National Native Title Tribunal

Registration test decision

Application name	Nywaigi People
Name of applicant	Roberta Lightning, Victor Cassady, Victor Bligh, Phil Rist, Gerald Berry, John Anderson and Evelyn Noble
NNTT file no.	QC2015/003
Federal Court of Australia file no.	QUD148/2015

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) (Act)[1].

For the reasons attached, I am satisfied that each of the conditions contained in ss 190B and 190C are met. I accept this claim for registration pursuant to s 190A.

Date of decision: 5 June 2015

_____

Nadja Mack

Delegate of the Native Title Registrar (Registrar)[2]

[1] 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.

[2] Pursuant to sections 190, 190A, 190B, 190C, 190D of the Act under an instrument of delegation dated 4 May 2015 and made pursuant to s 99.

Reasons for decision

Introduction

[1] The Registrar of the Federal Court of Australia (Federal Court) gave a copy of the Nywaigi People's claimant application to the Registrar of the National Native Title Tribunal (Registrar) on 10 April 2015 pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

[2] The reasons that follow consider the claim against the conditions of ss 190B and 190C (referred to as the registration test). I refer to ss 190A(6) which provides that the claim must be accepted for registration as I have found that it satisfies all the conditions of ss 190B and 190C.

Information considered

[3] As required by s 190A(3) I have had regard to the following information when considering the claim: the application, including its attachments; the geospatial assessment and overlap analysis (Geospatial Report) prepared by the Tribunal's Geospatial Services on 20 April 2015 and a IspatialView analysis undertaken by myself on 3 June 2015.

[4] I have not considered any information that may have been provided to the National Native Title Tribunal (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.

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

Procedural fairness steps

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

- On 23 April 2015, the Tribunal wrote to the applicant's legal representative, informing her that the Registrar has appointed a delegate to apply the registration test to this matter and invited the applicant to provide any further information for consideration by 7 May 2015.

- Also on 23 April 2015, the Tribunal wrote to the State of Queensland (State) advising that should the State wish to make any submissions in relation to the registration of this application, they should be provided by 7 May 2015. The State was also informed that if any additional material was received from the applicant, it may be forwarded to the State with an opportunity to comment.

- On 8 May 2015, the applicant's legal representative advised that the applicant would not provide further information.

- On 8 May 2015, the State advised that it would not make any submissions.

Procedural and other conditions: s 190C

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

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

[7] 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.

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

[9] 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. 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 and do not require any separate consideration by the Registrar. Paragraph 61(5)(c), which requires that the application contain such information as is prescribed, does not need to be considered by me under s 190C(2). I already test these things under s 190C(2) where required by those parts of ss 61 and 62 which actually identify the details/other

information that must be in the application and the accompanying prescribed affidavit/documents.

Native title claim group: s 61(1)

[10] I must consider whether the application sets out the native title claim group in the terms required by s 61(1). If the description indicates that not all persons in the native title claim group have been included, or that it is in fact a subgroup of the native title claim group, then the relevant requirement of s 190C(2) would not be met and I could not accept the claim for registration—*Doepel* at [36]. I am not required to go beyond the material contained in the application and in particular I am not required to undertake some form of merit assessment of the material to determine whether I am satisfied that the native title claim group as described is, in reality the correct native title claim group—*Doepel* at [37].

[11] The description of the native title claim group, the Nywaigi People, is set out in Schedule A of the application. There is nothing on the face of the application which leads me to conclude that the description indicates that not all persons in the native title group have been included, or that it is in fact a subgroup of the native title claim group.

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

Name and address for service: s 61(3)

[13] The name and address for service of the applicant is found in Part B of the application.

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

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

[15] The application contains a description of the persons in the native title claim group in Schedule A (as opposed to naming them). I will consider whether the description is sufficiently clear so that it can be ascertained whether any particular person is one of those persons, under the corresponding merit condition in s 190B(3). See *Gudjala v Native Title Registrar* [2007] FCA 1167 (*Gudjala*) at [31].

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

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

[17] The application is accompanied by the affidavits required by s 62(1)(a) from each person jointly comprising the applicant, namely Roberta Lightning, Victor Cassady, Victor Bligh, Phil Rist, Gerald Berry, John Anderson and Evelyn Noble. Each of these affidavits is signed by the deponent and competently witnessed. I am satisfied that each of the affidavits sufficiently addresses the matters required by s 62(1)(a)(i)-(v).

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

Details required by s 62(1)(b)

[19] Subsection 62(1)(b) requires that the application contain the details specified in ss 62(2)(a)–(h). The application **contains** all the relevant details, as identified in the reasons below:

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

[20] Schedule B of the application refers to Attachment B for a description of the external boundary of the application area. Schedule B also provides a description of the areas within the external boundaries that are excluded from the application.

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

[21] Schedule C refers to Attachment C, which is a map showing the application area and its external boundaries.

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

[22] Schedule D states that no searches have been carried out by North Queensland Land Council Native Title Representative Body (NQLC) on behalf of the applicant. There is no information before me to indicate that the applicant has made any searches of the kind described in this section.

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

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

[24] I assess the adequacy of the description in the corresponding merit condition at s 190B(4) below.

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

[25] Kiefel J in *Queensland v Hutchinson* (2001) 108 FCR 575; [2001] FCA 416 notes that it is not enough to merely recite the general or the three particular assertions in s 62(2)(e); what is required to meet the requirement of s 62(2)(e) is a 'general description' of the factual basis for the three particular assertions —at [25].

[26] The Full Federal Court (French, Moore, Lindgren JJ) commented in obiter on the requirements of s 62(2)(e) in *Gudjala People # 2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*). Their Honours said:

> The fact that the detail specified by s 62(2)(e) is described as a 'general description of the factual basis' is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes

> the statements in that general description to be true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality.

[27] Schedule F, Attachment F and the affidavit of Phil Rist, which is attached to Schedule F, provide a description of the rights and interests claimed and the factual basis for the assertions set out in s 62(2)(e). The description does more than recite the particular assertions and in my view, meets the requirements of a general description of the factual basis for the assertions identified in this section.

[28] I assess the adequacy of the description in the corresponding merit condition at s 190B(5) below.

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

[29] Schedule G sets out details of activities currently carried out by the native title claim group in relation to the area claimed.

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

[30] Schedule H sets out that there are no other applications to the Courts or a recognised State or Territory Body of which the applicant is aware that have been made in relation to the whole or part of the area covered by the application.

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

[31] Schedule HA states that the applicant is not aware of any notifications under s 24MD(6B)(c). There is no information before me to indicate that the applicant is aware of any notifications of the kind described in this section.

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

[32] Schedule I states that Attachment I contains a list of s 29 notifications that have been issued in relation to the whole or part of the application area as at 31 March 2015. I note that Attachment I is a memorandum from Jeff Milne of the Tribunal which provides an analysis of the description and map contained in a proposed Nywaigi People application supplied to the Tribunal on 19 March 2015. The memorandum notes that no s 29 notices fall within the external boundary of the proposed application. There is no information before me to indicate that the applicant is aware of any notifications of the kind described in this section.

Conclusion

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

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

The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:

(a) the previous application covered the whole or part of the area covered by the current application, and
(b) the previous application was on the Register of Native Title Claims when the current application was made, and
(c) the entry was made, or not removed, as a result of the previous application being considered for registration under s 190A.

[34] The requirement that the Registrar be satisfied in the terms set out in s 190C(3) is only triggered if all three of the conditions found in s 190C(3)(a), (b) and (c) are satisfied—see *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*)—at [9].

[35] The Geospatial Report shows that there is no application on the Register of Native Title Claims that covers all or part of the area covered by this amended application. This is confirmed by the iSpatial View search results. The requirement to consider common members therefore does not arise.

[36] 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.

[37] 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.

[38] My consideration is governed by s 190C(4)(a) as the one representative body for the application area, the NQLC, has certified the application. The signed certification dated 6 May 2015 is attached to the application as Attachment R.

[39] For the certification to satisfy the requirements of s 190C(4)(a) it must comply with the provisions of s 203BE(4)(a)–(c). I note that it is not the task of the Registrar under s 190C(4)(a) to look behind a certification, nor is he required to be satisfied that the applicant is authorised—see *Doepel* at [79]–[82].

[40] In my view the certification complies with s 203BE(4)(a) as it contains the required statement of the representative body's opinion that all persons in the native title claim group have authorised the applicant to make the application and deal with all matters in relation to it and 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.

[41] Further, the certification complies with s 203BE(4)(b) as it briefly sets out the reasons for being of the above opinion. The certificate states that:

- The identification of the native title claim group has involved the engagement of a consultant anthropologist who has undertaken extensive anthropological research in the region, including in the identity of the claim group by interviewing Elders and cross-checking of secondary resources. An anthropological report regarding the claim and claim group description has been prepared, which was reviewed by the NQLC and considered and authorised by members of the claim group; and

- An authorisation meeting was held on 18 December 2014 in Ingham. A decision-making process was agreed to and adopted and the decision to authorise the applicant to make this application and deal with all matters arising in relation to it was made in accordance with this process.

[42] Section 203BE(4)(c) requires the representative body to, 'where applicable, briefly set out what the representative body has done to meet the requirements of s 203BE(3)'. Section 203BE(3) requires the representative body to make all reasonable efforts to achieve agreement between competing claimants and to minimise the number of overlapping applications over an area of land and waters. The certification meets this requirement. NQLC states that the application area is not covered by any other application and that NQLC does not intend to lodge any overlapping application nor is it aware of any person's intention to lodge an overlapping claim.

[43] For the above reason I am of the view that the requirements set out in s 190C(4)(a) are **met.**

Merit conditions: s 190B

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

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

[44] Schedule B refers to Attachment B for a description of the external boundary of the claim area and Attachment C for a map depicting the boundary. The Geospatial Report which provides an analysis of the description and map, and advises whether the application area has been described with reasonable certainty notes the following:

> **Description**
> Schedule B refers to Attachment B.
> Attachment B is titled "Nywaigi People – External boundary description" and contains a metes and bounds description (prepared by National Native Title Tribunal, 28 October 2014) referencing lot on plan, rivers and creeks, the High Water Mark, native title determination QUD85/2005 Gugu Badhun People #2 (QCD2012/002) and coordinate points to six (6) decimal places referenced to the Geocentric Datum of Australia 1994 (GDA94).
> Schedule B lists general exclusions.
>
> **Map**
> Schedule C refers to Attachment C.
> Attachment C contains an A4 colour copy of a map prepared by National Native Title Tribunal (29 September 2014) titled "Native Title Determination Application - Nywaigi People" that includes:
> - The application area depicted by a bold dark blue outline;
> - The Gugu Badhun People #2 determination area by black outline and stipple fill;
> - A Land Tenure background with lot on plan identifiers for several allotments;
> - Major roads, towns and rivers shown;
> - Scalebar, northpoint, coordinate grid; and
> - Notes relating to the source, currency and datum of data used to prepare the map.
>
> **Assessment**
> The description and map are consistent and identify the application area with reasonable certainty.

[45] Having regard to the identification of the claim area at Schedule B's Part (A), Attachment B and the map at Schedule C, I am satisfied that the application area has been described such that the location of it on the earth's surface can be identified with reasonable certainty.

[46] The specific exclusions to the area of the application are clearly identified at Schedule B's Part (B). Nicholson J in *Daniel for the Ngaluma People & Monadee for the Injibandi People v Western Australia* [1999] FCA 686 (*Daniel*) was satisfied that a generic description of internal excluded areas such as that contained in this application met s 62(2)(a)(ii), if the applicant is not in possession of the facts relating to extinguishment to more particularly delineate the internal

excluded areas. In *Strickland v Native Title Registrar* (1999) 168 ALR 242; [1999] FCA 1530 at [51][52] (*Strickland*), Justice French agreed with the decision in *Daniel* in the context of the Registrar's assessment of a generic description of internal excluded areas against the requirements of s 190B(2). I note that the applicant states in Schedule D that NQLC on behalf of the applicant has not carried out any searches. There is no information before me to indicate that the applicant is in possession of tenure information which would enable the more precise identification of areas within the boundaries covered by the kinds of acts described in Part (B) of Schedule B. Given that the proceedings are at an early stage, I am of the view that the generic description of the internal excluded areas is sufficient for the purposes of s 190B(2).

[47] I therefore agree with the Geospatial Report and am satisfied that the information and the map required by s 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 areas of the land or waters.

[48] 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.

[49] Schedule A of the application describes the persons in the native title claim group as the descendants of certain ancestors which are listed in Schedule A. The list sets out 14 names of ancestor couples and/or persons. In some cases further identifying information is provided, such as an alternative name by which the ancestor is known or the name of an ancestor's child or grandchild.

[50] Pursuant to subsection 190B(3)(b) I must be satisfied that the description is sufficiently clear so that it can be ascertained whether any particular person is in the native title claim group.

[51] In considering the operation of s 190B(3)(b) in *Doepel*, Mansfield J stated that the section's focus is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the identified native title claim group can be ascertained—at [37].

[52] Further, Carr J in State of *Western Australia v Native Title Registrar* (1999) 95 FCR 93 found, in the way native title claim groups were described, that 'it 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'—at [67].

[53] Describing the claim group as the 'descendants' of certain named persons provides a sufficiently reliable and objective means by which to ascertain a person's membership of the group. Some factual inquiry may be required to ascertain how members of the claim group are descended from the named apical ancestors, but that would not mean that the group had not been sufficiently described.

[54] I am therefore of the view that the native title claim group is described sufficiently clearly to enable identification of any particular person in that group.

[55] 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.

[56] Section 62(2)(d) provides that the application must contain:

> 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.

[57] The description of the claimed rights is found in Schedule E.

[58] In *Doepel*, Mansfield J agreed with the Registrar that s 190B(4) requires a finding as to 'whether the claimed native title rights and interests are understandable and have meaning'—at [99]. I am of the view that the description in Schedule E is sufficient to allow the native title rights and interests claimed to be readily identified. The claimed rights have been clearly and comprehensively described in a way that does not infringe s 62(2)(d). Further, the description is meaningful and understandable, having regard to the definition of the expression 'native title rights and interests' in s 223.

[59] Whether I consider that the claimed rights can be established prima facie is the task at s 190B(6), discussed below.

[60] 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.

[61] Following Mansfield J at [17] of *Doepel*, I understand that my assessment is to 'address the quality of the asserted factual basis for [the] claimed rights and interests … but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests' and that it 'is not for the Registrar to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts'. This was endorsed by the Full Federal Court in *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317; [2008] FCAFC 157 (*Gudjala 2008*) at [83].

[62] The Full Court in *Gudjala 2008* also considered the interaction between s 62 (which prescribes that an application must contain a certain level of information) and s 190A (which obliges the Registrar to consider the sufficiency of information against the conditions of s 190B). The Full Court held that:

> The fact that the detail specified by s 62(2)(e) is described as 'a general description of the factual basis' is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim—at [92] (underlining added).

[63] The Full Court observed that if the primary Judge 'approached the material before the Registrar on the basis that it should be evaluated as if it was evidence furnished in support of the claim … then it involved error'—at [93]. The Full Court found that the primary Judge erred in his approach to the information in an anthropological report within the application. The error being that the primary Judge was 'critical of, and in many respects did not accept, the opinions expressed ... which, if accepted as a recitation of facts, went a considerable way towards establishing the factual basis asserted by the applicant in relation to the various matters referred to in s 190B(5)'—*Gudjala 2008* at [93]–[94] (underlining added).

[64] Although the Registrar must not be critical of, nor must he refuse to accept, the facts provided in support of the assertions, there must be more than a mere restatement of the claim. Thus, I am of the view that the Registrar is required to consider whether:

a. the information provided is more than merely assertive; and

b. there are sufficient and specific facts which support the assertions.

[65] This was explained by Dowsett J in *Gudjala People #2 v Native Title Registrar* (2009) 182 FCR 63; [2009] FCA 1572 (*Gudjala 2009*):

> … it would not be sufficient for an applicant to assert that the claim group's relevant laws and customs are traditional because they are derived from the laws and customs of a pre-sovereignty society, from which the claim group also claims to be descended, without any factual details concerning that pre-sovereignty society and its laws and customs relating to land and waters. Such an assertion would merely restate the claim. There must be at least an outline of the facts of the case—at [29].

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

Reasons for s 190B(5)(a)

[67] The assertion in s 190B(5)(a) relates to the association of the native title claim group and that of their predecessors with the area covered by the application.

General principles

[68] I understand from comments by Dowsett J in *Gudjala 2007* that a sufficient factual basis for the assertion in s 190B(5)(a) needs to address that:

- the claim group as a whole presently has an association with the area, although it is not a requirement that all members must have such an association at all times; and

- there has been an association between the predecessors of the whole group over the period since sovereignty—at [52].

Applicant's material

[69] Schedule F states that the 'native title rights and interests claimed are those possessed under the traditional laws and customs of the Nywaigi People which together form part of a body of customary law that is part of a broader system of Aboriginal culture. The broader system is a comprehensive body of law covering cultural values, norms of social behavior and principles that compromised the law component of that body of law that govern the landed interests of the claim group. The acquisition of land interests is by descent from ancestors and derived from fundamental rights of possession and ownership of land'. Schedule F repeats the assertions at s 190B(5)(a), (b) and (c) and contains other assertions that are at a high level of generality. Finally, Schedule F makes reference to Attachment F and the affidavit of Mr Phil Rist.

[70] The following summary sets out the relevant information in support of the assertion in s 190B(5)(a) contained in Attachment F and notes my comments in brackets:

- 'Published documents' (the nature of which is not set out) establish that the Nywaigi identify as a tribe whose members have in common the Nywaigi language and ownership of a continuous track of land and waters located along the coastal plain, hinterland and inshore waters of Halifax Bay (according to Wikipedia Australia, Halifax Bay is a region situated on the coast in Far North Queensland, bordered by the town of Ingham to the north, city of Townsville to the south and Great Palm Island off the coast to the east). Historical records refer to a number of places in the claim area such as Ollera Creek, Mungulla, Warren's Hill (which I understand to also be known as Mt Mercer) and Bambaroo and various people informed researchers such as **[Anthropologist 1 – name deleted]**, **[Anthropologist 2 – name deleted]** and **[Anthropologist 3 – name deleted]** of the presence of Nywaigi People in the claim area. The written sources which refer to the Nywaigi People date back to the 1880s.

- Anthropological evidence shows that the son of ancestors Billy Erin and Jeannie, Long Heron, was born in Ingham (a town about 5 kilometers outside the northern boundary of the claim area) in 1880. His parents were 'full blooded' Nywaigi persons of Rollingstone (a town located within the southern boundary of the application). Long Herron was removed to Palm Island but returned to Warrens Hills (located about 20 km south of Ingham) in the 1960s. He passed away in 1970.

- Jack Roach, the son of ancestors Tommy Roach and Nora, who was also known as Wargurdjal and an 'old Nywaigi King', was born on the banks of Munggabulla (also known as Ollera Creek, which is located north of Rollingstone and sought of Moongobulla) between 1880 and 1900 (I note that Mr Rist in his affidavit states that he thinks that his grandfather was born in the 1920s but that it is possible that he is a lot older than he thinks). Jack Roach, who worked as a stockman, was also removed to Palm Island, together with his wife, Daphne Roach, and ten children. After he passed away in 1949, his wife and children returned to the Ingham district in the 1950s.

[71] The following summary sets out the relevant information in support of the assertion in s 190B(5)(a) contained in Mr Rist's affidavit and notes my comments in brackets:

- Most Nywaigi people can tell you who a Nywaigi person is and over what country they can speak for. An example is that the Roaches can speak for the Ollera Creek area, the Paynes, Cassadys, Seatons, Blighs, Addos and some Roaches can speak for Mungalla station (located between Forest Beach and Ingham) and surrounds – at [2].

- His family has a special connection to the Ollera Creek area. His grandfather, Jack Roach (who was said to be an old Nywaigi king), was born on the banks of the creek, which was a birthing place and story site for Nywaigi People, as well as the place where the scrub turkey made its nest. He thinks his grandfather was born in the 1920s, but it is possible that his grandfather is much older than that - at [17], [22], [24] and [85].

- His grandfather Jack Roach was 'under the Act' and forcibly taken from Nywaigi country to work on cattle stations in other areas but always escaped to return to Nywaigi country. His grandmother, Daphne Lewis, also under the Act, spent most of her time in Townsville or Palm Island where a large contingent of Nywaigi People were removed to. Prior to being moved to Palm Island the Roach family, including his mother, had a big camp at Warren's Hill, consisting of huts made out of iron sheets with dirt floors – at [18], [19] and [26].

- His mother, Marjorie Roach, was born in the early 1940s, though he is not sure about her date of birth. She was born on Muralambeen station near Forest Beach where she and her family had humpies and tin shacks - at [14], [22]. His mother 'came back from Palm' when she was in her teens. After spending time in the Upper Murray region and living in a convent in Tully, she went to Burdekin to work, were she met his father, Edward Stanley Rist. His family and others (Lightning's and Roach's) lived in barracks on a farm owned by an Italian on the banks of Palm Creek at Ingham. They had a strong and profound connection with Palm Creek. They also fished at Cattle Creek which is on Nywaigi country – at [14], [26]–[36].

- Story places in the claim area include the northern side of Cattle Creek ('where you can find water babies'), Helen's Hill ('where little people live'), Waterfall Creek (a taboo area), Yuruga (a meeting place), Mungalla station (a story and burial site) and Mt Cordelia (the story place for the water python). Ollera Beach has been used as a burial site. Remains of a woman buried in the early 1700s have been found there - at [15] and [68]–[81], [84] and [94].

- The old aunties told him and other children stories about places they could not go to such as Waterview Creek ('because evil little fellas lived there') and special places such as Jourama Falls. The aunties also passed on stories about creatures such as the olive python. The aunties had learned about these stories from their ancestors – at [38].

- He had 'a few grandfathers'. His grandfather Bulloo (also known as Herron), when 'things were really bad for us' would take on cultural duties and would sing all night, sometimes for a week, to protect his family from bad things. His grandfather was still performing his traditional duties which he had learned as a young boy, in the late 1960s and early 1970s, when he was in his 80s or 90s. He was born before or just ast contact with the white man. His grandfather Esau had the reputation of being a Goobi Man, a 'fella that would eat you'.

He was a law man and was really close to his family and a connection to Warragmay, a neighboring group – at [39]–[46].

- He often goes fishing and to eat turtle and eel at Mungalla station, which has always been an important area to Nywaigi people. There are burial sites as well as story sites, birthing places and some camp sites. The station was bought by the ILC for the Nywaigi people and all the meetings of the Nywaigi Land Corporation, which holds the title for the station, are held at Mungalla. The station is managed by Jacob Cassady, who, in his view, maintains 'a contemporary connection with the land in a physical, economic and spiritual way' – at [94]–[99].

[72] Schedule G also notes that there is 'unbroken occupancy of Nywaigi Territory by a cross-section of Nywaigi People on the claim area'. Examples of this stated occupancy include: residency in rental houses in various towns or at rural properties, squatting on Crown land, regular, widespread visitation of the claim area for fishing, hunting and gathering as well as in the course of land and sea management. Schedule G also refers to Mungalla station, which was purchased for the Nywaigi People by the ILC, which is managed by the Nywaigi Land Aboriginal Corporation and serves as a meeting place on the claim area.

Consideration

[73] British sovereignty was proclaimed over eastern Australia (including the present State of Queensland) on 26 January 1788. The earliest sources the application refers to are said to be from the 1880s. The son of apical ancestors Billy Erin and Jeannie, Long Heron, is said to have been born in 1880, which is said to be 'around the time a European community known as Ingham would have been established'. On that basis I assume that the time of first contact in the application area was around 1880. In my view, if the factual basis is sufficient to support the presence of relevant persons at first contact, it may be inferred that this reflects the situation at and before sovereignty. In my view I can make such an inference on the basis of the material before me. Further, the factual basis material contains information about the association of current members of the Nywaigi People with areas and places within the claim area. The material also supports the assertion of a continuity or history of association.

[74] On the basis of the above, I am **satisfied** that the requirements of s 190B(5)(a) are met.

Reasons for s 190B(5)(b)

[75] For this requirement, the factual basis must identify the relevant pre-sovereignty society and the persons who acknowledged the laws and customs of that society. Where a native title claim group is defined in reference to an apical ancestor model, the factual basis must also explain the link between those persons (the ancestors) and the relevant society. The factual basis must contain a sufficient explanation of how laws and customs can be said to be traditional as well as details sufficient to support the assertion that there has been continuous

acknowledgement and observance— see, for instance, *Gudjala [2007]* at [63], [65], [66]; *Gudjala [2009]* at [36], [37], [40].

[76] Schedule F and Attachment F state that the pre-sovereignty society is that of the Nywaigi and that the native title rights and interests claimed are those possessed under the traditional laws and customs of the Nywaigi People. Attachment F further states that

> The manner in which Pre-Sovereignty Society of the Nywaigi Territory and surrounds constituted itself into named entities that correspond to land ownership as well as to language and group identity has been addressed by a range of sources from the 1880's to the 1980's. Pre-Sovereignty Society of Nywaigi Territory can be summarised in terms of six sets of traditions:
>
> a. Social organisation: this is about the existence of the Nywaigi tribe within a wider regional context, as well as its language, territory and seven Bara Groupings.
>
> b. Social structure: this focuses on the use of a class (or section) system to regulate social status, identity and marriage. There was a Kinship System that distinguished kin based on age, gender, generational level and whether they were biological kin or in-laws. No attendant rules of behaviour have been recorded, expect that old men had a high social status.
>
> c. Subsistence activity and ecological knowledge: this covers accounts about fishing, hunting and gathering practices, and about the wide range of foodstuffs consumed. Totemism and restrictions on the consumption of food are also discussed. Lumholtz lists a wide variety of game, insects, eggs from birds and lizards, marine animals, native bee honey and plant foods as being consumed.
>
> Pre-Sovereignty Society of Nywaigi, hunted and gathered anything edible. There was an array of laws and customs – based on age, gender and religious beliefs – that placed restrictions on the animals one could hunt and gather, and on the types of food one could consume.
>
> d. Material culture: this pertains to the many and varied implements, weapons, constructions, clothing and adornments manufactured and used. Lumholtz, collected numerous objects and took them back to Norway with him, he recorded the following:
>
> i. Boomerangs which were rare;
> ii. Wooden swords;
> iii. Long spears;
> iv. Short spears;
> v. Spear throwers;
> vi. Wooden shields;
> vii. Nolla-Nolla;
> viii. Woman's digging stick and
> ix. Large nets for catching wallabies.
>
> e. Crime, punishment and intergroup relations: this centred on accounts of regulated, ritualised combat as well as other small to large tribal gatherings. There was an array of laws and customs pertaining to sanctioned punishments for stealing people (marriageable women), stealing property (food and objects), and trespass. If there was conflict between tribes, then it involved highly controlled, ritualised combat between the accused aggrieved parties, as well as more generally between the parties' respective tribe. These accounts about crime,

> punishment and intergroup relations further evidence a regional system, as does accounts about intergroup festivities and trade.
>
> f. Spiritual beliefs and practices: this comprises an array of interrelated accounts about beliefs in supernatural forces and sorcery, mourning and mortuary practices, and mythological conceptions such as the Kohin and Tikovina. The System of Religious Beliefs of the Nywaigi generated an array of laws and customs that regulated numerous activities, such as healing the sick, the treatment of a corpse, or the avoidance of certain places. Religious beliefs also generated a fear of supernatural punishment, which is also an aspect of the System of Punishment for Transgressions.

[77] Schedule F sets out a number of assertions in support of the requirements of s 190B(5)(b). Facts in support of the assertions are also contained in Attachment F, Schedule G and Mr Rist's affidavit. For ease of reference I have set out the assertions as they appear in Schedule F and have summarised the relevant supporting information underneath:

The members of the claim group continue to pass on to their descendants the body of traditional laws and customs and rights to conduct activities under those traditional laws and customs, stories and beliefs concerning their traditional country including the claim area

[78] Mr Rist's affidavit makes numerous references to him being taught about specific aspects of laws and custom and story places, stories, animals and mystical creatures, places to avoid and the boundaries of Nywaigi country by his mother and aunties who in turn have been taught by their parents and grandparents – at [38] and [68]–[81]. Mr Rist also speaks about having been taught Nywaigi language by his mother and him teaching it to his children – at [89].

[79] Schedule G states that current members of the claim group teach the younger generations about the location and boundaries of the claim area including neighboring groups. There is also regular and repeated teaching of Nywaigi history and culture by Nywaigi elders to the younger generations while on country. Schedule G also refers to the claim group members' belief that the country is inhabited by sprits, creatures and ancestral beings, their knowledge of supernaturally dangerous places to avoid and the recounting of mythological and historical stories during visits to places associated with them on when nearby and the use of sorcery on the claim area. Schedule G further states that there is restricted knowledge about the full significance of certain areas within the claim area and about certain practices (such as male initiation and smoking ceremonies), as well as restricted access to certain places.

Members of the claim group continue to use the claim area for traditional hunting and fishing and for the gathering of traditional bush medicines and other materials

[80] Mr Rist's affidavit states that he learned to hunt from his uncles and the old ladies, being his mother and his 'mum Maude' who in turn had been 'taught to hunt in the traditional Nywaigi

way by their parents and their parent's parents'. He gives numerous examples of traditional hunting and fishing methods and places where these traditional rights and interests were and are exercised such as Palm Creek (to which he says he and his family had a 'strong and profound' connection) and provides some examples of gathering bush tucker – at [36] and [47]–[67], [99] and [109].

[81] Schedule G provides some information about the current exercise of native title rights and interests, noting that current members of the claim group gather materials such as timber to use in manufacturing implements (eg shanghais and spears) and to make fire (eg for cooking or straightening spear shafts). It also notes that claim group members share, trade and exchange resources of the claim area with other Aboriginal People as well as manufactured objects. Members of the group are also said to share foods and medicines fished, hunted or gathered with kin and friends on the claim area.

Members of the claim area continue to care for their traditional country, including the claim area, in accordance with traditional laws and customs passed down to them by their forebears

[82] Mr Rist at [82] of his affidavit gives the example of the rule that according to traditional laws a pregnant woman should not eat barramundi and noting that this is a Nywaigi way of conserving the fish. He also speaks about turtle tagging which has been carried out at Ollera Creek – at [100] and the Girringun ranger program where future rangers are taught by elders of the cultural obligations to country. Two camps have been run for that purpose, both on Nywaigi country, where Nywaigi elders and elders from other groups spoke about laws, customs and obligations – at [101] and [102]. Through his involvement at Girrigun as CEO he wants to take old protocols, laws, customs and traditions , which have been taught to him by his elders and in turn to his elders by their elders, and 'put them into a new way of business', with the assistance of the elders and traditional owners. Four protocols have been established for Nywaigi country which deal with rangers conduct – at [104]. Nywaigi People have signed off on a Traditional Use of Marine Resources Agreement between six saltwater groups, which deals with the take of dugong and turtle and defines how the Nywaigi People undertake hunting on country (no hunting of dugong and only up to four turtles per year; this limit was imposed for conservation of the species). The agreement is acknowledged, observed and respected by government agencies such as the Great Barrier Reef Marine Park Authority, Fisheries and Queensland Parks and Wildlife – at [108].

[83] Schedule G states that members of the claim group perform smoking ceremonies on the claim area and refers to the creation and operation of Mungalla as a training centre and the creation and operation of a Cultural Museum and Keeping Place (eg for stone artefacts or human remains) on the claim area. Members of the claim area also teach visiting members of other Aboriginal groups about dangerous places in the claim area and accompany them to places and introduce them to ancestral spirits. They also work collectively with other groups in the context of

land and sea management as well as cultural management of the claim area. Members of the claim group are employed as rangers by the Queensland National Parks and Wildlife Service or the Girrigun Aboriginal Corporation.

The members of the claim group continue to exercise a body of traditional law and customs which has been passed down to them from generation to generation by their forebears and predecessors.

[84] In addition to the above comprehensive outline of the exercise of laws and customs in relation to hunting and fishing and the collection of bush tucker, Mr Rist, at [82] of his affidavit speaks about the reburial of remains which have been found at Ollera Beach, dating back to the early 1700s. When the remains will be returned to the original burial site, only Nywaigi men will be present for the burial, 'as this is men's business' – at [83]–[88]. At [111]–[113] he speaks about rules for a traditional marriage and how marriage today 'is more about making sure that a wrong way marriage does not occur. If you marry the wrong person culturally it's frowned upon, the people can be shunned. It is not encouraged'. At [107] he notes that the entering into the Traditional Use of Marine Resources Agreement, referred to above, shows 'Nywaigi are responsible managers of their sea country based on their law, culture and customs as handed down from before white man'. His affidavit makes numerous references to laws and customs and practices being taught to him by his forebears - for example at [62], [89] and [109].

[85] Schedule G states that members of the claim area respect their elders and their decision-making authority. Certain elders are entrusted with certain knowledge and there is men's only and women's only business. Only elders conduct ceremonies and shunning, shaming and fear of supernatural punishment and sorcery are used by members of the claim group.

Consideration

[86] The factual basis material does sufficiently address the requirements of s 190B(5). It identifies the pre-sovereignty society, being the Nywaigi People, and provides some facts in support of the existence of this society in the claim area. It also links some of the identified ancestors with parts of the claim area, thus allowing the favorable inference that those persons formed part of the relevant society, noting that the claimants' oral history and historical records these persons as being of the Nywaigi People. The material also outlines facts that provide some explanation of how laws and customs of the current claim group may be said to be traditional. This is evident in the explanation of the transmission and teaching from one generation to the next. I note that of itself, the assertion that laws have been handed down from generation to generation may not be sufficient to support the assertion at s 190B(5)(b), however, the application also provides some facts that elicit a similarity between the laws and customs recorded at sovereignty and those that are acknowledged and observed today.

[87] On the basis of the above, I am satisfied that the requirements of s 190B(5)(b) are met.

Reasons for s 190B(5)(c)

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

[89] Dowsett J at [82] *in Gudjala 2007* indicates that this particular assertion may require the following kinds of information:

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

[90] The Full Court in *Gudjala FC* at [96] agreed that the factual basis must identify the existence of an Indigenous society observing identifiable laws and customs at the time of European settlement in the application area.

[91] The factual basis in support of this assertion is provided in the application in Attachment F, Schedule G and Mr Rist's affidavit. From the information contained in these documents I understand that the members of the claim group continue to acknowledge and observe the traditional laws and customs passed on to them by their ancestors. This continues today amongst claim group members. There are examples in Mr Rist's affidavit – see my summary of the material above at s 190B(5)(b).

[92] Having considered the material I am satisfied that the factual basis provided is sufficient to support an assertion that the members of the claim group and their predecessors have continued to hold native title in accordance with the traditional laws and customs.

[93] On the basis of the above, I am satisfied that the requirements of s 190B(5)(c) are met.

Conclusion

[94] 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.

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

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

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

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

- *Yorta Yorta* (see s 190B(5) above) in relation to what it means for rights and interests to be possessed under the traditional laws acknowledged and the traditional customs observed by the native title claim group; and

- The High Court's decision in *Western Australia v Ward* (2002) 213 CLR 1 [2002] HCA 28 (*Ward HC*) that a 'native title right and interest' must be 'in relation to land or waters'.

[98] I also need to consider the case law relating to extinguishment when examining each individual right and interest claimed.

[99] Any rights that clearly fall prima facie outside the scope of the definition of 'native title rights and interests' in s 223(1) cannot be established.

[100] In my consideration of the individual rights and interests claimed, I take into account information contained in the application on activities conducted by the claim group. While current activities by claimants on the claim area which are said to be in exercise of the claimed native title rights and interests are not determinative of the existence of a right and interest, they can be supportive of it.

Consideration

1. Exclusive rights and interests

[101] Paragraph 1 of Schedule E states that 'with respect to all unallocated State Land (USL) within the land and waters covered by the application… where there has been no prior extinguishment of Native Title or where s 238 applies, the Native Title rights and interests claimed are the right to possess, occupy, use and enjoy the claim area as against the whole world, pursuant to the traditional laws and customs of the claim group.

[102] *Ward HC* is authority that the 'exclusive' rights can potentially be established prima facie in relation to areas where there has been no previous extinguishment of native title or where extinguishment is to be disregarded as a result of the Act.

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

[104] As noted above, Attachment F provides information about the nature of the pre-sovereignty Nywaigi society and its social structure. Schedule G states that members of the claim group invite and host visits from members of other groups on the claim area and give permission to obtain resources from Nywaigi Territory, being the claim area. Mr Rist speaks about certain families within the claim group which speak for certain areas within the claim area.

[105] The information, in my view, is of a relatively broad and general nature and lacks clear examples which illustrate how the claimed exclusive right arises under the traditional laws and customs of the relevant society. The information is not sufficient, in my view, to support the assertion that the claim group members have a right under their traditional laws and customs to effectively exclude from their country people not of their community.

[106] Not established, prima facie.

Non-exclusive rights and interests

[107] I now assess whether the rights and interests claimed in paragraph [2] of Attachment E can be established prima facie as non-exclusive native title rights in relation to that part of the claim area where exclusive rights cannot be prima facie established. I have grouped those rights and interests that appear to be of a similar character and therefore rely on the same evidentiary material. I refer to them as listed in Attachment E.

i. maintain and use the claim area
ii. conserve the natural resources of the claim area
iii. protect the claim area and natural resources of the claim area for the benefit of the Native Title holders
iv. care for the claim area for the benefit of the Native Title holders

v. use the claim area and the natural resources of the claim area for social purposes
vi. use the claim area and the natural resources of the claim area for cultural purposes
vii. use the claim area and the natural resources of the claim area for religious purposes
viii. use the claim area and the natural resources of the claim area for spiritual purposes
ix. use the claim area and the natural resources of the claim area for customary purposes
x. use the claim area and the natural resources of the claim area for traditional purposes
xiv. exercise rights of use and disposal over the natural resources over the natural resources of the claim area
xvi. to harvest plant material from the claim area
xxiii. preserve sites of significance to the Native Title holders and other Aboriginal people on the claim area

[108] The application in Attachment F, Schedule G and Mr Rist's affidavit gives numerous examples of current and past members of the claim group using the claim area and also discusses the traditional responsibility that claim group members have to conserve, and care for, the claim area. For example, as is noted in Attachment F, the members of the pre-sovereignty Nywaigi society were bound by 'an array of laws and customs – based on age, gender and religious beliefs – that placed restrictions on the animals one could hunt and gather, and on the types of food one could consume'. Mr Rist gives the example of pregnant women not being allowed to eat barramundi, limiting who can eat barramundi being a way of conservation of the barramundi stock. A further example provided by Mr Rist is the Traditional Use of Marine Resources Agreement which, amongst other things, limits the dugong and turtle take of the parties to the agreement, being six saltwater Traditional Owner groups. Mr Rist notes that the agreement shows Nywaigi People are 'responsible managers of their sea country based on their law, culture and customs as handed down from before white man'. He also gives numerous examples of the claim area and its natural resources being used, including for the above claimed purposes. Reference is made in Schedule G to the claim area being used for meetings and for camping, hunting and fishing and the gathering of food and materials to produce implements. Schedule G also speaks about the members of the claim group hunting, fishing and gathering food and medicines on the claim area.

[109] It is also clear from the information before me that Nywaigi People have a right and responsibility to protect places of significance on the claim area. Schedule G refers to the negotiation of Indigenous Land Use Agreements on the claim area and elders undertaking cultural heritage work, noting that only certain members have access to, and knowledge about, certain significant places in the claim area. Mr Rist explains that Girringun Aboriginal Corporation, which, I note, according to its website represents the interests of traditional owners from nine tribal groups: Bandjin, Djiru, Girramay, Gugu Badhun, Gulnay, Jirrbal, Nywaigi, Warrgamay and Warungnu, ran two camps on Nywaigi country as part of their indigenous rangers program. At the camps Nywaigi and other elders spoke about their cultural obligations to country. The corporation also has protocols in place in relation to the conduct of their rangers

including that if cultural business has to be done on country, it can only be done by Nywaigi rangers and when non-Nywaigi rangers go on Nywaigi country, they are required to take one or two Nywaigi elders with them.

[110] Outcome: prima facie established

xi. reside on the claim area
xii. to camp on the claim area
xiii. to travel across the claim area
xxxii. construct structures for the purpose of exercising the Native Title rights on the claim area
xxxiii. maintain structures for the purpose of exercising the Native Title rights on the claim area

[111] As noted above at my consideration of the requirements of s 190B(5)(a), Nywaigi People past and present have and had an association with the claim area. Attachment F states that historical records, dating back to the 1880s, refer to a number of places in the claim area of the presence of Nywaigi People. Schedule G notes that the members of the claim group have an 'unbroken occupancy' of Nywaigi territory, with claimants residing in the claim area's townships or on rural properties or squatting on crown land. Mr Rist's affidavit also provides information about current and past members residing on the claim area, constructing and maintaining structures and camping on it and travelling across it.

[112] Outcome: prima facie established

xv. to use the claim area for growing and producing plant material

[113] It is my view that the material does not disclose enough information regarding this right, for me to be satisfied that the right exists, prima facie, pursuant to traditional law and custom.

[114] Outcome: prima facie, not established

xvii. to exchange plant material from the claim area with other persons
xviii. to exchange the natural resources of the claim area with other persons
xxxiv. share, trade and exchange resources from the claim area with other Aboriginal people

[115] Whilst Schedule G states that current members of the claim group share, trade and exchange with other Aboriginal People resources from the claim area and also notes that they share and trade manufactured objects such as spears, in my view the material does not provide sufficient evidence in support of these rights existing prima facie, pursuant to traditional law and custom.

[116] Outcome: prima facie, not established

xxiv. conduct secular activities on the claim area
xxv. conduct ritual activities on the claim area
xxvi. conduct cultural activities on the claim area
xxvii. conduct burials on the claim area

[117] Schedule G and Mr Rist's affidavit speak about the conduct of secular, ritual and cultural activities as well as burials on the claim area, such as smoking ceremonies, meetings and 'welcome to country' ceremonies. Attachment F speaks about spiritual practices such as sorcery, mourning and mortuary practices, noting that a system of religious beliefs of the Nywaigi generated an array of laws and customs that regulated activities such as healing the sick, treatment of a corpse and the avoidance of certain places. Mr Rist gives the example of the planned reburial of historic remains found on Ollera Beach. He states that when the remains are returned to the site where they were discovered and reburied, only Nywaigi men will be present as burials are men's business.

[118] Outcome: established, prima facie

xxvii. maintain the cosmological relationship beliefs, practices and institutions through ceremony and proper and appropriate custodianship of the claim area and special and sacred sites, to ensure the continued vitality of culture, and well being of the Native Title holders
xix. to discharge cultural rights and duties and obligations or responsibilities with respect to the claim area
xx. to discharge spiritual rights and duties and obligations or responsibilities with respect of the claim area
xxi. to discharge traditional rights, duties and obligations or responsibilities with respect of the claim area
xxii. to discharge customary rights, duties and obligations or responsibilities with respect of the claim area
xxix. inherit Native Title rights and interests in relation to the claim area in accordance with custom and tradition
xxx. dispose of Native Title rights and interests in relation to the claim area in accordance with custom and tradition
xxxi. resolve disputes between the Native Title holders and other Aboriginal persons in relation to the claim area

[119] In my view the above rights are part of the claim group's laws and customs rather than rights or interests in relation to land or waters (see chapeau to s 223(1)).

[120] Outcome: not established, prima facie

Conclusion

[121] 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.

[122] Under s 190B(7), I must be satisfied that at least one member of the native title claim group currently has, or previously had, a traditional physical connection with any part of the land or waters covered by the application. I take 'traditional physical connection' to mean a physical connection in accordance with the particular laws and customs relevant to the claim group, being 'traditional' in the sense discussed in *Yorta Yorta*.

[123] Sufficient material is provided in the application regarding the traditional physical connection of members of the native title claim group. For example, as noted above at s 190B(5), Mr Rist fishes within the application area using traditional Nywaigi methods and following traditional laws and customs.

[124] I am satisfied that at least one member of that group currently has a traditional physical connection with parts of the application area.

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

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

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s 61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.
Section 61A provides:
(1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.
(2) If:
(a) a previous exclusive possession act (see s 23B) was done in relation to an area; and
(b) either:
    (i) the act was an act attributable to the Commonwealth; or
    (ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23E in relation to the act;
a claimant application must not be made that covers any of the area.
(3) If:
(a) a previous non-exclusive possession act (see s 23F) was done in relation to an area; and
(b) either:
    (i) the act was an act attributable to the Commonwealth, or

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

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

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

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

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

[126] In the reasons below, I look at each part of s 61A against what is contained in the application and accompanying documents and in any other information before me as to whether the application should not have been made.

Section 61A(1)

[127] Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title. In my view the application does not offend the provisions of s. 61A(1) because the Geospatial Report dated 20 April 2015 reveals that there are no approved determinations of native title over the application area.

Section 61A(2)

[128] 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. In my view the application does not offend the provisions of s 61A(2) because Schedule B, paragraph B excludes from the application area any areas covered by previous exclusive possession acts as defined in s 23B.

Section 61A(3)

[129] 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. In my view, the application does not offend the provisions of s 61A(3) because Schedule E, paragraph [2] acknowledges that a claim to exclusive possession is not made over areas where such a claim cannot be recognised.

Conclusion

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

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

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

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

Section 190B(9)(a)

[132] The application at Schedule Q states that no ownership of minerals, petroleum or gas wholly owned by the Crown is claimed.

Section 190B(9)(b)

[133] The application at Schedule P states that no exclusive possession of all or any part of an offshore place is claimed.

Section 190B(9)(c)

[134] There is no information in the application or otherwise to indicate that any native title rights and/or interests in the application area have been extinguished.

Conclusion

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

[End of reasons]

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Nywaigi People
NNTT file no.	QC2015/003
Federal Court of Australia file no.	QUD148/2015

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

Section 186(1): Mandatory information

Application filed/lodged with:

As per Schedule of Native Title Applications

Date application filed/lodged:

As per Schedule of Native Title Applications

Date application entered on Register:

5 June 2015

Applicant:

As per Schedule of Native Title Applications

Applicant's address for service:

As per Schedule of Native Title Applications, however, note that the Form 1, Part B does not list Cheryl Thomson as the contact person. Please do not include her name.

Area covered by application:

As per Schedule of Native Title Applications

Persons claiming to hold native title:

As per Schedule of Native Title Applications

Registered native title rights and interests:

2. With respect to all remaining tenures within the claim area [being tenures where the following does NOT apply: unallocated State land (USL) within the land and waters covered by the application where there has been no prior extinguishment of Native Title or where s.238 applies] the Native Title rights and interests claimed are not to the exclusion of all others and are the rights and interests to:

i. maintain and use the claim area
ii. conserve the natural resources of the claim area
iii. protect the claim area and natural resources of the claim area for the benefit of the Native Title holders
iv. care for the claim area for the benefit of the Native Title holders
v. use the claim area and the natural resources of the claim area for social purposes
vi. use the claim area and the natural resources of the claim area for cultural purposes
vii. use the claim area and the natural resources of the claim area for religious purposes
viii. use the claim area and the natural resources of the claim area for spiritual purposes
ix. use the claim area and the natural resources of the claim area for customary purposes
x. use the claim area and the natural resources of the claim area for traditional purposes
xiv. exercise rights of use and disposal over the natural resources over the natural resources of the claim area
xvi. to harvest plant material from the claim area
xxiii. preserve sites of significance to the Native Title holders and other Aboriginal people on the claim area
xi. reside on the claim area
xii. to camp on the claim area
xiii. to travel across the claim area
xxxii. construct structures for the purpose of exercising the Native Title rights on the claim area
xxxiii. maintain structures for the purpose of exercising the Native Title rights on the claim area
xxiv. conduct secular activities on the claim area
xxv. conduct ritual activities on the claim area
xxvi. conduct cultural activities on the claim area
xxvii. conduct burials on the claim area

3. The Native Title rights are subject to:

a) the valid laws of the State of Queensland and the Commonwealth of Australia
b) the rights (past or present) conferred upon persons pursuant to the laws of the Commonwealth and the laws of the State of Queensland.

[End of document]