed to describing a particular measure of control over access to land' (emphasis added). Further, that expression (as an aggregate) conveys 'the assertion of rights of control over the land', which necessarily flow 'from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country' – at [89] and [93].

The Full Court in *Griffiths v Northern Territory* (2007) 243 ALR 7 indicates that the question of exclusivity depends upon the ability of the native title holders to effectively exclude from their country people not of their community, including by way of 'spiritual sanction visited upon unauthorised entry' and as the 'gatekeepers for the purpose of preventing harm and avoiding injury to country'—at [127].

[Anthropologist 1 – name deleted] in her report notes at para 171 that claimants state that 'according to their law and custom, if Aboriginal persons who are not members of the claimant group want to access the Application area, they should first seek permission from the claimants, because "we are the carers, the protectors of that land and all its resources" and that the Elders of the claimant group are the proper persons who should be approached for such permission'.

[Anthropologist 1 – name deleted] also notes that '[r]ecently members of the Port Curtis Coral Coast claim group sought and obtained the claimants' permission to visit the Auburn National Park region'.

Statements made by claimants and quoted in the report support the existence of this right, for example:

> If another group wants to come out – they have to contact me – [once] the Wakkas – the mongrel things – did walk on my country but they will get punished – it's coming! The Wakkas did this and I did not know – no one stopped them – People have big fights over that! But they will get punished! Now, if I hear another Aboriginal person has been at my sites and in my area, I tell the pastoralists to lock the gate – at [para 171].
> I heard what [so-and-so] was getting up to – going to take people out walking without letting me know – told [so-and-so] off! Don't like people talking about things they know nothing about! I'm the boss for my family, my tribe – this is handed down and I'm the Elder for my family now and I know the country – I was born and raised out there – by rights there should only be one Elder to a tribe! And you have to go by that Elder – Younger people in my group should ask my permission before they go out there – that's the Aboriginal way – this is because I'm the boss and the oldest now - at [para 163].

I am satisfied that the factual basis material establishes that a right to exclusive possession as claimed by the applicant exists, prima facie.

Non-exclusive rights

The remaining rights and interests claimed at Schedule E are of a non-exclusive nature. The report addresses each of these rights individually, and provides factual basis material in support of their existence under traditional law and custom. I am satisfied that each of the non-exclusive rights and interests claimed can be found to exist, prima facie, for the following reasons:

Right to live and be present on the application area

A right to live and be present on the application area has previously been recognised by the Court – see for example *Griffiths; Ward; King v Northern Territory* [2007] FCA 1498 (*King*) at [para 9(e)]. The applicant's factual basis material speaks in some detail of the nature of this right claimed by the applicant according to their traditional laws and customs.

For example, the report states at [para 136 to 141] that the claimants regard the application area as part of their homelands, and that they and their immediate and more distant forebears lived and camped at various places throughout the application area and had access protocols with pastoralists. Records show that large camps of bark huts and campfires set up by the claimants predecessors existed at the time of early exploration of the area.

One claimant is quoted in the report as stating:

> When I was a young person we could move all over our country because we worked for the station owners, and in those days the properties were huge, now they are cut up into little blocks. And we did not need permission to move from one part to another because the pastoralists knew us and this is so even today – they know we are the Aboriginal people who belong to this region and my Grannie **[Ancestor 11 – name deleted]** told me it was the same for her and her parents – we lived mostly in tents – we'd cut trees and make our A-frames and put calico over them – camped at Piggott, Auburn, Burnwood, Jarra, Pinedale, Coondarra, Dykehead, Glenwood, Wells Station, DiDi – at [para 139].

As noted above, the report further notes at [para 142] that although many claimants reside in Chinchilla, Mundubbera, Eidsvold and Monto (which are near the application area) and in Cracow and Theodore (which are in country covered by Wulli Wulli QUD6006/2000) they move regularly through the application area to visit relatives, to camp, to attend social events and to access the facilties and services of these towns.

For the above reasons, I am of the view that the applicant's factual basis material supports the existence, prima facie, of a right held by the claimants, to live and be present on the application area.

Outcome: established, prima facie

Right to take, use, share and exchange traditional natural resources

I am of the view that the factual basis material provided by the applicant contains various information in support of the existence of such a right held under the traditional laws and customs of the native title claim group. For example, the report states that since childhood the claimants have hunted, fished, harvested, collected, used and enjoyed the natural resources of the application area and continue to do so. Such as ochre being used for body paint for ceremonies, bush plants being used for medicinal purposes and kangaroo skins being used for making rugs – at [para 143, 150 to 151].

Claimants are quoted in the report as stating that the gathering and use of these resources is taught to their children, in accordance with traditional laws and customs regarding certain restrictions on such use. Claimants also state that it was customary that the predecessors of members of the native title claim group would share amongst themselves and between families those foods hunted and gathered, and would also trade necklaces and other special objects made from natural materials including echidna quills and seeds – at [para 147, 151 to 152].

For the above reasons, I am of the view that the applicant's factual basis material has established that a right to take, use, share and exchange traditional natural resources for personal, domestic and non-commercial, communal purposes exists, prima facie.

Outcome: established, prima facie

Right to conduct burial rites

A right to conduct burial rites has previously been recognised by the Court – See *Griffiths* at [para 7(f)(v)]; *King* at [para 9(g)(ii)]. The report states at [para 77 and 153 to 155] that traditional methods of burial included the deceased being placed in bark coffins in caves or in trees. Claimants' deceased family members are now placed in cemeteries of towns close to the application area and there are special ceremonial practices that take place in carrying out the burial of claim group members. Such practices are intimately connected to the spiritual affiliations of the claim group. The claimants also have plans to arrange for special ceremonies to bury those remains of their predecessors that have been stored at the Queensland Museum and they conduct and participate in smoking ceremonies if, for example, they feel that there are strange or malevolent spirits present such as might occur following a death.

For the above reasons, I am satisfied that the factual basis material in the report supports the existence, prima facie, of a right held by members of the claim group to conduct burial rites.

Outcome: established, prima facie

Right to conduct ceremonies

The Court has previously recognised and upheld a right to conduct ceremonies – See for example *Walker v Queensland* [2007] FCA 1907 (*Walker*) at [para 3(b)(iii)]; *Griffiths* at [para 7(f)(ii)]. The report contains various detail relating to the assertion of this right. At para [156 to 158] it states that members of the claim group regularly visit the application area for spiritual reasons and to commune with their ancestors. They believe that their immediate and more distant forbears are in this country, watching over the country and its people. There is also considerable information at [para 76 and 77] relating to ceremonies and activities conducted by the claimants and their forebears, including initiation ceremonies, marriage ceremonies and bunya harvesting.

For the above reasons, I am of the opinion that the right to conduct ceremonies has been established by the applicant, prima facie.

Outcome: established, prima facie

Right to teach on the area about physical and spiritual attributes

The Court has previously determined that a non-exclusive right to teach on the determination area the physical and spiritual attributes of the area exists – See *Witjara* at [para 10]; and *Griffiths* at [para 7(f)(iv)]. Concerning this right, the report at [para 159 to 164] contains information and statements from claimants that support its existence. For example, one claimant states:

> I learnt about my country from my Auntie and my Grannie – I grew up with them – they taught us that our land provided everything for us – food, water and our spiritual connections

> – I was taught by my auntie and Grannie that I belonged to this land [the Application area] and to respect this knowledge and this land – we were brought up to never take more from the land than we needed and to leave the rest – so that whatever we took could make some more – like when we found a turkey nest, we'd be told to only to take some of the eggs and to leave the rest, so that they would hatch – I feel spiritually disconnected when I am in someone else's country – I feel really uncomfortable – and I can't talk about or for another person's country, even though I might be living in it at the moment – it's not right by our law to do this – I can only talk for my own area – I have taught my children about my country because it's their's too and I am now teaching my grandchildren so that they know where they come from – we plan to have a family camping trip there this Christmas so that we can take the grandkids and, because this will be their first time, we'll introduce them to the country – at [para 159].

The passing on of knowledge regarding the application area to younger generations is referred to numerous times throughout the report. For example at para 129 to 131 and para 182 to 183.

For the above reasons, I am satisfied that the right to teach about the physical and spiritual attributes of the application area can be established, prima facie, by the applicant's factual basis material.

Outcome: established, prima facie

Right to maintain places of importance and areas of significance

The right to maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and to protect those places and areas from physical harm was recognised by the Court in *Walker* at [para 3(b)(vi)].

An example of the existence of this right is provided in the report relating to the claimants' belief that those who damage the various significant sites and places on the application area will be punished – at [para 129 and 165], being the erection of a Telstra Tower on Mount Narayen, one of the claimants' most sacred places. A claimant stated in relation to this event that '[t]here are spirits there – and they [Telecom] got a big sign from them when they tried to put a telegraph pole on Mount Narayen – a big storm came and blew it down. My father told me never to go there in the dark – there's a ghost up there' – at [para 165].

Members of the native title claim group also take part in cultural heritage surveys on the application area and contribute to its conservation and care. Certain Elders and senior claimants are asked for advice when external and non-Indigenous parties are seeking to do works in the area. As they were taught about these important places by their parents and grandparents, today the claimants take their own children out to these sites and show them the proper way to conduct themselves when approaching such places – at [para 167, 169 to 170].

For the above reasons, I have formed the view that the factual basis material before me is able to establish that a right to maintain places of importance and areas of significance, as asserted by the claim group, exists, prima facie.

Outcome: established, prima facie

Right to light fires for domestic purposes

The right to light fires for domestic purposes, including cooking but not for hunting or clearing vegetation has previously been recognised by the Court – See for example *King* at [para 9(f)]; *De Rose v State of South Australia* (No 2) [2005] FCAFC 110 (*De Rose*) at [para 3(f)].

The report addresses this right at para 172 to 176 and, in summary states that the oral histories of older claimants, who grew up in the application area, describe that they and their immediate and more distant forebears regularly lit fires for domestic purposes, including cooking. Claimants regard 'ashes cooking' and the use of white ant ovens as defining features of their traditional cuisine and recall how a range of game and fish and vegetable foods were cooked. Today claimants, restricted by fire regulations, refrain from lightning large camp-fires and restrict themselves to making only small fires for boiling a billy and making sufficient hot coals and ashes for cooking what they have caught.

For the above reasons, I am of the opinion that for the purposes of s. 190B(6), the applicant's factual basis material has established that a non-exclusive right to light fires for domestic purposes exists, prima facie.

Outcome: established, prima facie

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

In the decision of *Witjira*, the Court recognised a right held by members of the claim group to be accompanied onto the determination area by non-claimants, including those persons who were spouses of claimants or persons who were acknowledged under traditional law and custom as having rights in the application area, despite the fact that they were not descended from a named apical ancestor – at [para 9(m)].

The report at para 178 to 180 speaks to this right and cites a number of examples which support its existence. The claimants state that under their system of law and custom, there are some persons who are required to attend the claimants' performance of ceremonies and cultural activities. These persons include spouses of claimants who are associated with neighbouring groups who, in the past, took part in the forebears region-wide ceremonies held inside and outside of the application area. It is asserted that customary practice involves claimants' spouses

being invited to attend such ceremonies, and that this traditional knowledge is passed down to younger generations orally during visits to country.

The report also provides that there are a number of persons of Aboriginal descent who have a historical association with the area, such as through moving to the area for pastoral work, but who are not descended from the apical ancestors of the claim group. There are also persons from neighbouring groups whose forebears would have participated in region-wide ceremonies once held in the application area, and for that reason, such persons are recognised as having rights in the application area – at [para 184].

For the above reason, I am of the view that the applicant's factual basis material supports the existence, prima facie, of a right held by the claimants under traditional law and custom, to be accompanied onto the application area by non-claimants.

Outcome: established, prima facie

Right to take and use water and natural resources from the water

There are two components comprising this right. Firstly, the applicant claims a right to take and use water for personal, domestic and non-commercial purposes and secondly, the applicant claims a right to take and use traditional natural resources from the water. In my view, there is nothing contentious about either of these components and the factual basis material speaks to both.

The report addresses the two components separately at para 187 to 192. In relation to the right to take water for personal, domestic and non-commercial purposes, the report provides that as their forebears did, the claimants continue to take water for these purposes. The access to and use of water specifically relates to the death of one of the more immediate forebears of the group, hence this right has special significance for some claimants. The Auburn River also has a strong significance for the claimants and is an important place in accordance with traditional law and custom. Not only did the river provide food and water for the claimants' forebears, but it was also a place where claimants' predecessors lived and carried out much of their daily life and cultural activity. Younger generations continue to be taught how to find water when travelling through the application area – at [para 190 to 192].

In relation to the second element of the right claimed, the report states that older claimants recall how they and their older family members obtained resources including fish, ducks, eels, turtles, lily bulbs and reeds from the waters of the application area. One claimant states:

> My Granny **[Ancestor 7 – name deleted]** taught me how to fish. She taught me how to trick the fish into coming to where my line was by throwing sand or soft soil or gravel over where my line was. This would attract the fish. She also taught me how to get my line free if it was

> snagged – by doing this – the fish come and eventually the line gets free. We were also taught not to kill the pregnant fish – Granny always knew if the crayfish – we call them crawfish – and the jewfish were pregnant, and she and Mum would tell us to throw them back. We also caught turtle, but we children were not allowed to eat turtle – only the older people ate turtle, and only the short-necked ones– at [para 189].

For the above reasons, I am satisfied that the applicant's factual basis material supports the existence, prima facie, of a right to take and use water, and natural resources from the water, as held by the native title claim group according to their traditional law and custom.

Outcome: established, prima facie

Conclusion

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.

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

I also understand that the term 'traditional,' as used in this context, should be interpreted in accordance with the approach taken in *Yorta Yorta—Gudjala 2007* at [89]. In interpreting connection in the 'traditional' sense as required by s. 223 of the Act, the members of the joint judgment in *Yorta Yorta* felt that:

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

The report contains many examples of claimants having a traditional physical connection with the application area. I refer to my reasons at ss. 190B(5) and (6) above.

Therefore, I am satisfied that at least one member of the claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application.

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.

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)

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

In considering the requirement of s. 61A(1), I have turned my mind to information provided in the Geospatial Report, and conducted a search of the Register. The geospatial assessment states that no determinations as per the Register fall within the external boundary of the application. Similarly, there is nothing on the Register that indicates there has been an approved determination of native title for any of the area covered by the application.

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

Section 61A(2)

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

Schedule B which contains a list of general exclusions (areas not covered by the application), provides that the application area does not include any land or waters that is or has been covered by various types of grants of exclusive possession interests and leases. These interests and leases are identical to those set out in s. 23B(2), which defines 'previous exclusive possession act'. For that reason, I am satisfied that the claimant application has not been made over an area covered by a previous exclusive possession act.

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

Section 61A(3)

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

Schedule E, which describes the native title rights and interests claimed, states that a right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world is only claimed over areas where exclusive possession can be recognised, such as areas where there has been no prior extinguishment of native title, or where s. 238, ss. 47, 47A or 47B apply.

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

Conclusion

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

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

The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:

(a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or

(b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or

(c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss. 47, 47A or 47B.

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

Section 190B(9)(a)

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

Schedule Q of the application states that the claim group does not claim ownership of minerals, petroleum or gas that are wholly owned by the Crown.

Section 190B(9)(b)

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

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

Section 190B(9)(c)

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

Schedule B of the application, containing a list of general exclusions of areas not covered by the application, states that the application area does not include land or waters where the native title rights and interests claimed have been otherwise extinguished.

Conclusion

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

Date of these reasons: 27 October 2014

[End of reasons]