National Native Title Tribunal

Registration test decision

Application name	Quandamooka People #4
Name of applicant	Robert Anderson and Evelyn Parkin
NNTT file no.	QC2014/006
Federal Court of Australia file no.	QUD601/2014
Date application made	18 November 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: 25 March 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

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 Quandamooka People (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] On 18 November 2014, the application was filed with the Federal Court of Australia (the Court). The Registrar of the Court gave a copy of the application to the Registrar on 19 November 2014 pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

[4] Given that the claimant application was made on 18 November 2014 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

[5] Therefore, in accordance with s 190A(6), I must accept the claim for registration if it satisfies all of the conditions in ss 190B and 190C of the Act. If those conditions are not satisfied then, pursuant to s 190A(6B), I must not accept the claim for registration. This is commonly referred to as the registration test.

Registration test

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

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

Information considered when making the decision

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

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

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

- the information contained in the application and accompanying documents;
- the Geospatial Assessment and Overlap Analysis (GeoTrack: 2014/2198) prepared by the Tribunal's Geospatial Services on 24 November 2014 (geospatial assessment); and
- the results of my own searches using the Tribunal's mapping database.

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

Procedural fairness steps

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

- On 27 November 2014, the case manager for this matter sent a letter to the State of Queensland (the State) enclosing a copy of the application and accompanying documents. That letter informed the State that any submission in relation to the registration of this claim should be provided by 11 December 2014.
- On 13 February 2015, the State was informed that the delegate anticipates making the registration test decision by 27 February 2015 and that any submission should be made by 18 February 2015. The State has not made any submission.
- The case manager, also on 13 February 2015, wrote to inform the applicant that the delegate anticipates making the registration test decision by 27 February 2015.
- On 5 March 2015, the case manager wrote to inform both the State and the applicant that the delegate anticipates making the registration test decision by 25 March 2015.

Procedural and other conditions: s 190C

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

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

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

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

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

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

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

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

Native title claim group: s 61(1)

[18] Schedule A of the application provides a description of the native title claim group, 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 — see s 62(1)(a)

affidavits of the persons comprising the applicant at [1] and [19]. 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.

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

Name and address for service: s 61(3)

[20] Part B of the application contains the name and address for service of the applicant's representative.

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

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

[22] 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.

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

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

[24] The application is accompanied by affidavits sworn by each of the persons who comprise the applicant. The affidavits contain the statements required by s 62(1)(a)(i) to (v) including stating the basis on which the applicant is authorised as mentioned in subsection (iv), which I understand to be pursuant to a process of the kind contemplated by s 251B(b) — at [7] to [20].

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

Details required by s 62(1)(b)

[26] 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)

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

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

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

Searches: s 62(2)(c)

[29] Schedule D provides that no searches have been carried out by the current applicant to determine the existence of non-native title rights and interests in relation to the application area.

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

[30] 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)

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

Activities: s 62(2)(f)

[32] Schedule G contains a list of the activities currently carried on by members of the native title claim group on the land and waters of the application area.

Other applications: s 62(2)(g)

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

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

[34] Schedule I provides that the applicant is not aware of any notices under s 29 of the Act that has been given and that relates to the whole or part of the application area.

Conclusion

[35] 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.

[36] 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].

[37] 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.

[38] 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.

[39] 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].

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

[41] 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.

[42] 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.

[43] 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.

[44] 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)

[45] 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.

[46] 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

[47] Attachment R is titled 'Certification of Native Title Determination Application — Quandamooka People #4' (certification). It is dated 12 November 2014 and signed by the Chief Executive Officer of Queensland South Native Title Services Limited (QSNTS).

[48] The certificate states that QSNTS is a body funded under s 203FE(1) of the Act for the purpose of performing the functions of a representative body. The certificate also provides that the application has been certified pursuant to ss 203BE and 203FEA of the Act — see note to s 190C(4)(a) which allows an application to be certified under s 203BE.

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

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

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

The requirements of s 203BE

[52] 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].

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

Subsection 203BE(4)(a)

[54] 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.

[55] 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.

[56] The certification contains the statement required by s 203BE(4)(a) — at [3] – [5].

Subsection 203BE(4)(b)

[57] 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).

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

- The authorisation meeting was extensively advertised for three weeks with notices placed in the Brisbane Courier Mail on 4, 18 and 19 February 2012, Redland Times on 3 and 17 February 2012 and the Koori Mail on 8 February 2012.
- Letters were sent to members of the Quandamooka People whose contact details are held by QSNTS. The public notice was also placed on QSNTS' website.
- The authorisation meeting, held at Dunwich, North Stradbroke Island on 25 February 2012, was well attended. QSNTS convened the meeting and attendance records, meeting procedures and outcomes were taken and kept by QSNTS staff who attended the meeting.
- QSNTS is satisfied that through the holding of the meeting all necessary steps and processes have been followed in accordance with the requirements of the Act, the decision making processes and the instructions of the native title claim group.
- QSNTS is satisfied that all 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 that 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 — at [6].

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

Subsection 203BE(4)(c)

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

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

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

[63] 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.

[64] Attachment B describes the application area as 'the land and waters of Moreton Island above the High Water Mark'. The description specifically excludes all the land and waters subject to Quandamooka People #1 (QUD6010/1998) determination of native title. Schedule B lists general exclusions.

[65] Attachment C is a colour copy of a map titled 'Quandamooka People #4' prepared by QSNTS on 10 September 2014. The map includes:

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

Consideration

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

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

[68] 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.

[69] 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.

[70] Schedule A contains the following description of the native title claim group:

> The native title claim group on whose behalf this application is made is the Quandamooka People who are the biological descendants of the following people:
>
> i. Nellie / Lilly Kidgeree;
> ii. Mary Indoole Compignie;
> iii. Elizabeth Ruska;
> iv. Charlie Moreton (Dandruba);
> v. Sidney Rollands (Kingal / Winyeeaba);
> vi. Lillian Lyons (Dungoo);
> vii. King Billy Toompani;
> viii. Juno (Gonzales);
> ix. Liza Jungerboi (mother of Rose Martin nee Bain);
> x. Tommy Nuggin (Gendarieba);
> xi. Tilly (mother of Tommy Dalton, Richard Dalton and Henry Lea);
> xii. Kindarra,
>
> who identify as and are accepted by other Quandamooka People as Quandamooka People according to Quandamooka traditional law and custom.

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

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

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

[73] 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 expressed the view that where a claim group description contained a number of paragraphs, 'consistent with traditional canons of construction', the paragraphs should be read 'as part of one discrete passage, and in such a way as to secure consistency between them, if such an approach is reasonably open' — at [34]. His Honour also confirmed that s 190B(3) required the Registrar to address only the content of the application — at [30].

[74] 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 the application 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

[75] I understand that there are two elements of the Quandamooka native title claim group description. The first is set out in the first paragraph, being the descendants of the identified ancestors. The second element is set out in the last paragraph which identifies those persons who identify as and are accepted by other Quandamooka People as being part of the native title claim group under their traditional laws and customs. I am of the view that this description is to be read as a discrete whole — *Gudjala 2007* at [34].

[76] I will discuss each criteria below before deciding whether I am satisfied that the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[77] I note that in reaching my view about this condition, I have been informed by the applicant's factual basis material contained in Attachment F & M.

Descent

[78] The first criterion includes those persons who are the biological descendants of the apical ancestors identified at (i) to (xii). Describing a claim group in this manner is one method that has been accepted by the Court as satisfying the requirements of s 190B(3)(b) — see *WA v NTR* at [67].

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

[80] The factual basis indicates, in my view, that descent from a named ancestor provides the fundamental basis for membership to the Quandamooka People native title claim group — Attachment F & M at [8] – [9] and [32]. 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.

Identification and acceptance

[81] I am of the view that the description of the native title claim group is to be read as a discrete whole and recognition as a Quandamooka person is not meant to be a stand alone criterion. Rather, it is a qualifier to membership by descent. I discuss below my reasons for coming to this view, including the relevant case law that has considered identification and acceptance/recognition as a criterion of itself.

[82] I note that a description of membership containing qualifiers of identification and acceptance is not one with an external and objective point of reference from which to commence an inquiry.

[83] While not addressing the requirements of s 190B(3), Dowsett J in *Aplin on behalf of the Waanyi Peoples v Queensland* [2010] FCA 625 (*Aplin*) considers the complexities relating to the criteria for the membership of the claim group and the internal perspective of the group, which, as a matter of necessity, determines its composition. His Honour, whilst dealing with, among other things, a request to change the native title claim group description to include a criterion of descent from another apical ancestor not identified in the application, stated that:

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

[84] Dowsett J referred to the decision of the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*) where it was found that the existence of a society depended upon mutual recognition within the group. His Honour also referred to the decision in *Sampi v Western Australia* [2005] FCA 777 where French J, at [820], stated that identification as a member involved an internal perspective of the group — *Aplin* at [258]. The decision of French J was appealed and the Full Court stated that:

> [a] relevant factor among the constellation of factors to be considered in determining whether a group constitutes a society in the *Yorta Yorta* sense is the internal view of the members of the group … The unity among members of the group required by *Yorta Yorta* means that they must identify as people together who are bound by the one set of laws and customs or normative system — *Sampi v Western Australia* [2010] FCAFC 26 at [45].

[85] Having regard to the information contained in the factual basis, it is my view that descent from the named ancestors provides the fundamental basis for membership to the Quandamooka people native title claim group — see Attachment F & M at [8] – [9], [29], [32], [38] and [48]. Identification as a Quandamooka person is linked to the connection to Quandamooka land. Generally, those who have rights in country must be a biological descendant of an ancestor from the area, and must also be identified with the area and the group — at [9]. It follows that, in my view, identity and acceptance are inherently linked to the recognition of one's biological descent from a named ancestor. It is through this connection that individuals identify themselves and are accepted by other Quandamooka people as being a member of the claim group.

Conclusion

[86] 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).

[87] 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.

[88] 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].

[89] 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 …

[90] 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.

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

> 1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where ss 238, 47, 47A or 47B apply), the Quandamooka People claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group.
> 2. Over areas where a claim to exclusive possession cannot be recognised, the Quandamooka People claim the following rights and interests, being:
>   a. the right to travel over, to move about and to have access to those areas;
>   b. the right to hunt and to fish on the land and waters of those areas;
>   c. the right to gather and to use the natural resources of those areas such as food, medicinal plants, wild tobacco, timber, stone and resin;
>   d. the right to take and to use the natural water on those areas;
>   e. the right to live, to camp and for that purpose to erect shelters and other structures on those areas;

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

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

   i. cultural activities;

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

   iii. ceremonies;

   iv. meetings;

   v. teaching the physical and spiritual attributes of sites and places on those areas that are of significance under their traditional laws and customs;

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

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

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

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

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

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

k. the right to make decisions about the use and enjoyment of the areas by Aboriginal people who recognise themselves to be governed by the laws and customs acknowledged by the Quandamooka People; and

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

Consideration

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

Conclusion

[93] In my view, the right and interest at paragraph (2)(l) is not understandable or has meaning. This does not mean that this right does not exist. I am however unable to understand how this right and interest is claimed in relation to the land and waters of the application area and the material within the application, specifically Attachment F & M, does not provide any clarification. For the purposes of s 190B(4), I am not satisfied that this right and interest is readily identifiable.

[94] In respect of the remaining rights and interests, I am satisfied that they are understandable and have meaning.

[95] 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].

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

[97] 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.

[98] 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

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

[100] 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 — see *Gudjala FC* at [92].

[101] I also understand that the applicant's material must be 'more than assertions at a high level of generality' and must not merely restate or be an alternate way of expressing the claim — *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].

[102] 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).

[103] The factual basis material is contained in Attachment F & M, which include references and extracts from various connection, anthropological, genealogical and other forms of expert reports as well as affidavit material. The affidavits of [name 1 deleted] of 12 August 2013 and [name 2 deleted] of 15 December 2013 also form part of the factual basis.

[104] I proceed with my assessment of the sufficiency of this material by addressing each assertion set out in s 190B(5) below.

Reasons for s 190B(5)(a)

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

[105] I understand that s 190B(5)(a) requires sufficient factual material to support the assertion:

- that there is 'an association between the whole group and the area', although not 'all members must have such association at all times' — *Gudjala 2007* at [52];
- that the predecessors of the group were associated with the area over the period since sovereignty — at [52]; and
- that there is an association with the entire claim area, rather than an association with part of it or 'very broad statements', which for instance have no 'geographical particularity' — *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) at [26]; see also *Corunna v Native Title Registrar* [2013] FCA 372 at [39] and [45] where Siopis J cited the observations of French J in *Martin* with approval.

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

[106] The factual basis contains the following relevant information about the predecessors' association with the application area:

- The application area, being Moreton Island, is part of the wider Quandamooka traditional land and waters — at [7].
- The Quandamooka People have been left relatively undisturbed from their traditional country — at [11].
- The main permanent camps of the ancestors were located within the north-eastern and mid-eastern regions of the application area — affidavit of [name 2 deleted] at [58]. Another residential area for the predecessors prior to settlement was located in the mid-western region of the application area — at [71]. The predecessors used rocks within the northern region to make their tools — at [86]. There are middens in the south-western region which are made from the shells of oysters which were eaten by the ancestors — at [90].
- The first explorers came to the region around 1799 but substantive contact took place around the 1820s — Attachment F & M at [12]. Shelters, campsites, walking tracks and use of canoes between Moreton and North Stradbroke Island (south but proximate to the application area and within the wider Quandamooka country) were observed — at [14]. Large gatherings of huts and relatively permanent structures spaced a few kilometres apart were regularly reported along the western side of the application area — at [27]. The Moreton Bay people were reported as being numerous and mostly self-sufficient – at [28].

- Historical material from 1825 to 1880 'conclude that the Ngugi occupied Moreton Island, whilst the Nunukal occupied the north of Stradbroke Island with a main camp at Amity (this camp being the jump off point to cross to Moreton) [therefore is located south but proximate to the application area]' — at [15].
- The Quandamooka predecessors moved freely between Cape Moreton (northern region of the application area) and Amity Point, and would hunt, fish and gather resources, practice corroborees and they also believed in spiritual presences — at [16] and [34].
- In the period 1880 to 1950, the enactment of protection legislation and establishment of a mission, school and housing south but proximate to the application area, involved some disruptions and a number of removals occurred particularly between 1912 and 1938 — at [18]; see also affidavit of [name 2 deleted] at [21] – [22]. However, a lot of Quandamooka people remained and some managed to escape and return to their country. Some families lived and worked on North Stradbroke Island during the early part of the period — Attachment F & M at [18]. Some older claimants speak of growing up on country, as well as camping, harvesting, hunting, making medicines and fulfilling landowning responsibilities on country — at [19].
- Since 1950, a number of families have continued to live, some for a substantial period, at a location south but proximate to the application area — at [20]. These families are 'the descendants of the native inhabitants of the Moreton Bay Islands and the nearby mainland' — at [21].
- Overall, there is evidence of the physical occupation, visitation and resource use by the Quandamooka People of the Moreton Bay area. In particular, there is evidence that at and for a considerable time after contact all the named apical ancestors lived on Stradbroke or Moreton Island and many of their descendants including the current claimants, had camps in locations south but proximate to the application area — at [23] – [24].
- Of relevance to the association of the apical ancestors identified in Schedule A and their descendants, the factual basis includes the following information:
  - Apical ancestor Sidney Rollands (Kingal/Winyeeaba) was born in the application area in 1837 — at [10]. She had four children, one of her sons being a well-known dugong man of the Ngugi tribe — affidavit of [name 2 deleted] at [6]. She died in 1917 and is buried in a location south but proximate to the application area — at [9]. Her descendants have continued to remain associated with Moreton Island. For instance, her great grandson speaks of visiting the application area, initially in the early 1950s, but has returned on many occasions including in the 1990s and 2000s — at [48] and [62] – [63]. He says he has walked across the application area — at [53]. He visits campsites and sings out to the ancestral spirits — at [43]. He would camp and go fishing most weekends in the western region in the early 1950s and has taken his son there — at [48] – [49]. He speaks of visiting middens in the north-eastern region of the application area where he once had 'an incredible spiritual experience' — at [51] – [52].
  - Ancestor King Billy Toompani was born around 1810 and died on 5 September 1886 — Attachment F & M at [10].
  - Tommy Nuggin was born around 1850 and died on 14 December 1914 — at [10].

- Kindarra was born in the mid-1800s and died on 3 October 1934. Current descendants of this ancestor have spent many years living within the application area — at [10].
- Ancestor Juno had her first child in 1856 and she was still living in 1882 — at [10]. Some of her descendants have remained within the southern region of Moreton Island, living 'isolated' and 'traditionally' — affidavit of [name 1 deleted] at [47].
- A historian states that 'on the balance of evidence' ancestors King Billy, Juno and Tommy Nuggin 'can be reasonably assumed to be associated with Moreton Island' — Attachment F & M at [10].

- The current members of the claim group are biological descendants of the apical ancestors identified in Schedule A — at [41]. They are entitled to speak for and make decisions about country on the basis of cognatic descent from an apical ancestor — at [8].
- The claim members continue to identify with Quandamooka country, saying they 'belong to Quandamooka' — at [44] and [47]. For instance, one claimant says that he has 'always understood that all of the Moreton Bay, the Bay Islands are [his] country', which he learnt from his grandfather and now tells his children — at [44]. He and his uncles continue to have 'very strong ties' to the application area — at [44]. Another claimant says:

> My country is all around Moreton and Stradbroke. I do not see Moreton as a separate entity … The waters are very special as well. The water has its own spiritual realm, just like the land. Quandamooka country is all just one big area which I belong to — affidavit of [name 1 deleted] at [44].

- The Quandamooka people have a spiritual connection to their country. In particular, they have knowledge of and continue to believe in the creation stories, spirits and the spiritual world and sacred places such as increase sites, men's and women's places, and sacred lakes, lagoons and streams — Attachment F & M at [41] and affidavit of [name 2 deleted] at [64]. For instance, there are references to creation stories about the creation beings travelling over the application area, and about the separation of the application area from North Stradbroke Island. There are also references to another story that is located within the southern region of the application area — at Attachment F & M at [47] and affidavit of [name 2 deleted] at [32]. In addition, bora grounds are located in the mid-eastern region of the application area and current claimants have camped near this location — affidavit of [name 1 deleted] at [48]. Some claimants believe the application area to be a 'healing place' and have stayed in houses in the northern region for the purposes of healing — at [57]. The claimants continue to speak to the spirits whilst on country — at [63].
- Current claimants learn about their country and are taught about their responsibilities including teaching their children about country from their grandparents or uncles. They continue to live within the wider Quandamooka country including the application area, as well as camp, hunt, fish, gather resources, travel over country and practice other traditional customs such as making spears, baskets and mats — Attachment F & M at [42] – [43]; and affidavit of [name 2 deleted] at [98]. In particular, some claimants occasionally return to Moreton Island for hunting and fishing — Attachment F & M at [46]. Some claim members had seasonal jobs within the western region and would walk across the application area — affidavit of [name 2 deleted] at [27] and [33]. Claim members would

cast traditional nets out and catch fish in the waters adjacent to the application area and find oysters in the southern bay side of the application area — at [39] and [89].

Consideration

[107] 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 Quandamooka 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 Quandamooka land and waters including about sacred sites.

[108] 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 of the apical ancestors within the application area prior to the date of sustained European contact, which I understand from the factual basis to have occurred around the 1820s. I also infer that some of the predecessors were present on the application area prior to sustained contact. For instance, the historical material indicates that ancestor King Billy Toompani was born in 1810, and although the location of his birth is not specified, the material states that he was associated with the claim area. Apical ancestor Juno had her first child in 1856, from which I infer that she would have been alive at least in the late 1820s or early 1830s. Her descendants have lived for many years in the application area. In addition, apical ancestor Sidney Rollands was born in the application area in 1837 which indicates that her parents were associated with the area prior to contact. She died in 1917 and is buried proximate to the application area. Her descendants have remained associated with the application area, in particular, her great grandson has continued to visit and camp on the application area since the 1950s. He has visited the application area with other Quandamooka people including his son. Descendants of apical ancestors Kindarra and Juno have also resided on the application area. Current claim members have continued to live, visit, travel across and work on the application area.

[109] The factual basis is also sufficient to support the assertion that the Quandamooka People have a spiritual association with the application area and is sufficient to show the history of that association. The Quandamooka People have knowledge of the creation stories, men's and women's places, bora grounds and sacred lakes, lagoons and streams. The asserted facts indicate that they believe that country is a healing place and is imbued with spiritual presence. The claimants learn about creation stories and traditional practices from their immediate predecessors so that the younger generations continue to have a spiritual association with their country. In my view, this transfer of knowledge and belief system demonstrates the history of the spiritual association the Quandamooka People have with the application area.

[110] For the purposes of s 190B(5)(a), I must also be satisfied that there is sufficient factual material to support the assertion of an association between the group and the whole area. The affidavit material refers to the ancestors having permanent camps within the north-eastern, mid-eastern and mid-western regions of the application area. They collected resources in the northern region to make tools, would eat oysters in the south-western region and used the bora grounds in the mid-eastern region. Current claim members continue to live, work, fish and camp in the mid-western region and visit the permanent camps of their predecessors as well as the sacred places such as the bora grounds. They stay in the northern region for spiritual healing and find oysters in the southern region. The asserted facts indicate that some of the descendants of ancestor Juno have remained within the southern region. There are also references to creation stories travelling through the application area. For instance, one story travels from the mainland and over the application area and the other creation stories are located in and around the southern region.

[111] 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.

[112] 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)

[113] 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 *Yorta Yorta* about the meaning of the word 'traditional' — see *Gudjala 2007* at [26] and [62] – [66].

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

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

[115] 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, 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

[116] The identification of a pre-sovereignty society or a society that existed prior to European contact 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 Quandamooka People belong to a distinct society within the Moreton Bay region. 'The members are identified by themselves and by the outside world, including by neighbouring Aboriginal groups' — Attachment F & M at [25]. The people from Moreton Bay are distinguished from their neighbours 'by their occupation and possession of the islands and their landed group identifies' — at [33]. They also had a distinct marine oriented economy and culture — at [28] and [39].
- Within this society there are three main dialect groups, namely the Nunagal/Nunukal from the northern part of North Stradbroke Island, the Ngugi from Moreton Island, and the Guwenbal/Koenpul from the remaining land within the Moreton Bay region — at [30]. The dialect groups held proprietary countries in various sections of Moreton Bay, as referred to above, but were closely allied, linked through intermarriage, had co-residence and freely accessed each others land — at [31] – [32] and [34].
- The Quandamooka people were united by common ancestry, observed systems of social organisation and landholding based on cognatic descent, and had large trade and ceremonial networks and clear systems of territorial, linguistic and political affiliation — at [27] – [29], [35] and [38].

Traditional laws and customs

[117] Attachment F & M contains the following information about the normative system of laws and customs that were in existence around the time of contact:

- The predecessors freely hunted, fished and gathered 'land game, birds and eggs, tubers, vegetable and fruits, fish, crustaceans, dugong, turtles and turtle eggs, rays, beached whales, shellfish and many other marine species … as well as shell, plant, and timber and stone materials' — at [35]. Stone materials were used to manufacture tools and weapons. The predecessors also made nets, baskets, mats and jewellery and followed a rule where women and children were not permitted to observe the slaughtering of dugongs — at [16], [35] and [41].
- Raw and processed foods, marine products and manufactured goods were traded with neighbouring groups — at [35].
- A system of trespass was observed where recognition of the owners was required to access land — at [38]. Certain family groups had primary rights or responsibility for a particular tract of country within Quandamooka country on the basis of birthplace or cognatic descent from a Quandamooka ancestor. In addition, the connection material indicates that '[p]eople own stories for particular places or events and will express their rights to ownership of land in terms of rights to knowledge of place' — at [38].
- The predecessors observed other customs and practices such as performing corroborees and dances as well as rules regarding the protection of land — at [35] and [41].

[118] The factual basis also contains information about how current members of the claim group continue to acknowledge and observe the laws and customs that have been handed down by their predecessors, for instance:

- The claimants have been told by their predecessors, such as their grandparents, about the boundary of Quandamooka country and that it includes the application area — at [44]; see also affidavit of [name 1 deleted] at [25], [37] and [80]. They have knowledge of the traditional names of the islands and places within it — [3] and [5]; see also affidavit of [name 2 deleted] at [14] and [86]. They are taught about their responsibilities to country, which include teaching their children about country — Attachment F & M at [42].
- The claim members continue to follow a system of landholding where all of Quandamooka country can be accessed freely by the claim members, however 'families … have their own places and things on country that they are responsible for and are entitled to speak for' — affidavit of [name 1 deleted] at [81]; see also affidavit of [name 2 deleted] at [101]. A senior elder generally can speak for the entire application area but certain families speak for particular areas. For instance, one claimant can speak for an area in the mid-eastern region and another can speak for areas in the north-eastern and southern regions — at [97] and [103].
- The claim members say that outsiders need to seek permission to visit the application area or face the consequence of being removed from it — Attachment F & M at [44]. They inspect and monitor country to ensure it is being protected and maintained — affidavits of [name 2 deleted] at [98] – [101] and [name 1 deleted] at [53] and [66].
- The claimants continue to use ceremonial grounds for men's and women's business — affidavit of [name 2 deleted] at [46].

- The claim group members have knowledge of the creation and other stories, increase sites, sacred sites such as bora grounds, men's and women's places and avoidance places and they believe in the spiritual world — Attachment F & M at [41] and [46] – [47]; see also affidavits of [name 1 deleted] at [22] and [27] – [28] and [name 2 deleted] at [29] – [32], [34] – [35] and [64]. The stories are passed down the generation where claim members tell their children and grandchildren in a traditional manner, namely by either reciting or dancing the story (corroboree) — affidavits of [name 1 deleted] at [30] – [32] and [34] and [name 2 deleted] at [35] – [38] and [45].
- The claim members acknowledge the spirits whilst walking on country and visiting sites of significance so that the claimants can greet the spirits and the spirits can watch over them — Attachment F & M at [42] and affidavits of [name 1 deleted] at [63] – [65] and [name 2 deleted] at [19], [43] – [44] and [46].
- The Quandamooka people have knowledge of their own totem and speak of the protocols of giving or taking names — affidavits of [name 1 deleted] at [74] and [name 2 deleted] at [104] – [105].
- Elders teach claim members practices that were observed by the ancestors prior to sovereignty including fire management techniques, cleaning freshwater creeks, controlling access to natural resources, taking natural resources at the appropriate time and in an appropriate manner, manufacture of oil, sharing portions, women not being permitted to participate in dugong hunt or slaughter, collecting reeds from swamps and making mats and baskets, spear and net making, introducing a person to country, conduct of ritual at increase sites, dances, and burial on country — Attachment F & M at [41], [42] and [46]. The claimants continue to hunt, fish and gather natural resources using traditional practices such as using reed or vine nets and communicating with dolphins whilst fishing — at [41] and affidavit of [name 2 deleted] at [39] – [41] and [91] – [93]. They also have knowledge of other traditional remedies such as using dugong oil and utilising the sand on country — affidavit of [name 1 deleted] at [82] – [84].
- The claim group continue other traditional practices such as not sweeping the house at night, not whistling at night and not separating from a group whilst walking together — at [76] – [78].

[119] Most members of the claim group have a biological connection with at least one apical ancestor who is likely to have been or been descended from people who at the time of sovereignty held traditional rights in some or part of the claim area — Attachment F & M at [41].

[120] 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

[121] 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.

[122] 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].

[123] In my view, the factual basis identifies a relevant pre-sovereignty society in the application area, and the wider Quandamooka country, which consisted of the predecessors of the native title claim group. Attachment F & M sets out the nature, extent and the laws and customs of that society. The society comprised of members of the Quandamooka claim group who were united by a common ancestry and who shared the Quandamooka country in common. The pre-sovereignty society acknowledged and observed a system of social organisation and a body of laws and customs regarding, amongst other things, rights to country, trade network, religious beliefs, and practices such as conducting ceremonies, hunting, fishing and gathering resources for various purposes.

[124] In my view, the factual basis demonstrates that at least some of these ancestors were living within Quandamooka country, or were amongst the generation born to those who were living within Quandamooka country, at the time of sustained European contact. In this sense, I understand that the information supports the assertion that at least some of the apical ancestors were born into the society that existed at and prior to European contact — see *Gudjala 2009* at [55] and also my reasons at s 190B(5)(a) above. From the factual basis, I understand the current claim group members are descendants of these ancestors as well as those identified in Schedule A.

[125] 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 Quandamooka People observe a landholding system in which rights, responsibilities and interests are exercised by the descendants of the ancestors named in Schedule A. The factual basis indicates that family groups continue to have knowledge of their ancestral country and have knowledge of sacred places on country. In my view, there is sufficient information to support the assertion that the present landholding system whereby members of the Quandamooka gain rights to country on the basis of birth or 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 sustained contact. 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.

[126] The factual basis contains information which speaks to the way the claim group continues to perform traditional practices such as hunting, fishing and gathering natural resources for various purposes in a traditional manner — see also my reasons at s 190B(5)(a). 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 contact, and that they have been passed down the generations to the claimants today.

[127] The factual basis also contains references to current observance and acknowledgement of laws and customs of a spiritual nature. The claimants have knowledge of the creation stories and the creative spirits. They have knowledge of sacred and avoidance places and speak of acknowledging spirits on country. There are references to current claimants performing corroborees, burials and rituals such as men's and women's business. The claimants also say that they are spiritually drawn to the application area and have returned there for spiritual healing.

[128] The factual basis, in my view, is sufficient to support the assertion that the relevant laws and customs, acknowledged and observed by this society, have been passed down through the generations, by word of mouth, traditional teaching and through dance, to the current members of the claim group and have been acknowledged by them without substantial interruption. For instance, there are references to the current claimants hunting and fishing in the application area in a traditional manner, having totems and traditional names, being told by their immediate predecessors about their responsibility to country and to speak to the spirits on the application area, and shown how to make spears, nets, baskets and mats, 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 sustained European contact.

[129] 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)

[130] 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.

[131] 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].

[132] 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.

[133] 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

[134] 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.

[135] The factual basis provides the following relevant information:

> (ii) a long list of practices taught by [Quandamooka] elders consistent with practices observed by ancestors pre-sovereignty (including fire management techniques; cleaning of freshwater creeks, controlling access to natural resources; taking natural resources at an appropriate time, and in an appropriate manner; rule to take no more than one needs and can eat, and the corollary, don't waste any resource; dugong netting …)
>
> …
>
> The evidence, both expert and lay, shows Quandamooka people:
>
> (a) being taught about their country by "the grannies" and uncles;
> (b) being taught of their responsibilities, including to teach their children about their country;
> (c) living at One Mile and other places on North Stradbroke Island with numerous other (Quandamooka) families;
> (d) camping;
> (e) living off the sea and land – including catching fish, turtle, dugong, crabs, and all kinds of fauna and birds;
> (f) learning about how to hunt and fish, and about bush tucker;
> (g) learning about plants and their various uses, including medicinal;
> (h) burning practices;
> (i) walking to various other places on the island;
> (j) being taught to call out for the spirits to watch over them;
> (k) call out when approaching certain sites;
> (l) the men catching and butchering dugong away from women and children;
> (m) collecting reeds from swamps and making baskets and mats for sale
> (n) learning how to make spears — Attachment F & M at [41] – [42].

[136] 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 Quandamooka People in relation to the application area;
- examples of the claim group's current acknowledgement and observance of laws and customs in relation to the application area have been provided.

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

[138] 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.

[139] 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)

[140] 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].

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

[142] 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.

[143] 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].

[144] 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.

[145] 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.'

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

[147] 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

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

[148] 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].

[149] 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].

[150] 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].

[151] 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.

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

[153] The factual basis provides that the Quandamooka people maintain the traditional right to exclude all others from the application area. The material states that '[s]trong prohibitions on trespass existed and remain however modified, today' — Attachment F & M at fn 79.

[154] One claimant says that:

> [i]t has always been known to me that all the islands in Moreton Bay was our country and that it was our responsibility to look after it, and if anyone came to the island they needed our permission to stay, if they didn't ask for permission or they played up while they were there, they would be told to go away and be put off the island. That is still the case today. Our spirits have always been on that island and they will always stay there — at [44].

[155] The asserted facts indicate that members of the claim group have a spiritual responsibility to protect their country and have, for instance, prevented mining activities from taking place in the application area — affidavit of [name 1 deleted] at [45] and [50].

[156] The factual basis also indicates that the claim group continue to follow a landholding system where country is inherited on the basis of cognatic descent — affidavit of [name 2 deleted] at [97]. Senior elders have more of a right to speak for Quandamooka country generally, however members of families or descent groups are responsible for speaking for, caring for and making final decisions about their ancestral tracts of country — at [99], [101] and [103]. The authority to speak for country and make the final decision is derived from the 'bloodlines to Country' — at [101]. The right to protect and care for country and sites is derived from the claim group's obligation under their laws and custom to ensure the well-being of the land, namely 'making sure that country is not being abused, and that it is looked after and is healthy' — at [99]. The claim members maintain they have ownership of their ancestral landholding — Attachment F & M at [37] – [38] and [41]. 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.

[157] Members of the claim group believe their country is imbued with spirituality, consider it to be a healing place, and have knowledge of the creation stories, totems, increase sites, sacred waterholes and the spiritual presences on it — at [41] and affidavit of [name 1 deleted] at [57]. They speak of a need to prevent destruction to their country, in particular their sacred sites and places, which I understand are imbued with their ancestors' spirits — affidavits of [name 1 deleted] at [45], [50] and [67] and [name 2 deleted] at [62]. The claimants are taught by their predecessors to talk to the spirits when walking on country and visiting sites of significance so that the claimants can greet them and the spirits can recognise them as the traditional owners — affidavits of [name 1 deleted] at [63] – [65] and [68] and [name 2 deleted] at [43] and [47]. The claimants have knowledge of avoidance places and say that if they were to go somewhere unintentionally, then they would be given a sign to turn around — affidavit of [name 2 deleted] at [64] – [65]. The sign would be given by the spiritual caretakers of the country who may present themselves at times within particular birds — at [65] – [67].

[158] I am of the view that the factual basis material asserts that current members of the native title group maintain 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. Those with 'bloodlines to Country' make the final decision about matters concerning country, with senior elders having more of a right to speak for country generally. In addition, families or descent groups have an association with and have the responsibility to make decisions 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.

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

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

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

e. the right to live, to camp and for that purpose to erect shelters and other structures on those areas

[160] The claim group members speak of their use of country, visiting sacred sites, camping, and travelling over the application area for cultural purposes and some claim members have lived within the application area.

[161] The factual basis indicates that the predecessors resided on country, accessed country for various traditional purposes such as taking the natural resources, and there are references to permanent camps, huts and relatively permanent structures within the application area.

[162] 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.

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

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

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

[163] There are references to the predecessors hunting, fishing and gathering the natural resources of the application area — at Attachment F & M at [16] and [35]. They made tools, weapons, nets, baskets and mats — at [35] and [41].

[164] Current claimants continue to hunt, fish and gather the natural resources in a traditional way. For instance, they fish using vine nets and communicate with dolphins — at [41] and affidavit of [name 2 deleted] at [39]. They make medicine, spears, baskets and mats in a traditional manner — Attachment F & M at [41] – [42] and affidavit of [name 1 deleted] at [82] – [84]. I infer that the claimants and their predecessors would have taken and used water for practical consumption whilst camping and whilst carrying out other cultural activities.

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

f. the right to light fires on those areas for domestic purposes, but not for the clearance of vegetation

[166] The factual basis refers to the claimants using fire to traditionally roast eugaries — affidavit of [name 2 deleted] at [87]. I infer the claim members and their predecessors would also light fires whilst camping.

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

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

i) cultural activities

ii) cultural practices relation to birth and death, including burial rites

iii) ceremonies

iv) meetings

v) teaching the physical and spiritual attributes of sites and places on those areas that are of significance under their traditional laws and customs

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

[168] The factual basis indicates that the claimants continue to use ceremonial grounds for men's and women's business like their predecessors did — at [46]. There are references to the claimants having meetings in the application area regarding 'business, cultural business and community business', including the protection and maintenance of land — at [63] and affidavit of [name 1 deleted] at [53]. The claimants speak of their predecessors teaching them about the country. For instance, claimants say that they 'teach the young fellows by walking a bit of Country with them, and telling them a few things' — [name 2 deleted] at [56]. The claimants learn about sites of significance and their spiritual connection to their traditional land when they are young — at [57] – [58].

[169] The claimants speak of the entire application area of having spiritual significance, of the importance of protecting it and that claim members including those who are rangers still play a role in looking after the country — affidavits of [name 1 deleted] at [59] and [66] and [name 2 deleted] at [98].

[170] 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.

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

[171] One of the senior elders says that '[i]f there is an abundance of resources, the protocol is that you invite your neighbours to share with you – as is the custom and practice of the bunya festival – or you share it out amongst the families in your own community' — at [102].

[172] I consider that this right is prima facie traditionally based.

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

i) people required by traditional law and custom for the performance of ceremonies or cultural activities on the areas

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

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

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

[174] The factual basis indicates that this right is observed by members of the claim group. For instance, one of the claimants says that claim group members 'camped with a group of non-Indigenous people from Brisbane who were there to support [the claimants] in blocking the sand mining' that was going to occur on the application area — affidavit of [name 1 deleted] at [45].

[175] There are also references to the predecessors trading and exchanging resources with others.

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

k. the right to make decisions about the use and enjoyment of the areas by Aboriginal people who recognise themselves to be governed by the laws and customs acknowledged by the Quandamooka People

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

[178] In *De Rose v South Australia* [2002] FCA 1342, however, O'Loughlin J recognised the non-exclusive right to make decisions about access to the application area for Aboriginal people who were *bound* by the traditional laws and customs of the native title holders — at [553]. His Honour, however, did not make a subsequent determination of native title. In the consent determination in *Mundraby v Queensland* [2006] FCA 436, the Court recognised the non-exclusive right to 'make decisions in accordance with traditional laws and customs concerning access thereto and use and enjoyment thereof by aboriginal people who are *governed* by the traditional laws acknowledged, and traditional customs observed by, the native title holders [emphasis added]' — at [3(c)(ii)]. I also note that in another consent determination, the Full Federal Court held that:

> there is a clear distinction between a right to control access … and a right to make decisions about the use and enjoyment of land by Aboriginal people who will recognise those decisions and observe them pursuant to their traditional laws and customs. The continued existence of the former right is incompatible with a pastoral lease entitling the pastoral lessee to determine who has access to the land; the latter right is not — *NT v Ward* [2003] FCAFC 283 at [27].

[179] In light of the case law cited above, I consider that there is willingness for courts to uphold such non-exclusive rights in situations where those rights are qualified to be against persons who

are bound by the laws and customs of the native title holders. The right being claimed here is, in my view, qualified or limited this way. I consider that where the material supports the prima facie existence of the right, it will be able to be recognised for the purposes of s 190B(6).

[180] The factual basis contains references to sites of avoidance, which I understand to be places that the Quandamooka people are not allowed to access under their traditional laws and customs. For instance, one of the claimants says that:

> [t]here are men's and women's places [within the application area]. I was told that that [*sic*] by my family and also by other Elders, now deceased. You grow up with that information, and you know where to go and where not to go, and you do not go to certain places unless you are invited. But I have never been anywhere that I should not go — affidavit of [name 2 deleted] at [64].

[181] In my opinion, this right is prima facie established under the traditional laws and customs of the native title claim group.

Rights prima facie not established

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

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

Conclusion

[183] 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.

[184] 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].

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

[186] I refer to the information above in relation to s 190B(5) of these reasons, which provide a sufficient factual basis supporting the assertion that the Quandamooka People acknowledge and observe the traditional laws and customs of the pre-sovereignty society.

[187] I note that the factual basis contains relevant information that describe a traditional physical association of the Quandamooka People with the application area, including travelling, hunting, fishing, gathering natural resources and camping on country — Attachment F & M at [42] – [43] and [46] and affidavit of [name 2 deleted] at [39] and [89]. There are also references indicating that claim members have previously and continue to work, stay in dwellings and visit the sacred sites within the application area — affidavits of [name 2 deleted] at [27] and [33] and [name 1 deleted] at [48] and [57].

[188] Given the above, and considering all of the information provided with the application, I am satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with the land or waters within the application area.

[189] 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.

[190] 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.

Reasons for s 61A(1)

[191] 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.

[192] The geospatial assessment identifies a technical but not an actual overlap with the Quandamooka #1 (QUD6010/1998) native title determination and 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 actual 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.

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

Reasons for s 61A(2)

[194] 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.

[195] Schedule B states that the application does not cover any area where a previous exclusive possession act was done. Schedule L identifies sixteen lots over which the extinguishment of native title is required by ss 47, 47A and 47B of the Act to be disregarded.

[196] 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]. I note that s 61A(4) provides that s 61A(2) does not apply if the application states that ss 47, 47A or 47B applies to it.

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

Reasons for s 61A(3)

[198] 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.

[199] I note that the description of the native title rights and interests claimed at Schedule E includes the following:

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

[200] I further note that Schedule B provides that the application does not cover any other area where native title has been otherwise extinguished.

[201] 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.

[202] 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 47, 47A or 47B of the Act may apply — see Schedules B, E and L.

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

Conclusion

[204] 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.

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

Reasons for s 190B(9)(a)

[206] Schedule Q provides that the native title claim group makes no claim to ownership of minerals, petroleum or gas wholly owned by the Crown.

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

Reasons for s 190B(9)(b)

[208] Schedule P indicates that the native title claim group does not claim exclusive possession of all or part of an offshore place.

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

Reasons for s 190B(9)(c)

[210] Schedule B provides that the application does not cover any area where native title has been otherwise extinguished. The application also claims the protections afforded by ss 47, 47A and 47B — see Schedules B, E and L.

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

Conclusion

[212] 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]