National Native Title Tribunal

Registration test decision

Application name	Ankamuthi People #2
Name of applicant	Larry Woosup, Beverley Mamoose (formerly known as Beverley Tamwoy), Richard Woosup, Charles Woosup, George Mamoose, Michael Toby, Asai Pablo, Tracey Ludwick, Ella Hart (Deemal), Nelson Stephen, Ben Tamwoy, Catherine Salee and Mark Gebadi
NNTT file no.	QC2014/003
Federal Court of Australia file no.	QUD392/2014
Date application made	29 July 2014
Date application last amended	11 December 2014

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

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

Date of decision: 26 February 2015

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Radhika Prasad

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

Reasons for decision edited

Introduction

[1] This document sets out my reasons, as the delegate of the Native Title Registrar (Registrar), for the decision to accept the native title determination application made on behalf of the Ankamuthi People #2 (the application) for registration pursuant to s 190A of the Act.

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

Application overview

[3] The application was originally made on 29 July 2014 when it was filed in the Federal Court of Australia (the Court). The Registrar of the Court gave a copy of the application to the Registrar on 29 July 2014 under s 63 of the Act. This triggered the Registrar's duty to consider the claim made in the original application under s 190A of the Act.

[4] On 1 September 2014, whilst considering the claim as the Registrar's delegate, I requested the case manager for this matter to notify the applicant that the application may not meet certain conditions set out in ss 190B and 190C and that the application may be amended under s 190A(5A) of the Act.

[5] On 10 November 2014, the applicant provided a draft amended application and requested a preliminary assessment of that application. I provided further preliminary comments that the application may not meet certain conditions set out in ss 190B and 190C.

[6] On 2 December 2014, the applicant filed an interlocutory application for leave to amend the application with the Court.

[7] On 9 December 2014, the Registrar of the Court granted leave to amend the application and a copy of the amended application was given to the Registrar on 11 December 2014. The amendments to the application include changes to Schedule A and Schedule S has been altered to reflect the amendment to Schedule A.

Registration test

[8] My consideration of the application is governed by s 190A of the Act. Section 190A(6) requires the Registrar to consider whether a claim for native title satisfies the conditions in ss 190B and 190C, known as the registration test. The test is triggered when a new claim is referred to the Registrar under s 63 or in some instances when a claim in an amended application is referred under s 64(4). The test will not be triggered when an amended application satisfies the conditions of ss 190A(1A) or (6A). For the following reasons, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to this claim:

- subsection 190A(1A) does not apply as the application was not amended because an order was made under s 87A by the Court; and
- subsection 190A(6A) does not apply because the original claim had not been accepted for registration under s 190A(6) before the amended application was given to the Registrar.

[9] I must therefore apply the registration test to this amended application. In accordance with s 190A(6), I must accept the claim for registration if it satisfies all of the conditions in ss 190B and 190C of the Act. If those conditions are not satisfied then, under s 190A(6B), I must not accept the claim for registration.

[10] 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 requirements of s 190C first, in order to assess whether the application contains the information and documents required by s 190C *before* turning to questions regarding the merit of that material for the purposes of s 190B.

[11] As discussed in my reasons below, I consider that the claim in the application does satisfy all of the conditions in ss 190B and 190C and therefore, pursuant to s 190A(6), it must be accepted for registration. Attachment A contains information that will be included in the Register of Native Title Claims (the Register).

Information considered when making the decision

[12] 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.

[13] 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.

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

- the information contained in the amended application and accompanying documents;
- the additional information referred to the delegate by the applicant on 16 January 2015;
- the Geospatial Assessment and Overlap Analysis (GeoTrack: 2015/0189) prepared by the Tribunal's Geospatial Services on 9 February 2015 (geospatial assessment); and
- the results of my own searches using the Tribunal's mapping database.

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

Procedural fairness steps

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

- On 12 December 2014, the case manager for this matter sent a letter to the State of Queensland (the State) enclosing a copy of the amended application and accompanying documents. That letter informed the State that any submission in relation to the registration of this claim should be provided by 14 January 2015.
- The case manager, also on 12 December 2014, wrote to inform the applicant that any additional information should be provided by 14 January 2015.
- On 14 January 2015, the State advised, by email, that it did not wish to make any submission in relation to the registration of the claim.
- On 16 January 2015, the applicant requested, by email, that the delegate have regard to the information provided directly to the Registrar on 10 and 26 November 2014 in respect of the application as originally filed.
- On 20 January 2015, the case manager wrote to inform the State that the applicant has requested the delegate to consider the material provided directly to the Registrar. On 28 January 2015, the State advised that it did not wish to make any submission in relation to the additional material.

Procedural and other conditions: s 190C

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

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

[17] 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.

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

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

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

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

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

Native title claim group: s 61(1)

[22] Schedule A of the application provides a description of the native title claim group, an extract of which can be seen in my reasons below at s 190B(3). The application indicates that the persons comprising the applicant are included in the native title claim group and have been

authorised by all the persons in the native title claim group to make the application and deal with all matters arising in relation to it — see s 62(1)(a) affidavits of the persons comprising the applicant. There is nothing on the face of the application that causes me to conclude that the requirements of this provision, under s 190C(2), have not been met.

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

Name and address for service: s 61(3)

[24] The names of those persons comprising the applicant appear at Part A of the Form 1 — at 2.

[25] Part B provides the name and address for service of the applicant.

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

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

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

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

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

[29] The application is accompanied by affidavits sworn by each of the persons who comprise the applicant. The affidavits are identical and contain the statements required by s 62(1)(a) (i) to (iv) — at [1] to [5].

[30] I am also of the view that the statements at [5] are sufficient to meet the requirements of s 62(1)(a)(v). This subparagraph requires the affidavits to set 'out details of the process of decision-making complied with in authorising the applicant'. This requirement was introduced as a result of amendments to the Act by the *Native Title Amendment (Technical Amendments) Act 2007* (Cth). Prior to the amendment, subparagraph (v) required only that the affidavits state 'the basis on which the applicant is authorised as mentioned in subparagraph (iv)'. Subparagraph (iv) relevantly requires the affidavit to state 'that the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it'. The explanatory memorandum of this amending Act describes the motive behind the new wording of the subparagraph:

> 1.223 Some affidavits accompanying applications provide little or no information setting out the basis of authorisation, for example, merely setting out the date the authorisation meeting was held. This limits the utility of requiring the applicant to state the basis on which the applicant is authorised.
>
> 1.224 [The Bill] would amend subparagraph 62(1)(a)(v) to provide that the applicant must include a statement in the affidavit accompanying the application setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it. This should include indicating whether the decision-making process complied with paragraph 251[B](a) or 251[B](b).

[31] In light of the above, I consider that the legislature's intent was to ensure that an affidavit provided for the purposes of this provision indicates the process of decision making that was utilised by the native title group. Specifically, in my view, to meet the requirements of s

62(1)(a)(v) the affidavit must at least identify whether the process used to authorise was of a kind described by paragraph 251B(a) or by paragraph 251B(b).

[32] The persons who jointly comprise the applicant each state in their affidavits that:

> The Native Title Claim Group authorised the other people making up the Applicant and I to make this application, to deal with matters arising in relation to it and to represent all the people in the native title claim group at a meeting of the native title claim group, in accordance with a traditional process — at [5].

[33] I understand from this statement that a traditional process of decision making was utilised to authorise the persons comprising the applicant. Therefore, the process that was utilised was of the kind contemplated by s 251B(a). This, in my view, corresponds to the affidavits containing the information which the legislature was most concerned to ensure is provided.

[34] I also consider that the affidavits indicate that the decision making process involved claim group members meeting and deciding which claim group members to authorise as the applicant.

[35] Having considered the terms of the Act in light of the explanatory memorandum that accompanied the 2007 amendments, I consider that the level of detail of the process of decision making is sufficient for the purposes of s 62(1)(a). In this regard, I also note that s 190C(2) is concerned with procedural matters and that I do not consider that the requirements of this condition entails assessing the validity of the information provided for the purposes of s 62(1)(a), in particular, determining whether the applicant was in fact properly authorised — *Doepel* at [73], [74] and [87].

[36] For the reasons stated above, I am satisfied that the application contains the information required by s 62(1)(a).

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

Details required by s 62(1)(b)

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

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

[39] Schedule B contains information that allows for the identification of the boundaries of the area covered by the application.

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

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

Searches: s 62(2)(c)

[41] Schedule D provides that the applicant has not carried out any historical tenure searches.

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

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

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

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

Activities: s 62(2)(f)

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

Other applications: s 62(2)(g)

[45] Schedule H provides that the applicant is 'unaware of any application or determination covered by this application'.

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

[46] Schedule HA of the application provides that the applicant is not aware of any notifications under paragraph 24MD(6B)(c) of the Act.

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

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

Conclusion

[48] 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.

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

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

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

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

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

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

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

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

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

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

Subsection 190C(4) Authorisation/certification

> Under s 190C(4) the Registrar/delegate must be satisfied that either:
> (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
> (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
>
> Note: The word ***authorise*** is defined in section 251B.
>
> Under s 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

[57] 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.

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

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

[59] Section 190C(4)(a) imposes upon the Registrar conditions which, according to Mansfield J, are straightforward — *Doepel* at [72]. His Honour noted that the Registrar is to be 'satisfied about the fact of certification by an appropriate representative body', but is not to 'go beyond that point' and 'revisit the certification of the representative body' — at [78], [80] and [81]; see also *Wakaman People #2 v Native Title Registrar* [2006] FCA 1198 at [32]. I therefore consider that my task here is to identify the appropriate representative body and be satisfied that the application is certified under s 203BE.

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

Identification of the representative body and its power to certify

[61] Attachment R is entitled 'Certification under section 203BE of the [Act] — Ankamuthi People #2 Native Title Determination Application' (certification). It is dated 25 July 2014 and signed by the Chief Executive Officer of Cape York Land Council (CYLC).

[62] The certificate states that the areas of land and waters of the Ankamuthi #2 claim are in the Cape York Region representative body area and that CYLC is the representative body recognised under s 203AD(1) of the Act for the Cape York Region. The certificate also provides that the application has been certified by CYLC pursuant to s 203BE of the Act — see note to s 190C(4)(a) which allows an application to be certified under s 203BE.

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

[64] Having regard to the above information, I am satisfied that CYLC was the relevant representative body for the application area and that it was within its power to issue the certification.

The requirements of s 203BE

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

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

Subsection 203BE(4)(a)

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

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

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

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

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

Subsection 203BE(4)(b)

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

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

> CYLC engaged [an] anthropologist … from March 2010 to April 2014 to:
>
> (a) review existing ethnographic material for areas including the [application] area;
>
> (b) do field work with relevant traditional owner groups, including the Ankamuthi People; and
>
> (c) advise CYLC on the composition of the [native title claim group] for the [application] area.
>
> [The anthropologist] did:
>
> 1. 205 days of research work between March 2010 and April 2014;
>
> 2. Advised CYLC on the composition of the [native title claim group];
>
> 3. Met, along with CYLC, with the [native title claim group] on 19 March 2014 where the description of the [claim group] was reviewed and accepted, and the … claim authorised in accordance with traditional law and custom; and
>
> 4. Advised CYLC that the … claim was authorised pursuant to section [251B(a)] of the [Act].

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

Subsection 203BE(4)(c)

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

[74] I do not consider that any application currently overlaps the application area — see my reasons at s 190C(3) above. Accordingly, in my view, the requirements of s 203BE(3) are not applicable to the area covered by this application.

[75] I am of the view that the requirements of s 203BE(4) of the Act have been satisfied.

[76] For the reasons set out above, I am satisfied that requirements of s 190C(4)(a) are met.

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

Merit conditions: s 190B

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

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

[78] Schedule B contains a description prepared by the Tribunal's geospatial services on 17 July 2014 and contains a metes and bounds description of the external boundaries of the application area, referencing cadastral boundaries and the Ducie River.

[79] Attachment C is a colour copy of a map titled 'Ankamuthi People #2' prepared by the Tribunal's geospatial services on 17 July 2014. The map includes:

- the application area depicted by a bold outline;
- land tenure and topographic features;
- scalebar, northpoint, coordinate grid, legend and locality map; and
- notes relating to the source, currency and datum of data used to prepare the map.

Consideration

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

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

[82] 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.

[83] Schedule A of the application contains the following definition of the native title claim group:

> The native title group is made up of all persons descended by birth or adoption from the following apical ancestors:
>
> Woobumu and Inmare
>
> Bullock (father of Mamoose Pitt, husband of Rosie/Lena Braidley)
>
> Charlie Mamoose (father of Silas, Larry, Johnny and Harry Mamoose)
>
> Charlie Seven River
>
> Toby Seven River (father of Jack Toby)
>
> Asai Charlie
>
> Sam and Nellie (parents of George Stephen)
>
> Mammus/Mamoos/Mark/Mamoose and his siblings Peter and Elizabeth
>
> Charlie Maganu (husband of Sarah McDonnell)
>
> Polly (wife of Wautaba Charlie Ropeyarn) …

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

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

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

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

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

Consideration

[87] I note that in reaching my view about this condition, I have been informed by the applicant's factual basis material contained in the application and accompanying documents and not the additional material provided as I consider that I am confined to the material contained in the application for the purposes of s 190B(3). In particular, I have been informed by the applicant's factual basis material contained in Schedule F of the application.

[88] The description of the native title claim group is such that it comprises those persons who are the biological descendants of the apical ancestors identified in Schedule A. The description also provides for adopted persons to be included within the claim group.

Descent

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

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

[91] In my view, the factual basis contained in Schedule F appears to indicate that descent from an ancestor provides the fundamental basis for membership to the native title claim group. I am of the view that with some factual inquiry it will be possible to identify the persons who fit the description of the native title claim group.

Adoption

[92] In respect of membership by adoption, I note that in *WA v NTR*, Carr J accepted the approach of identifying members of the native title claim group by biological descendants, *including by adoption*, of named people. His Honour accepted the description without any qualification indicating whether the method of adoption of persons was according to traditional laws and customs — at [67].

[93] Having regard to Carr J's acceptance of the approach of identifying membership by adoption without any qualification in *WA v NTR*, I am of the view that the description of this criterion is sufficient to ascertain, after some factual inquiry, the persons who are the adopted descendants of the apical ancestors.

Conclusion

[94] In my view, the description of the native title claim group contained in the application is such that, on a practical level, it can be ascertained whether any particular person is a member of the group. Accordingly, focusing only upon the adequacy of the description of the native title claim group, I am satisfied of its sufficiency for the purpose of s 190B(3)(b).

[95] 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.

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

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

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

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

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

> In relation to the areas that is:
>
> - part of the Comalco ILUA (Western Cape Communities Co-Existence Agreement) (National Native Title Tribunal File No: QIA2001/002),
>
> are as follows:
>
> 1. The native title rights and interests claimed in relation to the land and waters referred to above, other than in relation to Water and subject to paragraphs 3, 4 and 5, are non-exclusive rights to:
>
>   a. live on the claim area, to camp, erect shelters and other structures;
>
>   b. access, be present on, move about in and on and use the claim area;
>
>   c. take and use the Natural Resources of the Determination Area for the purpose of satisfying the personal and domestic communal needs of the native title claim group;
>
>   d. maintain and protect from harm by lawful means sites and places of significance in the claim area;
>
>   e. conduct social, religious, cultural, spiritual and ceremonial activities on the claim area;
>
>   f. hunt and gather in, on and from the claim area for the purpose of satisfying the personal, domestic or non-commercial communal needs of the members of the claim group,
>
>   and the right to inherit and succeed to the native title rights and interests.
>
> 2. Subject to paragraphs 3, 4 and 5, the native title rights and interests claimed in relation to Water covered by the Application are non-exclusive rights to:
>
>   a. hunt and fish in or on, and gather from Water for the purpose of satisfying the personal, domestic or non-commercial communal needs of the native title claim group; and
>
>   b. take, use and enjoy Water for the purpose of satisfying the personal, domestic or non-commercial communal needs of the native title claim group.
>
> 3. The native title rights and interests are and the native title is subject to and exercisable in accordance with:

a. the traditional laws acknowledged and customs observed by the native title claim group;

b. the laws of the Commonwealth and the State of Queensland.

4. The native title rights and interests claimed in the Application do not confer on the native title claim group possession, occupation, use and enjoyment of the claim area to the exclusion of all others.

5. The native title rights and interests claimed in the Application are not claimed by the native title claim group in relation to any part of the claim area where native title has been validly extinguished by operation of the Laws of the Commonwealth and the State of Queensland.

6. The words and expressions used in paragraphs 1 to 5 above have the … following defined expressions:

…

"Determination Area" means the land and waters within that part of the Claim Area that is part of the [Comalco ILUA area].

…

A description of the native title rights and interests in relation to the balance of the Claim Area are as follows:

1. In relation to the exclusive areas, the native title rights and interests that are possessed under their traditional laws and customs are, subject to the traditional laws and customs that govern the exercise of the native title rights and interests by the native title holders, possession, occupation, use and enjoyment to the exclusion of all others.

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

a) to access, be present on, move about on and travel over the Determination Area;

b) to hunt and fish in or on, and gather from, the Determination Area;

c) to take, use, share and exchange natural resources on the Determination Area;

d) to take and use water from the Determination Area for cultural, personal, domestic and communal purposes;

e) to live and camp on the Determination Area and for those purposes to erect shelters and other structures thereon;

f) to light fires on the Determination Area for cultural, spiritual or domestic purposes, including cooking, but not for the purpose of hunting or clearing vegetation;

g) to be buried and to bury native title holders within the Determination Area;

h) to conduct ceremonies on the Determination Area;

i) to hold meetings on the Determination Area;

j) to teach on the area the physical and spiritual attributes of the Determination Area;

k) to maintain places of importance and areas of significance to the native title holders under their traditional laws and customs on the Determination Area and to protect those places and areas from harm;

l) to be accompanied on to the Determination Area by those persons who, though not native title holders, are:

i. spouses or partners of native title holders;

ii. people who are members of the immediate family of a spouse or partner of a native title holder;

iii. people reasonably required by the native title holders under traditional law and custom for the performance of ceremonies or cultural activities on the Determination Area; and

iv. people who have specialised knowledge based on their training, study or experience who are requested by native title holders to observe or record traditional activities or otherwise to investigate matters of cultural significance on the Determination Area.

These native title rights and interest do not confer on the native title holder's possession, occupation, use and enjoyment of the non-exclusive areas, to the exclusion of all others.

The native title rights and interests are subject to and exercisable in accordance with the valid laws of Queensland and the Commonwealth of Australia.

Consideration

[100] I note that I understand that the rights and interests are claimed in relation to two separate parts of the application area, namely the part subject to the Comalco ILUA and the balance of the application area not covered by the Comalco ILUA. I further note I understand the reference to 'Determination Area' in the first paragraph 1 refers to the area covered by the Comalco ILUA, as indicated in the definition at paragraph 6, whereas 'Determination Area' in the second paragraph 2 are references to the balance of the application area not covered by the Comalco ILUA.

[101] For the purposes of s 190B(4), I am satisfied that the rights and interests identified are understandable and have meaning. I note that although the claim to exclusive possession is broadly asserted, I am of the view that it does not offend the requirements of this provision — *Strickland* at [60].

[102] I find that the description of the native title rights and interests claimed is sufficient to allow the rights and interests to be readily identified and that therefore the application satisfies the condition of s 190B(4).

[103] The application **satisfies** the condition of s 190B(4).

Subsection 190B(5)
Factual basis for claimed native title

> The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:
> (a) that the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interest, and
> (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

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

The requirements of s 190B(5) generally

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

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

[107] Accordingly, although the facts asserted are not required to be proven by the applicant, I consider the factual basis must provide sufficient detail to enable a 'genuine assessment' of whether the particularised assertions outlined in subsections (a), (b) and (c) are supported by the claimant's factual basis material. Further, I note that where the applicant's material contains assertions that 'merely restate the claim' or 'is really only an alternative way of expressing the claim or some part thereof', that material 'does not assist in building the factual basis necessary for assessing the application' — *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*) at [28] and [29] and *Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal* [2012] FCA 1215 at [43] and [48].

[108] I am therefore of the opinion that the test at s 190B(5) requires adequate specificity of particular and relevant facts within the claimants' factual basis material going to each of the assertions before the Registrar can be satisfied of its sufficiency for the purpose of s 190B(5).

[109] The factual basis material is contained in Schedule F and the additional material provided by the applicant on 10 and 26 November 2014. That additional material comprises of:

- anthropologist report titled 'Authorisation Report: Ankamuthi and NCY#1 NTDA' and dated 14 April 2014 (report of April 2014);
- anthropologist report titled 'A Northern Cape York Peninsula Regional Society' and dated June 2012 (report of June 2012);

- anthropologist report titled 'Northern Cape York #1 QUD157/11 Native Title Connection Report' (connection report) excluding the appendices; and
- anthropologist report titled 'NCYP #1 and #2 Native Title Claims: Supplementary Report' and dated 26 June 2013 (supplementary report).

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

Reasons for s 190B(5)(a)

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

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

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

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

[113] The supplementary report contains the following relevant information about the association of the claim group to the application area:

- The application area is situated within the Cape York region — at [13] and [14].
- The Ankamuthi is one of the language areas of the northern Cape York region — at [17].
- A claim group member says that the Ankamuthi 'country extended northward as far as the Jardine River, Muttee Head, Crab Island, Jardine Swamps and Cowal Creek. [T]he north-eastern boundary was around Sanamere Lagoon and Packsaddle Creek' (I understand these areas to be outside and north of the application area) — at [74].
- The claimants have knowledge of the stories of the ancestral snakes that are said to inhabit certain lagoons on the [place name deleted] (on or proximate to the application area) — at [84]. They also have knowledge of the flying fox story which is associated with an area south but proximate to the application area — at [26].
- In the early 1920s, 'native dwellings [were] seen at the Skardon River [north but proximate to the application area]' — at [90].
- Apical ancestor Mammus was associated with the Warranggu/Namaleta Creek (outside but proximate to the northern boundary of the claim area), which forms part of the broader country traditionally associated with the Ankamuthi people — at [122].
- The Ankamuthi people have hunting grounds around the Ducie River (covers most of the application area) which they share with another group — at [127].

[114] The report of April 2014, which documents an anthropologist's findings and opinions regarding the traditional rights and interests and decision making process of the indigenous people within the Ankamuthi country, provides the following relevant information:

- 'The [Ankamuthi] Seven River group are the descendants whose traditional homelands include places located in the lower catchments of the western coastal rivers of Northern Cape York which collectively known as the Seven Rivers (a term applied since the nineteenth century to the country extending across the lower catchments of the Jardine River, Crystal Creek, Doughboy River, McDonald River, Jackson River, Skardon River [I understand these rivers and creeks to be north of the application area] and the Ducie/Dulhunty River [forms and/or is proximate to the application area]). The ancestors of this grouping spoke an [Ankamuthi] dialect of the Uradhi language family' — at [12].
- Apical ancestor Mammus was born around 1888 — at [15]. He originated from the Dulhunty River region (the Dulhunty River is on/proximate to the middle region of the application area) and stayed at the mission at Mapoon (outside but proximate to the western boundary of the application area) — at [16]. In the early days of the mission, people would cross Port Musgrave (outside but proximate or adjacent to the western boundary of the application area) in bark canoes and camp at the mission where some of the children attended school — at [16]. He had one sister, who was born at Mapoon, and a brother, who may have been born at Mapoon and may have died on the 'Musgrave Harbour, Ducie River' — at [16]. These ancestors 'were traditionally associated with the Namaleta Creek – Skardon River area and that this is located in the southern part of the broader [Ankamuthi] language country' — at [22]. Descendants of Mammus' sister and brother are connected to the Skardon – Port Musgrave area — at [21].

[115] The report of June 2012 contains the following relevant information about the association of the claim group to the application area:

- Anthropological material, referring to the predecessors living in family groups in separate camps across particular country, states that 'Ducie mamoose lives in the district about six miles south along the telegraph line from the Ducie crossing, and as far east as he likes to go. … [B]elow him lives his brother with a crowd of blood-related families; and so on for forty miles in a south-east direction. Right at the outskirts of the tribal land lives a son of the mamoose, who has been up to the Ducie only once in twelve years. They are all friendly, and mix about freely, and make themselves at home in each other's camp, but for all that the camp belongs to a certain group, and all the others are visitors. The country belonging to a group is sometimes subdivided among the families' — at [46].
- A mythic ancestor is asserted to originate proximate to the western/southwestern boundary of the application area — at [22]. In addition, there are reports of the foundational stories of mythical snakes inhabiting lagoons on the [place name deleted] — at [28]. The Rainbow Serpent and other related beings continue to feature strongly about the claimants description of the cosmology of the region and form a core set of beliefs about the normative social order — at [29].
- The predecessors believed they were spiritually bound to their country by birth — at [128].

[116] The connection report contains the following relevant information:

- The Ankamuthi claim group 'are the descendants of ancestors whose traditional homelands include places located in the lower catchments of the west coast rivers of northern Cape York, commonly known as the Seven Rivers (an area which includes parts of the catchments of the Jardine River, Crystal Creek, Doughboy River, McDonald River, Jackson River, Skardon River and Ducie/Dulhunty River)' — executive summary at [9], and see also [39].
- The weight of ethno-historic evidence regards Ankamuthi country to include the northern banks of Port Musgrave and east through the Ducie River as far as Catfish Creek [which is located east of the application area] — at [147] – [148] and Table 5. The Ankamuthi people are also strongly associated with the lower reaches of the Dulhunty River — at [148] and [156].
- Explorers in the early seventeenth century encountered inhabitants at the Skardon River — at [3].
- Expeditions in the Northern Cape York region were taking place around the middle of the nineteenth century and settlement occurred around the mid-1860s — at [5] – [6]. '[B]y the end of the nineteenth century the tribes of northern Cape York were still in full possession of their territories, with little sustained and systematic impact from settlers', in particular the 'whole of the western coast north from the Mitchell to the Jardine River [is] in absolute possession of the wild tribes [I understand this area to include the claim area]' — at [7].
- Even by the late 1920s, 'Aboriginal people were living in camps on the Ducie and Dulhunty Rivers' — at [20].
- Records state that 'Mamoose located tribe on [south] shore of Mapoon Bay, [south] to Janey Creek [this creek is west/south-west but proximate to the application area], bordered [north] of Pennefather [this river is south but proximate to the application area]' — at [122].
- Research indicates that current claim members, in particular certain family groups, are descendants of Ankamuthi ancestors including those identified in Schedule A, and have a 'well-accepted association' with Ankamuthi country — at [39] – [43], [50] – [53] and Table 2.4.1.
- Within the boundary of the wider Ankamuthi country there are different localised groupings, such as the 'Virilya, Ducie, Muttee and the Red Island' groups, which represent a form of local organisation — at [254]. Local groups are formed on the basis of cognatic descent of an ancestor and are generally regarded as family groups — at [258]. Current claim group members continue to follow a form of this traditional land tenure system — at [265] – [269]. For instance, the tract of country around the application area is said to be associated with members of a family descended from apical ancestor Mammus — at [133].
- Claim group members believe that the spirits of their ancestors are present on their country — at [325]. They believe that the spirits know when someone trespasses and cause punishment in the form of illness, discomfort and distress — at [211] – [212]. The claimants continue to believe in the presence of spirits in places such as on the Dulhunty

River and speak of the traditional practice of leaving gifts and speaking to them in traditional language — at [449] – [451].

- The claimants have knowledge of the foundational stories of the mythical snakes inhabiting lagoons on the [place name deleted] and that the Rainbow Snake created the wider Ankamuthi country, namely the Seven Rivers — at [438] – [439]; see also [494].
- The 'elders play an important role in the transmission of knowledge through verbal and visual instruction, including the telling of traditional stories, working on language recovery programs and managing the production and exhibition of visual art works' — at [332].
- Current claimants speak of being told about stories and places of significance from their predecessors such as their grandparents, in order to maintain ties with country. They would camp within Ankamuthi country and were told about the dreaming stories, including those about the river and catchment areas — at [333].
- Current claimants continue to observe and acknowledge other traditional laws and customs such as initiation ceremonies practiced by their predecessors although with some adaptation — [368], [374], [377] – [378]. They also continue to practice traditional burial rites — at [393] – [394].
- The Ankamuthi people also continue to believe in and perform increase ceremonies. The claim members believe that '[t]he ritual rubbing of certain sacred "stone places" would bring about the increase of various species for hunting' — at [382]. One 'story stone' place is located within or proximate to the application area — at [381]. The claimants have knowledge of the story associated with story stones and the elders continue to 'rub the rock and clean up around it to bring them good luck' — at [382]. 'Increase ceremonies … serve to mark out legitimate connections to country for those with ancestral links to those places and reproduce a sense of an authorized person's consubstantiality with Ancestral beings located at increase sites and with the country in which hunting will take place' — at [383].
- The claimants speak of camping on and using tracts of country, including in and around the application area — at [481].

Consideration

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

of traditional Ankamuthi land and waters including the sites of significance such as the lagoons relating to the ancestral snakes, as well as ancestral lands that different Ankamuthi family groups are associated with.

[118] There is also, in my view, a factual basis that goes to showing the history of the association that members of the claim group have, and that their predecessors had, with the application area — see *Gudjala 2007* at [51]. The factual basis contains references to the presence of the predecessors within the application area prior to the date of 'effective settlement', which I understand from the factual basis to have occurred around the mid-1860s.

[119] The asserted facts indicate that apical ancestor Mammus and his siblings had rights to country within the application area which I understand to be ancestral landholdings passed down to them from their predecessors who would have been present in the application area prior to effective settlement. The factual basis indicates that apical ancestor Mammus was born around 1888 and originated from the Dulhunty River region. He stayed at or proximate to the application area, which is where his sister was born and where his brother may have also been born. His brother may have also died around the application area. These ancestors are asserted to have been traditionally associated with the application area. The descendants of these ancestors continue to remain connected to the wider Ankamuthi country and the application area. In particular, one family group that is descended from apical ancestor Mammus continues to be associated with the application area and the surrounding area.

[120] The factual basis is also sufficient to support the assertion that the Ankamuthi people have a spiritual association with the application area and is sufficient to show the history of that association. The claim group has knowledge of the dreaming stories of the mythic flying fox and snakes, including the travels of the ancestral snakes and the resultant mythical lagoons proximate to the application area. Members of the claim group continue to believe in the presence of spirits on country. The asserted facts indicate that the predecessors performed initiation ceremonies and current claimants continue to practice a form of ceremony that marks the coming of age which is rooted in the traditions of the past but with some adaptation. They also perform traditional increase and mortuary ceremonies — see also my reasons at s 190B(5)(b) below. The dreaming stories, belief in spirits, practice of ceremonies and rituals have been passed down through the generations by the immediate predecessors so that the younger generations continue to have a spiritual association with country. In my view, this transfer of knowledge and belief system demonstrates the history of the spiritual association the Ankamuthi People have with the application area.

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

[122] For the purposes of s 190B(5)(a), I must also be satisfied that there is sufficient factual material to support the assertion of an association between the group and the whole area. I note that the application area is not very large, specifically it is about 16 sq kilometres. Majority of the area is covered by the Ducie River with Port Musgrave forming the eastern boundary and the

Dulhunty River joining the Ducie near the middle region from the north. The factual basis refers to the predecessors camping within the region and crossing the rivers using bark canoes. There are also references to traditional hunting grounds and increase story stone places around the Ducie River. The current claimants continue to remain associated with the application area and access it to camp, hunt and perform increase ceremonies. I also consider, as mentioned earlier, that the claim group has a spiritual association with the application area. The anthropological material refers to the mythical sites created by the ancestral snakes, as well as the presence of spirits, on or proximate to the application area.

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

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

Reasons for s 190B(5)(b)

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

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

[126] In light of the findings of Dowsett J in *Gudjala 2007* and the High Court in *Yorta Yorta*, I consider that a law or custom is 'traditional' where:

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

[127] I note that in *Gudjala 2009,* Dowsett J also discussed some of the factors that may guide the Registrar, or his delegate, in assessing the asserted factual basis for the purposes of s 190B(5)(b), including:

- that the factual basis demonstrate the existence of a pre-sovereignty society and identify the persons who acknowledged and observed the laws and customs of the pre-sovereignty society — at [37] and [52];
- that if descent from named ancestors is the basis of membership to the group, that the factual basis demonstrate some relationship between those ancestral persons and the pre-sovereignty society from which the laws and customs are derived — at [40]; and
- that the factual basis contain an explanation as to how the current laws and customs of the claim group are traditional (that is laws and customs of a pre-sovereignty society relating to rights and interests in land and waters). Further, the mere assertion that current laws and customs of a native title claim group are traditional because they derive from a pre-sovereignty society from which the claim group is said to be descended, is not a sufficient factual basis for the purposes of s 190B(5)(b) — at [29], [54], and [69].

Society

[128] The identification of a pre-sovereignty society or a society that existed prior to European settlement of the application area is relevant to my assessment of the assertion at s 190B(5)(b). In particular, I am of the view that identification of such a society is necessary to support the assertion of a connection between that society and the apical ancestors as well as a connection with the current native title claim group. I consider the following asserted facts to be relevant to my consideration of whether the factual basis is sufficient to support the existence of such a society:

- The Ankamuthi native title claim group is part of a single regional society within the Northern Cape York Peninsula. The groups within this society shared a single body of laws and customs at sovereignty with some minor variation between the practices — report of June 2012 at [4] and [14].
- Each group has their own distinct boundary mapped in terms of languages and dialects associated with particular watersheds so that high country between catchments form boundaries between groups — connection report, executive summary at [12].
- Languages within the society belong to a single language family known as the Northern Pama Sub Group of languages. The Ankamuthi language is one of the most prominent surviving language identities which were imparted to country by the travelling ancestral beings — executive summary at [13] – [14].
- Neighbouring groups share key principles of social organisation and participate in active social networks. This interaction reproduces a regionally shared body of socio-territorial principles — executive summary at [15].
- The groups in the society shared a range of socio-cultural principles including cosmology, way of linking language land and group identity, social and local organisation, role of elders in decision making and dispute resolution, laws and customs governing trade and exchange, responsibilities for ceremony and ceremonial and burial grounds, rules

regarding food prohibitions, and beliefs about spiritually dangerous places — report of June 2012 at [14].

Traditional laws and customs

[129] The factual basis contains extensive information about the traditional laws and customs acknowledged and observed by the Ankamuthi native title claim group. I refer to only some of the relevant information below.

[130] The claim members continue to follow a landholding system which defines a boundary for country within Ankamuthi country and where tracts of land is transmitted and inherited through group membership rules, namely on the basis of cognatic descent — connection report at [265]; see also [517] – [519]. For instance, the descendants of apical ancestor Mammus have an association with the application area — at [52]. Decisions about country are made primarily on the basis of particular rights, interests and responsibilities flowing from the right to speak for a specific tract of country or a specific site locale — at [365].

[131] Traditional marriage and kinship rules prevent marriage between people who are closely related. Intermarriage with neighbouring groups permits access to resources in the country of those neighbouring groups, a practice that has continued since before sovereignty — at [281] – [284] and [288].

[132] The claimants have knowledge of and continue to follow traditional naming practices and the use of classificatory kinship terms — at [300].

[133] The claim members observe demand sharing among close kin, where resources are shared among family and elders without expectation of a return, as well as more formalised form of exchange and trade — at [314] – [316]. In demand sharing, kinship status determines the order of sharing. For instance, elders and seniors are prioritised in order to prevent loss of resources and damage to social relationships — at [318] – [321].

[134] Elders and other senior people are given authority, particularly in discussions about land and its resources and matters pertaining to family relationships — at [322] – [323]. The claimants also believe that the elders are intermediaries between the world of the living and the knowledge base derived from those 'old people' who have deceased and are believed to inhabit country as spirits — at [325]. Learning from an elder is seen to accord legitimacy and veracity to a person's knowledge — at [327].

[135] The claimants are taught stories about ancestral and mythical beings that created the landscape and places of significance, and learn about other laws and customs from their elders and immediate predecessors such as parents or grandparents — at [332] – [333] and [438] – [439].

[136] Traditional methods are utilised for decision making and dispute resolution, such as through the use of kin solidarities or elders' authority for intervention — at [351] and [355]. Persons possessing rights and interests in a particular tract of country are often differentiated in terms of gender and seniority in decision-making processes — at [358].

[137] The claim members continue to perform various types of traditional ceremonies. For instance, they perform increase ceremonies using 'story stones' which when rubbed are believed to bring luck and an increase in various species for hunting — at [381] – [382]. Claim members who have an ancestral link to increase sites are believed to have a connection with the ancestral

being located at the increase site and with the country in which hunting will take place — at [383]. Claim members also perform an adapted form of initiation ceremonies, and traditional mortuary rites — see for instance [374], [377] – [378], [390] and [392] – [393].

[138] The claim members believe in sorcery which may cause death, or create and/or protect from misfortune — at [386] and [416]. They believe that their country is imbued with a potent spirituality and speak of avoidance places that have potentially dangerous spirits present and the traditional practice of leaving the spirits gifts and speaking to them in traditional language — at [446] and [449] – [451].

[139] Claimants speak of having a spiritual connection to birth and conception places — at [402].

[140] I note that the information extracted at s 190B(5)(a) is also relevant to my consideration of the assertions at s 190B(5)(b).

Consideration

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

- the connection between the pre-sovereignty society and the existing claim group; and
- the connection between the laws and customs acknowledged and observed by the pre-sovereignty society and the existing claim group.

[142] I also consider that the factual basis must include assertions that do not merely restate the claim but provide an adequate general description of the factual basis — see *Gudjala 2007* at [62] and [66] and *Gudjala 2009* at [27] and [29].

[143] My understanding of the factual basis material is that the pre-sovereignty society, being the Northern Cape York regional society, encompasses a wide area of land which is held at a localised level by various groups, including the Ankamuthi People. I understand that these landholding groups share common spiritual beliefs, social organisation and classificatory kinship and marriage systems, have common laws and customs and interact for cultural and social purposes. However, the groups have distinct territorial domains, the boundaries of which are defined by the landscape and recognised by the other groups.

[144] In my view, the factual basis indicates that the Ankamuthi country is situated within this society and their traditional laws and customs are said to be derived from it. In my view, within this society, the rights and interests in land that are asserted to be held by the Ankamuthi People are based on regionally held and practiced laws and customs. Relevant to this proposition, I note the observations of Lindgren J in *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 5)* [2003] FCA 218 that:

> [i]t is conceivable that the traditional laws and customs under which the rights and interests claimed are held might, in whole or in part, be also traditional laws and customs of a wider population, *without that wider population being a part of the claim group* [emphasis added] — at [53].

[145] The factual basis reveals that the laws and customs currently observed and acknowledged by the Ankamuthi People are based on, amongst other things, common principles of marriage and kinship and include observance of laws relating to land tenure and traditional usage of the resources of their land and waters. The content of the traditional laws and customs is said to have

been passed down to the current members of the native title claim group through the preceding generations.

[146] In my view, the factual basis demonstrates that the apical ancestors were either living or were amongst the generation born to those who were living within the Ankamuthi country at the time of effective European settlement. In particular, apical ancestor Mammus was born in the 1880s and was associated with the application area. In this sense, I understand that the information supports the assertion that at least one of the apical ancestors was born into the Ankamuthi claim group of the pre-sovereignty society that existed at and prior to European settlement — see *Gudjala 2009* at [55] and also my reasons at s 190B(5)(a) above. From the factual basis, I understand the current claim members are descendants of this ancestor as well as the other ancestors identified in Schedule A.

[147] I am also of the view that there is information contained within the factual basis material from which the current laws and customs can be compared with those that are asserted to have existed at sovereignty. The Ankamuthi People observe a landholding system in which rights, responsibilities and interests are exercised by the descendants of the named ancestors. The factual basis demonstrates that the descent groups continue to have knowledge of their ancestral country and have knowledge of hunting grounds and sites of significance relating to the mythical snakes and story stones. In my view, there is sufficient information to support the assertion that the present landholding system whereby claim group members gain rights to country on the basis of cognatic descent, and the spiritual relationship to country, is one that is founded upon a normative system that is likely to have been present at or before effective settlement. I consider that there is a sufficient factual basis that the landholding system held by the current claimants are derived from and rooted in customary laws and practices.

[148] The factual basis contains information which speaks to the way the members of the claim group continue to speak traditional language and perform traditional customs such as naming practices, performing ceremonies, hunting, fishing and gathering natural resources for various purposes. This in my view is sufficient to support the assertion that the laws and customs currently observed are relatively unchanged from those acknowledged and observed at the time of effective settlement, and that they have been passed down the generations to the claimants today.

[149] The factual basis also contains references to current observance and acknowledgement of laws and customs of a spiritual nature. The claimants have knowledge of myths and the ancestral beings. They have knowledge of story stone places, avoidance places and sites that are inhabited by the ancestral snakes on country. The claim members speak to the spirits on country in language and leave gifts when travelling or hunting. There are also references to current claimants performing rituals and practicing traditional ceremonies, such as increase and mortuary ceremonies.

[150] The factual basis, in my view, is sufficient to support the assertion that the relevant laws and customs, acknowledged and observed by this society, have been passed down through the generations, by verbal and visual instruction such as telling of traditional stories, by elders and other predecessors to the current members of the claim group, and have been acknowledged by them without substantial interruption. There are references to the current claimants using traditional naming practices, performing ceremonies, hunting, fishing, being told by their

predecessors about stories and places of significance, which in my view reveals a continuing practice of teaching laws and customs to the younger generation. This in my opinion is sufficient to support the assertion that these laws and customs will continue to be passed to future generations ensuring a vitality and continuity of the traditional laws and customs. I infer that, given the level of detail in the continued acknowledgement and observance of the group's cultural traditions and that the laws and customs have been passed between a few generations from the apical ancestors to the current claimants, the apical ancestors would have also practiced these modes of teachings. It follows that, in my view, the laws and customs currently observed and acknowledged are 'traditional' in the *Yorta Yorta* sense as they derive from a society that existed at the time of effective settlement.

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

Reasons for s 190B(5)(c)

[152] This condition is concerned with whether the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the native title rights and interests claimed in accordance with their traditional laws and customs.

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

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

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

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

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

Consideration

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

[157] The connection report indicates that ceremonial traditions are inherited from predecessors and the claimants continue to transmit these to the younger generation along with important creation stories and knowledge of sites of significance — at [510]. There are references to the claim members speaking of learning about stories, including dreaming stories about the river and catchment areas and of places of significance, from their predecessors such as their grandparents

— at [328]. They were told about the significance and meaning of the stories — at [333]. Elders transmit knowledge through verbal and visual instruction, including the telling of traditional stories, working on language recovery programs and managing the production and exhibition of visual art works — at [332]. Current claimants have knowledge of the dreaming stories, including the ancestral snake and the associated mythical sites, as well as of traditional ceremonies and practices. They continue to hunt, fish and gather natural resources.

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

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

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

[160] 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.

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

The requirements of s 190B(6)

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

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

[164] I understand that the requirements of s 190B(6) are to be considered in light of the definition of 'native title rights and interests' at s 223(1) — *Gudjala 2007* at [85]. I must, therefore, consider whether, prima facie, the individual rights and interests claimed:

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

[165] I also understand that the claimed native title rights and interests:

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

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

[167] I note that the 'critical threshold question' for recognition of a native title right or interest under the Act 'is whether it is a right or interest "in relation to" land or waters' — *Western Australia v Ward* [2002] HCA 28 (*Ward HC*) per Kirby J at [577]. I also note that the phrase 'in relation to' is 'of wide import' — *Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [93]. Having examined the native title rights and interests set out in Schedule E of the application, I am of the opinion that they are, prima facie, rights or interests 'in relation to land or waters.'

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

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

Rights prima facie established

[170] I note that, as mentioned in my reasons at s 190B(4) above, I understand that the rights and interests are claimed in relation to two separate parts of the application area, one where the Comalco ILUA is situated and the other being the balance of the application area — see Schedule E. I will refer to the relevant area when considering whether a particular right and interest is prima face established. I note that in respect of both areas, the claimed native title rights and interests are subject to the traditional laws and customs of the native title claim group.

1. In relation to the area that is not part of the Comalco ILUA, the native title rights and interests that are possessed under the traditional laws and customs of the native title holders are possession, occupation, use and enjoyment to the exclusion of all others

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

rights of control over the land', which necessarily flow 'from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country' — at [93].

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

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

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

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

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

[175] The factual basis is such that it is asserted that at the time of European settlement, there existed an association between the Ankamuthi native title claim group and its land and waters — see my reasons at s 190B(5)(a).

[176] The anthropological material refers to the Ankamuthi people having a right to exclude others from the application area — connection report at [512], report of June 2012 at [146] and supplementary report at [72] – [75]. This exclusive right is recognised by neighbouring groups.

[177] The claim group continue to follow a landholding system where country is inherited on the basis of cognatic descent — connection report at [258] and [265]. The family groups connected to a particular country, identify the country as their own often through expressions of 'feeling at home' in that country — report of April 2014 at [41]. The asserted facts indicate that decisions about country are made primarily on the basis of particular rights, interests and responsibilities flowing from the right to speak for a specific tract of country or a specific site locale — connection report at [365]. The factual basis indicates that there are verbal and physical confrontations when the 'wrong people' deliberately speak for country in which the primary rights and interests are seen to be held by another group — report of April 2014 at [40]. By continuing to acknowledge and observe this traditional system of landholding, claim group members who are descended from an ancestor or predecessor are able to demonstrate and be recognised as having ancestral

connection to that country. For instance, the descendants of Mammus have an association with the application area and surrounding areas — see also my reasons at s 190B(5)(a) and (b) above.

[178] The right to maintain and protect country and sites, including places imbued with spiritual or cosmological significance like birth and burial places of the claimants' predecessors, is derived from the claim group's obligation under their laws and custom to ensure the well-being of the country — connection report at [505]. The claimants believe that activities which disturb the country require 'clearing' by traditional owners and unlawful disturbance is avoided for fear of repercussions from the living relatives and/or the spirit domain — at [505].

[179] The Ankamuthi people believe that there are spiritually dangerous places on the country and that such places are dangerous to strangers without a recognised right or interest in that place — report of June 2012 at [134]. The predecessors believed that such places should not be entered without the traditional owners and knowledge and that trespasses would be lawfully punished by supernatural forces causing illness, discomfort and general psycho-physical unease — at [135]; see also connection report at [212]. Current claimants continue this belief and knowledgeable elders with ritual responsibilities may be asked to intercede on the behalf of visitors — report of June 2012 at [139]. A senior member speaks of an instance where a person from another group disappeared when trespassing on country — connection report at [212].

[180] I am of the view that the factual basis material asserts that current members of the native title group maintain vast knowledge of their country. The knowledge of the laws and customs of the current members, as owners of their traditional land and waters, elicit that they have a 'spiritual affair' with their country and have the right to exclude other people from it. In my view, such control flows from a right to speak for country and a spiritual necessity to protect country from harm and injury. Particular family groups have an association with and are given the primary duty to speak for and care for a particular area within their country on the basis of cognatic ties. I understand this symbolic ownership encompasses the right to speak for country and the right to exclude.

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

1. In relation to the area that is part of the Comalco ILUA area, the non-exclusive rights to:
a) live on the area, to camp, erect shelters and other structures
b) access, be present on, move about in and on and use the area

2. In relation to the area that is not part of the Comalco ILUA area, the non-exclusive rights to:
a) access, be present on, move about on and travel over the area
e) live and camp on the area and for those purposes to erect shelters and other structures thereon

[182] The anthropological material refers to the regular use of country by claim group members, visiting sites of significance, camping and travelling over the application area for cultural purposes such as for hunting and fishing within it.

[183] The factual basis indicates that the predecessors resided or lived on Ankamuthi country, built dwellings and traversed on country such as by canoeing across Port Musgrave. There are also references to the claimants regularly accessing country for hunting, fishing, camping and building dwellings —connection report at [476] – [482] and supplementary report at [88] – [100].

[184] It is my view that the factual basis material prima facie establishes that these rights are possessed pursuant to the traditional laws and customs of the native title claim group.

1. In relation to the area that is part of the Comalco ILUA area, the non-exclusive rights to:
c) take and use the natural resources of the area for the purpose of satisfying the personal and domestic communal needs of the native title claim group
f) hunt and gather in, on and from the claim area for the purpose of satisfying the personal, domestic or non-commercial communal needs of the members of the claim group

2a) In relation to water covered by the Comalco ILUA area, the non-exclusive right to hunt and fish in or on, and gather from water for the purpose of satisfying the personal, domestic or non-commercial communal needs of the native title claim group

2. In relation to the area that is not part of the Comalco ILUA area, the non-exclusive rights to:
b) hunt and fish in or on, and gather from, the area
c) take, use, share and exchange natural resources on the area

[185] The factual basis contains references to members of the claim group and their predecessors hunting, fishing and utilising the natural resources in Ankamuthi country.

[186] The claimants continue to hunt, fish and gather bush foods and materials on the application area — connection report at [483]. For instance, the claim members hunt and fish dugong, turtle, crayfish, kangaroo and emu and gather medicinal plants, fruits, timber, bird feathers, stones and other minerals — at [490].

[187] They speak of following traditional practices when hunting, fishing and gathering the natural resources such as those relating to consuming, sharing, speaking to the spirits and reading the signs indicating the correct season to harvest a particular resource — at [484] – [488]. The claimants say that when they hunt or fish, they leave some behind for the spirits — at [487].

[188] In my view, these rights are prima facie established under Ankamuthi traditional laws and customs.

1d) In relation to the area that is part of the Comalco ILUA area, the non-exclusive right to maintain and protect from harm by lawful means sites and places of significance in the area

2k) In relation to the area that is not part of the Comalco ILUA area, the non-exclusive right to maintain places of importance and areas of significance to the native title holders under their traditional laws and customs on the area and to protect those places and areas from harm

[189] The factual basis indicates that claim members maintain and protect significant sites on country including birth and burial sites and other places imbued with spiritual or cosmological significance — at [505]. They believe that such sites need to be maintained and protected for fear of repercussions from living relatives and/or the spirit domain.

[190] I consider these rights are prima facie established under the traditional laws and customs of the native title claim group.

1e) In relation to the area that is part of the Comalco ILUA area, the non-exclusive right to conduct social, religious, cultural, spiritual and ceremonial activities on the area

2. In relation to the non-exclusive area that is not part of the Comalco ILUA area, the non-exclusive rights to:
g) to be buried and to bury native title holders within the area
h) to conduct ceremonies on the area

i) to hold meetings on the area

[191] The factual basis indicates that the claim members have knowledge of ceremonies that mark the coming of age, increase and mortuary rituals and burial places on country. They also hold meetings such as for dispute resolution. There are references within the factual basis to the claimants and/or predecessors conducting such ceremonies or holding such meetings — at [373], [382], [393] and [527].

[192] In my view, these rights are prima facie established pursuant to Ankamuthi traditional laws and customs.

1. In relation to the area that is part of the Comalco ILUA area, the non-exclusive right to inherit and succeed to the native title rights and interests

[193] I note that the Court has allowed by consent a similarly worded right in *Wik and Wik Way Native Title Claim Group v State of Queensland* [2012] FCA 1096 — see order [2].

[194] The factual basis indicates that the claimants continue to emphasise that affiliation to country is based on descent which affords legitimate transmission and inheritance of rights and interests in country under their traditional laws and customs — at [517] – [518].

[195] I consider this right to be prima facie established pursuant to Ankamuthi traditional laws and customs.

2b) In relation to water covered by the Comalco ILUA area, the non-exclusive right to take, use and enjoy Water for the purpose of satisfying the personal, domestic or non-commercial communal needs of the native title claim group

2d) In relation to the area that is not part of the Comalco ILUA area, the non-exclusive right to take and use water from the area for cultural, personal, domestic and communal purposes

[196] The application area is predominantly covered by the Ducie River. The anthropological material refers to the claimants taking, using and enjoying water for practical consumption values, fishing and gathering such resources as crabs, crustaceans, yams as well as fresh and salt water — at [490] and [495]. I infer that water would also be taken and used by the claimants whilst camping.

[197] I am of the view that these rights are prima facie established pursuant to the traditional laws and customs of the native title claim group.

2f) In relation to the area that is not part of the Comalco ILUA area, the non-exclusive right to light fires on the area for cultural, spiritual or domestic purposes, including cooking, but not for the purpose of hunting or clearing vegetation;

[198] The factual basis refers to the claimants using fire to cook game that they have hunted — at [503]; supplementary report at [105]. The claim members would also light fires whilst out camping — at [106].

[199] I consider that the factual basis material prima facie establishes that this right is possessed pursuant to the traditional laws and customs of the Ankamuthi People.

2j) In relation to the area that is not part of the Comalco ILUA area, the non-exclusive right to teach on the area the physical and spiritual attributes of the area;

[200] The anthropological material contains references to the continued practice by the claimants of ceremonial traditions inherited from their predecessors which claim members have continued to transmit to the younger generation along with important creation stories and knowledge of sites of significance — connection report at [510].

[201] There are references to the claim members speaking of learning about traditional stories, and about places of significance from their predecessors such as their grandparents. In particular, one claimant says that they would camp within Ankamuthi country and they were told about the dreaming stories including those about the river and catchment areas — at [333]. Current claimants have knowledge of the dreaming stories, including the ancestral snake and the associated mythical sites, other significant sites such as burial and story stone places, and of traditional ceremonies and practices.

[202] The factual basis material, in my view, prima facie establishes that this right is possessed pursuant to the traditional laws and customs of the native title claim group.

2l) In relation to the area that is not part of the Comalco ILUA area, the non-exclusive right to be accompanied on to the area by those persons who, though not native title holders, are:
i. spouses or partners of native title holders;
ii. people who are members of the immediate family of a spouse or partner of a native title holder;
iii. people reasonably required by the native title holders under traditional law and custom for the performance of ceremonies or cultural activities on the area; and
iv. people who have specialised knowledge based on their training, study or experience who are requested by native title holders to observe or record traditional activities or otherwise to investigate matters of cultural significance on the area

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

[204] The factual basis indicates that this right is observed by members of the claim group. For instance, there are references to intermarriage with neighbouring groups which has allowed families to access resources located within Ankamuthi country — at [281]. There are also references to claim group members ritually introducing strangers to spirits and significant places on country in order to prevent harm coming to them or to the claim group members themselves — supplementary report at [111] – 116].

[205] In my view, this right is prima facie established pursuant to Ankamuthi traditional laws and customs.

Conclusion

As I am satisfied that at least one of the native title rights and interests claimed has been prima facie established, the application **satisfies** the condition of s 190B(6).

Subsection 190B(7)
Traditional physical connection

> The Registrar must be satisfied that at least one member of the native title claim group:
> (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or
> (b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:
> (i) the Crown in any capacity, or
> (ii) a statutory authority of the Crown in any capacity, or
> (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

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

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

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

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

[209] I consider that the factual basis contain some facts that show a traditional physical association of the Ankamuthi People with the application area. For instance, there is information about the predecessors travelling across and near the Ducie River and of the presence of hunting grounds around this river. There are other references to a traditional physical association of claim group members which I have referred to earlier in my reasons at ss 190B(5) and (6).

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

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

> The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s.61A (which forbids the making of applications where

there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

Section 61A provides:

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

(2) If :

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

(b) either:

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

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

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

(3) If:

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

(b) either:

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

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

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

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

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

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

[211] In the reasons below, I consider 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.

Reasons for s 61A(1)

[212] 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.

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

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

Reasons for s 61A(2)

[215] 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.

[216] The application does not contain an express exclusion of areas that are not covered by the application, such as areas covered by a previous exclusive possession act. I note that schedule E states that the native title rights and interests claimed are subject to and exercisable in accordance with the laws of the Commonwealth and the State of Queensland and schedule L states that, pursuant to ss 47A and 47B, extinguishment is to be disregarded.

[217] In *Doepel*, Mansfield J was of the view that it was not incumbent on the Registrar to resolve issues of fact or law as to whether ss 47, 47A or 47B may apply so as to require any extinguishment by a previous exclusive possession act to be disregarded when considering whether the application meets the requirements of s 190B(8) — at [135].

[218] I note, I understand that s 61A(4) specifically provides that s 61A(2) does not apply to an application in circumstances where the application states that ss 47, 47A or 47B applies to it.

[219] I consider that the information before me does not indicate that there are areas covered by a previous exclusive possession act and that ss 47A and 47B do not apply.

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

Reasons for s 61A(3)

[221] 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.

[222] Schedule E states that in relation to the areas that are part of the Comalco ILUA the 'native title rights and interests claimed in the Application are not claimed by the native title claim group in relation to any part of the claim area where native title has been validly extinguished by operation of the Laws of the Commonwealth and the State of Queensland' — at [5]. For the remainder of the application area, the description of the native title rights and interests includes the following:

> 1. In relation to the exclusive areas, the native title rights and interests that are possessed under their traditional laws and customs are, subject to the traditional laws and customs that govern the exercise of the native title rights and interests by the native title holders, possession, occupation, use and enjoyment to the exclusion of all others.
>
> …
>
> The native title rights and interests are subject to and exercisable in accordance with the valid laws of Queensland and the Commonwealth of Australia.

[223] Schedule L states that, pursuant to ss 47A and 47B, extinguishment is to be disregarded. As indicated above, the Registrar is not required to resolve issues of fact or law as to whether ss 47, 47A or 47B may apply when considering whether the application meets the requirements of s 190B(8) — *Doepel* at [135]. I consider that s 61A(4) provides that subsection (3) does not apply to an application if the application states that ss 47, 47A or 47B applies to it.

[224] In light of the above, I consider that the application does not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area that is, or has been, subject of a previous non-exclusive possession act, except to the extent that ss 47A or 47B of the Act may apply — see Schedules E and L.

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

Conclusion

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

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

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

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

Reasons for s 190B(9)(a)

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

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

Reasons for s 190B(9)(b)

[230] Schedule P indicates that the native title claim group does not claim exclusive possession of any offshore places.

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

Reasons for s 190B(9)(c)

[232] The application does not disclose, nor is there any information before me to indicate, that the native title rights and interests claimed have otherwise been extinguished.

Conclusion

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

[End of reasons]