National Native Title Tribunal

Registration test decision

Application name	Birriah People
Name of applicant	David Miller, Colin McLennan, Gracelyn Smallwood, Algon Walsh Jnr and Frank Fisher
NNTT file no.	QC1998/012
Federal Court of Australia file no.	QUD6244/1998
Decision date	20 May 2015

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

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

Date of reasons: 10 July 2015

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Heidi Evans

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

Edited Reasons for decision

Introduction

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

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

Application overview and background

[3] The Registrar of the Federal Court of Australia (the Federal Court) gave a copy of the Birriah People claimant application to the Registrar on 20 May 2015 pursuant to s 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

[4] I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to this claim. Subsection 190A(1A) refers to an application that has been amended as the result of an order of the Court pursuant to s 87A. There has been no such order in this instance. Subsection 190A(6A) refers to an application where the nature of the amendments are limited to those things set out in paragraph (d) of that provision. I am of the view that the nature of the amendments to the application before me are more extensive than those described in s 190A(6A)(d). For example, the description of the native title claim group set out in Schedule A of the application has changed. This is not one of the types of amendment set out in s 190A(6A)(d), and subsequently, I am of the view that the provision does not apply.

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

[6] This is the fourth time that the application has been amended. The application was first made on 2 April 1998 and was entered onto the Register of Native Title Claims (the Register) at that time, prior to the 1998 amendments to the Native Title Act including the introduction of the registration test provisions. It was accepted for registration pursuant to s 190A(6) on 7 February 2000 and subsequently remained on the Register. It has remained on the Register since that time, with decisions to accept two further amended applications pursuant to s 190A(6) being made on 21 September 2001 and 14 August 2007.

[7] The application was again amended and filed in the Court on 29 January 2015, however prior to the registration test provisions being applied to the application, a further amendment was made. This is the application before me, filed in the Court on 19 May 2015 pursuant to an order of the Court of 18 May 2015.

[8] At the time the amended application was filed, there were two notices pursuant to s 29 affecting the area of the application. Those relevant notification dates included:

- 11 March 2015 (EPC2285);
- 18 March 2015 (EPM25864).

[9] I understand, therefore, that I am required to use my best endeavours to make a decision regarding registration of the claim on or before 11 July 2015 (see s 190A(2)(f)). I note that the Birriah People claim already appears on the Register of Native Title Claims, such that the applicant's procedural rights are secured.

Registration test

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

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

Information considered when making the decision

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

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

[14] The information and documents I have considered in reaching my decision are set out below:

- Form 1 and accompanying material;
- previous amended application and accompanying material filed 29 January 2015;

- geospatial assessment and overlap analysis dated 2 February 2015 (GeoTrack: 2015/0145);
- letters containing submissions from the legal representative for QCoal Pty Ltd and Byerwen Coal Pty Ltd dated 13 March 2015 and 28 April 2015;
- email from the applicant's legal representative of 24 March 2015 requesting an extension of time to respond to submissions;
- submissions from the applicant dated 7 April 2015;
- email from the applicant's legal representative requesting a deferral of the registration test;
- additional material supplied by the applicant directly to the Registrar on 19 May 2015.

[15] It should be noted that the geospatial assessment referred to above was prepared in relation to the previous amended application, filed 29 January 2015. There has been no change to the map and description in the amended application before me and consequently, a new geospatial assessment and overlap analysis was not required in relation to the application.

[16] 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.

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

Procedural fairness steps

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

[19] In relation to the previous amended application, on 4 February 2015, I caused the case manager with carriage of the application to write to the State, advising of the receipt of the amended application, and my view that neither ss 190A(1A) nor 190A(6A) applied to the application. The letter provided that the delegate would use best endeavours to make a decision regarding registration of the amended application by 30 April 2015 in accordance with a s 29 notice, and invited the Minister to make submissions in relation to the amended application by Friday 20 February 2015. Nothing was received from the State within this period.

[20] Also on 4 February 2015, the case manager wrote to the applicant, advising that ss 190A(1A) and 190A(6A) had been found not to apply to the amended application, and that a decision was to be made on or before 30 April 2015 in accordance with a s 29 notice affecting the application.

[21] On Friday 13 March 2015, I received submissions from the legal representative for QCoal Pty Ltd (QCoal) and Byerwen Coal Pty Ltd (Byerwen). The letter setting out those submissions (of the same date) explains that QCoal is a respondent party to the Birriah People claim, and that its subsidiary, Byerwen, is the proposed grantee of mining tenement ML10374, the area of which lies wholly within the external boundary of the claim area. I have addressed the content of those submissions in my reasons below.

[22] Noting that the content of the submissions was adverse to the registration of the amended application, by letter dated 19 March 2015 I provided the applicant with a copy of those submissions, and invited the applicant to provide a response by 30 March 2015. The applicant responded by email on 24 March 2015, requesting that an extension of time of two weeks be granted to the applicant to provide a response to the submissions. That request set out in detail the grounds upon which it was made.

[23] Having regard to those grounds set out by the applicant, and noting that the date by which I was to use best endeavours to make a decision regarding registration of the claim was 30 April 2015, I caused the case manager to email the applicant on 26 March 2015, advising that the applicant was granted an extension of time until 7 April 2015 to respond to the submissions, but not 13 April 2015 as requested. On 30 March 2015, the applicant's legal representative responded by email, advising that the applicant would be in a position to respond within that time.

[24] By email on 7 April 2015, I received submissions from the legal representative for the applicant. Having regard to the information contained in those submissions and the information contained in the submissions from the legal representative for QCoal and Byerwen of 13 March 2015, I formed the preliminary view that the application did not satisfy one of the conditions of registration.

[25] Subsequently, on 8 April 2015, I caused the case manager to write to the applicant advising the applicant of this issue. The applicant was given until Friday 17 April 2015 to advise of their intended course of action regarding the amended application.

[26] Noting my preliminary view that the application was not going to satisfy all of the conditions of the registration test and that it would, therefore, be removed from the Register, I did not consider that the interests of either the State or QCoal and Byerwen were adversely affected such that they needed to be provided with a copy of the applicant's submissions.

[27] By email of 10 April 2015, the applicant's legal representative responded, requesting that the Registrar's delegate delay the application of the registration test provisions to the Birriah People native title determination application in order that the application could be amended and the deficiency within the application rectified.

[28] By letter of 17 April 2015 to the applicant's legal representative, I advised that the request for the extension of time be granted. This decision was on the basis that I was of the view that it was appropriate that the applicant be allowed an opportunity to address the requirements of the registration test, and that the request was reasonable in the circumstances.

[29] Also on 17 April 2015, I caused the case manager to write to the State, advising of the applicant's request for a deferral of the registration test, and that that request had been granted by the Registrar's delegate. The letter informed the State that a decision would now be made on or before 21 May 2015.

[30] On 21 April 2015, I caused the case manager to write to the legal representative for QCoal and Byerwen. That letter set out my view that the circumstances of the matter, contrary to that party's submission, did not give rise to any legitimate expectation or any other entitlement to a further opportunity to comment on any information provided by the applicant in response to the submission. In this regard, the letter referred the legal representative to the decision in *Stock v Native Title Registrar* [2013] FCA 1290 (at [40]).

[31] The legal representative for QCoal and Byerwen again wrote to the Registrar on 28 April 2015, reiterating the view that a legitimate expectation that a decision would be made on or before 30 April 2015 had been created, and that its client had a significant interest in the registration decision.

[32] By letter of 30 April 2015, I caused the case manager to write in response, confirming my view that Byerwen and QCoal were not entitled to a further opportunity to be heard prior to a decision regarding registration of the amended application being made, and advising that a decision would not be made on or before 30 April 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.

[33] 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.

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

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

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

Native title claim group: s 61(1)

[37] While previously, applications were not tested against the provision of s 61(1) on the basis that it did not actually require the application to contain any 'details or other information', in *Risk v National Native Title Tribunal* [2000] FCA 1589 (*Risk*), O'Loughlin J held that s 61(1) in fact required the Registrar to be satisfied that the application was made by a properly constituted 'native title claim group'. It followed from this decision that the Registrar was required to

consider whether the persons named or described in the application as the native title claim group were 'all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed', as defined in s 61(1).

[38] This requirement was, however, significantly narrowed by Mansfield J in the later decision of *Doepel*. In relation to the Registrar's task at s 61(1) for the purposes of s 190C(2), His Honour made the following comments:

> …s 190C(2) relevantly required the Registrar to do no more than he did. That is to consider whether the application sets out the native title claim group in the terms required by s 61… If the description of the native title claim group indicates that not all persons in the group were included, or that it was in fact a sub-group of the native title claim group, then the relevant requirement of s 190C(2) would not be met and the claim cannot be accepted for registration – at [36].

[39] His Honour also held that s 190C(2) did 'not involve the Registrar going beyond the application' and that it did 'not require the Registrar to undertake some form of merit assessment of the material to determine whether he is satisfied that the native title claim group is in reality the correct native title claim group' – at [37].

[40] I understand, therefore, that it is only where on the face of the application itself, the description of the native title claim group indicates that not all the persons in the group were included, or that the group described is in fact a sub-group of the actual native title claim group, that this condition will not be met.

[41] A description of the native title claim group appears at Schedule A. That description does not seek to exclude particular persons, nor is there anything within the terms of the description that suggest it is only part of the native title claim group that has been described.

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

Name and address for service: s 61(3)

[43] The names of the applicant persons appear immediately above Part A of the Form 1, at page 2. The address for service of the applicant's legal representative appears at Part B.

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

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

[45] My role at s 61(4) for the purposes of s 190C(2) is a matter of procedure, and limited to a consideration of whether the information required by the former provision is contained in the application – *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [31] and

[32]. I am not permitted to turn my mind to the correctness of the information – *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 (*Wakaman*) at [34].

[46] As above, a description of the native title claim group appears at Schedule A of the application.

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

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

[48] The application is accompanied by five affidavits, one sworn by each of the five persons comprising the applicant. The affidavits are all signed, dated and have been competently witnessed. Each of the affidavits contain the same 14 paragraphs, and there are two annexures to each affidavit. Those annexures are identical for each of the affidavits.

[49] Having turned my mind to the content of the 14 paragraphs appearing in each affidavit, and the two annexures that accompany each one, I have formed the view that the affidavits contain the statements required pursuant to subsections (i)–(v) of s 62(1)(a).

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

Details required by s 62(1)(b)

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

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

[52] A written description of the boundaries of the application area is provided at Attachment B to Schedule B of the application. The areas falling within those boundaries that are not covered by the application are set out in Schedule B, by way of general exclusion clauses.

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

[53] A map showing the external boundaries of the application area appears at Attachment C to Schedule C.

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

[54] Information about searches conducted by the applicant regarding non-native title rights and interests appears at Schedule D.

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

[55] Schedule E contains a description of the native title rights and interests subject of the claim. It is more than a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished at law.

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

[56] Information relating to a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist is contained in Schedule F. Schedule F refers to further relevant information at Attachment F.

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

[57] The activities currently being carried out on the land and waters of the application area by the members of the native title claim group are listed in Schedule G.

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

[58] Schedule H contains details of other applications of which the applicant is aware.

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

[59] Information about such notices is set out in Schedule HA.

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

[60] Schedule I refers to Attachment I as containing relevant information about these notices.

Conclusion

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

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

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

[62] In undertaking the task at s 190C(3), the requirement to consider common claimants between applications is only triggered where there is a 'previous application' that meets all three criteria set out at subsections (a), (b) and (c) – *Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

[63] Turning, therefore, to whether there is a previous application that covers the whole or part of the area covered by the current application, the geospatial assessment and overlap analysis prepared in relation to the previous amended application (geospatial assessment) (GeoTrack: 2015/0145, dated 2 February 2015) provided that one application partly overlapped the area of

that amended application (which, I note, is identical to the area covered by the current amended application), being Wierdi People of the Wribpid Nation (QC2014/004; QUD566/2014) (the Wierdi People application).

[64] The requirement of subsection (b) of s 190C(3) is that the overlapping application was on the Register of Native Title Claims at the time the current application was made. Prior to the current amended application being filed in the Court on 19 May 2015, the case manager for the current application advised me that by Order of the Court of 26 March 2015, the Wierdi People application was discontinued. At the time the current application was made, therefore, I am satisfied that the Wierdi People application did not appear on the Register of Native Title Claims. On that basis, the second criterion is not met.

[65] I have not, therefore, considered the requirements of the condition at s 190C(3) any further.

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

Subsection 190C(4)
Authorisation/certification

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

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

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

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

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

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

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

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

(a) includes a statement to the effect that the requirement in s 190C(4)(b) above has been met, and

(b) briefly sets out the grounds on which the Registrar should consider that the requirement in s 190C(4)(b) above has been met.

[67] 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.

[68] Schedule R of the application provides that the application has not been certified by the representative body for the area. Therefore, I must be satisfied that the requirements in s 190C(4)(b) have been met.

[69] Where an application has not been certified, s 190C(5) sets out further requirements that must be met. Subsection (a) requires the application to contain a statement to the effect that the requirement in s 190C(4)(b) has been met. Schedule R of the application states that '[t]he persons who constitute the applicant are members of the claim group and are authorised to make this application and deal with matters in relation to it by all the other persons in the claim group.' I am, therefore, satisfied that the requirement at s 190C(5)(a) is met.

[70] The requirement at subsection (b) of s 190C(5) is that the application 'briefly sets out' the grounds upon which the Registrar can be satisfied that the requirement at s 190C(4)(b) has been met. Following the statement set out above, Schedule R provides details pertaining to the authorisation of the applicant, including information about the decision-making process used by the claim group for that purpose. Schedule R also refers to further information in the affidavit of [*Legal Representative – name deleted*] at Attachment R. That affidavit contains considerable detail regarding the way in which the applicant was authorised, and the arrangements surrounding that decision of the members of the claim group. In my view, this is sufficient for the purposes of s 190C(5)(b) and therefore I consider that that requirement is met.

[71] In *Doepel*, Mansfield J held that 'in the case of subs (4)(b), the Registrar is required to be satisfied of the fact of authorisation by all members of the native title claim group' – at [78]. Noting the wording of the condition, it is my understanding that there are two elements of which I must be satisfied. Firstly, that the applicant is a member of the native title claim group, and secondly, that the applicant 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.

[72] There are five individuals comprising the applicant. These are the persons David Miller, Colin McLennan, Gracelyn Smallwood, Algon Walsh Junior and Frank Fisher. In accordance with the requirement of s 62(1)(a), each of those persons has sworn an affidavit. At paragraph [14] of each of those affidavits, the deponent states that '[a]t the authorisation meeting, I confirm that I consented to be one of the persons comprising the Applicant for the Further Amended Birriah NTDA [native title determination application]'.

[73] David Miller, Colin McLennan and Algon Walsh Junior have also sworn affidavits for the purposes of providing factual basis material, contained at Attachment F of the application. In these Attachment F affidavits, David Miller states his Birriah identity through his descent from apical ancestor Peggy Barker (at paragraph [4]); Colin McLennan states his Birriah identity through his descent from 'Jinnie' (who I accept to be apical ancestor Jinnie Tiers) (at paragraph [3]), and; Algon Walsh Junior states his Birriah identity through his descent from Maggie Callaghan (at paragraph [24]). The information within Attachment F demonstrates that Maggie Callaghan was the mother of apical ancestor Sambo Callaghan.

[74] I do not have statements sworn by the remaining applicant persons regarding the basis upon which they assert to be members of the Birriah People native title claim group, however, in their affidavits sworn for the purposes of s 62(1)(a), those applicant persons state: 'I am one of the persons authorised […] to be the Applicant'. I take this to mean that those persons assert that they are entitled to be authorised as such on the basis of their being members of the native title claim group.

[75] Further, in all of the authorisation material before me, which is of a considerably detailed nature, there is nothing to suggest that there was any disagreement amongst those in attendance as to whether these persons were members of the native title claim group. I note that I am not restricted to the information contained in the application in undertaking the task at s 190C(4)(b), and that in reaching this view, I have had no information placed before me challenging the assertion that the applicant persons are members of the group – see *Strickland* [1999] FCA 1530 at [57].

[76] I now turn to consider, therefore, whether the applicant is authorised to make the application, and to deal with matters arising in relation to it, by all the persons in the native title claim group.

[77] The note following s 190C(4)(b), referring to the definition of 'authorise' in s 251B, in my view, indicates the need for the material to address the requirements of that provision. Section 251B is set out in full above, and provides that a decision of the native title claim group to authorise the applicant can involve one of two decision-making processes. The material clearly asserts that the decision-making process employed in the current situation was one agreed to and adopted by the group, that is, a process pursuant to s 251B(b) – see for example Schedule R; Annexure MJO 6 to Attachment R at [2.1]–[2.3].

[78] In *Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation* NSW [2002] FCA 1517 (*Lawson*), Stone J held that where an agreed to and adopted decision-making process is used, there is no requirement that *all* the members of the relevant native title claim group be involved in the decision-making process, and that an applicant may be

authorised where the members of the group are given every reasonable opportunity to participate – at [25].

[79] It is clear from the material that the primary purpose of the application to amend the claim was to allow for the description of the native title claim group to be reformulated in accordance with the results of recent anthropological research admitted by the legal representative for the applicant in Court on 6 February 2015 (see affidavit of *[Legal Representative – name deleted]* at [5]). The previous application described the native title claim group by reference to seven apical ancestors. The reformulated group, being the native title claim group described in Schedule A of the amended application before me, is described by reference to eight apical ancestors.

[80] The material provides that there were two meetings held on 2 May 2015. The first was for the purpose of considering whether to amend the description of the native title claim group. Where the decision at the first meeting was that the description of the claim group should be reformulated, the second meeting was for the purposes of authorising an applicant to make the amended Birriah native title claim – see paragraphs [6] and [7] of the s 62(1)(a) affidavits sworn by the applicant persons (pp 436–500).

[81] The task at s 190C(4)(b), in my view, necessarily entails a consideration of the 'identity of the claimed native title holders' – *Wiri People v Native Title Registrar* [2008] FCA 574 (*Wiri People*) at [29]. This is on the basis that authorisation must flow from 'all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed' pursuant to s 61(1) – *Risk v National Native Title Tribunal* [2000] FCA 1589 (*Risk*) at [60]–[62].

[82] The material clearly sets out all of the relevant facts surrounding the way in which the narrower group of persons comprising the native title claim group for the previous application were invited to attend the first meeting. It also sets out how, at that meeting, those persons resolved to amend the application such that the description of the native title claim group was to be reformulated, extending the group to the descendants of the eight apical ancestors named in Schedule A. This information appears in the affidavit of *[Legal Representative – name deleted]* and annexures to that affidavit, which include copies of the notice for the meeting (Annexure MJO 1), copies of correspondence sent to members of the previous native title claim group regarding the proposed meeting (Annexure MJO 2), copies of the attendance sheets for the first meeting (Annexure MJO 3), and copies of the resolutions passed at the meeting (Annexure MJO 5). Having considered that information, I am satisfied of the identity of the native title claim group as described in the amended application before me. It is, therefore, the second meeting that is now the focus of my consideration for the purposes of this condition, being the meeting where the applicant was authorised to make the amended application.

[83] Regarding the way in which the members of the native title claim group were notified of the meetings, in his affidavit at Attachment R, *[Legal Representative – name deleted]* states that he caused a notice about the proposed authorisation meeting to appear in five geographically relevant publications, approximately two weeks prior to the meeting – at [9]. *[Legal Representative – name deleted]* states that he also mailed a copy of that notice to the last known addresses of all the Birriah People who attended the most recent authorisation meeting for the group held in September 2014 – at [10].

[84] A copy of the notice appears at Annexure MJO 1 to the affidavit. The notice advertises both the first and second meetings scheduled for 2 May 2015. The terms of the notice provide that:

> THE AMENDED BIRRIAH NATIVE TITLE CLAIM GROUP is currently described as the descendants of the following people:
>
> The biological or adopted descendants of:
>
> [*list of 7 named apical ancestors*]
>
> **Meeting 1 – Meeting of the Amended Birriah Native Title Claim Group**
>
> **This notice invites** all members of the Amended Birriah Native Title Claim Group (as described above) to an authorisation meeting at the time and date below:
>
> [*details for the meeting are set out*]
>
> **The purpose of the meeting** is to decide whether the description of the Amended Birriah Native Title Claim Group should be amended. It is proposed that the Amended Birriah Native Title Claim Group be re-formulated **TO ADD** the biological and adopted descendants of **JOHN SMALLWOOD**. If that were done, the claim group would become the following:
>
> The biological or adopted descendants of:
>
> [*list of 8 named apical ancestors*]
>
> This is a very important meeting as the claim group description will govern who will be entitled to exercise native title rights and interests in the claim area if a determination of Native Title is made.
>
> **Meeting 2 – Meeting of the reformulated Birriah Native Title Claim Group**
>
> If a decision is made to further amend the description of the Amended Birriah Native Title Claim Group a further meeting of the reformulated claim group will be held immediately following Meeting 1 for the purpose of authorising an Applicant to deal with all matters arising in relation to the Native Title Claim. **TAKE NOTICE THAT** the biological and adopted descendants of **JOHN SMALLWOOD** will be entitled to vote at this meeting (if it proceeds).

Note: If the proposed amendments to the description of the native title claim group are authorised at Meeting 1, then only persons who fall within the re-formulated claim group description may participate in Meeting 2.

[85] In addition to this, the notice provides that those interested in attending should register by contacting the appropriate person, and that such persons were required to set out their name, contact details and the Birriah ancestor through whom they assert membership to the group. The notice states that '[l]imited travel assistance will only be made available upon satisfying eligibility criteria'. The affidavit of *[Legal Representative – name deleted]* further provides that the Birriah applicant funded travel for all 'out of town' people who attended the meeting on 2 May 2015 – at [13].

[86] With reference to the terms of the notice above, it is clear, in my view, that all of the persons comprising the native title claim group as described in Schedule A were invited to attend the second meeting, and that the notice is explicit that it was only the members of the reformulated group who were able to attend that meeting. The notice also clearly sets out the business to be conducted at the meeting, namely, to authorise an applicant to make the amended application where a decision was made at the first meeting that the native title claim group should be reformulated.

[87] The copy of the notice was, in my view, widely distributed, with both personal and public notice given to the members of the native title claim group as described in the previously amended application. The public notification, in my view, was sufficient to alert the descendants of John Smallwood to the proposed meeting and that their attendance at the second meeting, should it proceed, was required for the purposes of authorising an applicant to make the amended application. Consequently, I consider that the members of the group were given 'every reasonable opportunity' to participate in the decision-making process.

[88] Regarding the meeting at which that decision was made, the affidavit sets out the following information:

- information about the purpose of the meeting and the proposed resolutions had been distributed at a plenary session for all of the Birriah People (including the descendants of John Smallwood) which was held prior to the commencement of the first meeting – at [14] and [15];
- at the plenary session, the attendees elected *[Legal Representative – name deleted]* as the Chairperson for the meetings – at [16];
- following the conclusion of the first meeting, the descendants of John Smallwood were invited into the meeting room – at [24];
- all those descendants entitled to vote were required to sign the attendance register (a copy of which appears at Annexure MJO 4) and were given red voting cards – at [25];
- the signing of attendance records was supervised by an independent anthropologist – at [12];
- although there was debate about some of the proposed resolutions, there were no disputes during the course of the meeting – at [29];

- those in attendance first resolved that there was no decision-making process pursuant to their traditional laws and customs that had to be complied with for the purpose of authorising an applicant to make an application – MJO 6 at [2];
- the decision-making process used to authorise the applicant, agreed to and adopted by those in attendance, was one where resolutions were read out to the meeting, a time for questions about the resolution was allowed, the resolution was moved and seconded by individuals present, discussion about the resolution followed, and then a vote by show of hands was taken where a vote was carried by majority and then the results read out to the meeting – at [2];
- all resolutions were carried unanimously – MJO 6;
- those in attendance at the meeting resolved to authorise the five applicant persons for the amended Birriah People native title claim group to make the amended application and to deal with all matters arising in relation to it – MJO 6 at [3];
- a report about what took place at the meeting was prepared by the independent anthropologist, dated 7 May 2015 (a copy of that report was supplied by the applicant directly to the Registrar for the purposes of the registration test).

[89] The nature of the decision-making process used to authorise the applicant, as above, was a process agreed to and adopted by the persons in attendance at the meeting. Noting the details about that process set out within the affidavit of *[Legal Representative – name deleted]*, I consider that the authorisation material sufficiently addresses the matters prescribed by s 251B.

[90] In *Ward v Northern Territory* [2002] FCA 171 (*Ward v NT*), O'Loughlin J posed a number of questions in relation to the meeting asserted to have given rise to the applicant's authority in the circumstances before His Honour. Those questions about the meeting were:

> …Who convened it and why was it convened? To whom was notice given and how was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so, by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded? – at [24].

[91] In that case, O'Loughlin J held that the information before His Honour was 'wholly deficient', and that at least the substance of those questions must be answered – at [24] and [25].

[92] The material before me clearly provides that those in attendance at the meeting, using the agreed to and adopted decision-making process described, resolved to authorise the applicant to make the amended application and to deal with all matters arising in relation to it. From my consideration of the attendance sheets at Annexure MJO 4, I understand that there were 85 persons in attendance at the meeting, 31 of whom were descendants of John Smallwood. In my view, this proportion of descendants of John Smallwood in attendance is sufficient to suggest that

those persons were given adequate notice of the meeting and a reasonable opportunity to attend. The material further states that there was no dissent or dispute that arose during the course of the decision being reached by the persons at the meeting. Since that meeting at the beginning of May 2015, I have not received any information from any person asserting that there was any error or misconduct in the way the authorisation of the applicant occurred.

[93] I consider, therefore, that the information contained within the authorisation material, as set out above, does answer the substance of the questions posed by O'Loughlin J in *Ward v NT* about the meeting held on 2 May 2015.

[94] Consequently, in light of the material before me about the way in which the applicant was authorised, I have formed the view that I am satisfied that the applicant is a member of the native title claim group and is authorised to make the application and to deal with all matters arising in relation to it by all the persons in the native title claim group.

[95] For the reasons set out above, I am satisfied that the requirements set out in s 190B(4)(b) are met.

Merit conditions: s 190B

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

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

[96] Noting the wording of s 190B(2), it is primarily to the information and map required to be contained in the application by way of ss 62(2)(a) and (b) that I have turned my mind in undertaking the test at this condition of the registration test.

[97] A written description of the external boundary of the application area appears at Attachment B to Schedule B. It is entitled 'Description of external boundary – QUD6244/98 Birriah People (QC98/12)', and contains a metes and bounds description of the boundary, referencing roads, rivers and creeks, cadastral parcels and coordinate points. The description has been prepared by the Tribunal's Geospatial Services and is dated 21 June 2006.

[98] Those areas falling within that boundary that are excluded from the application area are set out as general exclusion clauses in Schedule B. I do not consider that there is anything problematic in adopting this approach when describing such areas – see *Strickland v Native Title Registrar* [1999] FCA 1530 at [50]–[55].

[99] A map showing the external boundary of the application area appears at Attachment C to Schedule C. That map is entitled 'Native Title Determination Application QUD6244/98 (QC98/12) Birriah People' and was prepared by the Tribunal's Geospatial Services on 23 October 2012. It includes:

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

[100] The geospatial assessment prepared in relation to the written description and the map states that the area covered by the agreement has not been amended and that the area does not include any land or waters that have not been previously claimed in the original application. It further states that the written description and the map are consistent, and identify the agreement area with reasonable certainty. Having turned my mind to the description and the map before me, I agree with this assessment, and am satisfied that the information and map contained in the application allow for the boundaries of the area in relation to which native title is claimed, to be identified on the earth's surface with reasonable certainty.

[101] 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.

[102] A description of the persons comprising the native title claim group appears at Schedule A of the application. That description appears as follows:

> The claim group are persons who are the biological or adopted descendants of:
>
> - Jinnie Tiers;
> - *Kuburu*, the father of Billy Lightning *Banbari*;
> - John Smallwood;
> - Rosie Schilling;
> - Peggy Barker;
> - Sambo Callaghan;
> - Tommy Dodd or Tommy Morgan;
> - the mother of Lizzie Limburner.

[103] In *Doepel*, Mansfield J held that the focus of s 190B(3) is 'whether the application enables the reliable identification of the persons in the native title claim group' – at [51]. His Honour further emphasised that it is not for the Registrar's delegate to consider the correctness of the description or whether the persons described do in fact qualify as members of the native title claim group – at [37]. This approach was upheld by Kiefel J in *Wakaman* – at [34].

[104] My understanding of the task, therefore, is that it is not my role to consider the correctness of any description before me, but that the focus of my consideration is to be upon whether the description provided allows for the reliable identification of the persons in the native title claim group.

[105] A description involving identification of the members of a native title claim group by reference to apical ancestors was considered by Carr J in *Western Australia v Native Title Registrar* [1999] FCA 1591 (*WA v NTR*). His Honour held that a description where some factual inquiry was necessary in order to determine the persons comprising the group was not problematic in the application satisfying the condition at s 190B(3) – at [67].

[106] The description before Carr J in that case involved the application of three criteria or three rules, one of which was that persons were the biological descendants of named ancestors. Another criterion was that persons were adopted by the named ancestors or by their biological descendants. His Honour held that the group had been described sufficiently clearly, and that

through the application of the rules, necessitating some factual inquiry, the members of the group could be ascertained – at [67].

[107] I do not consider that there is any difference in the substance of the description in the application before me, and that considered by Carr J in *WA v NTR*. I understand that here, there are two criteria to be applied in determining who the members of the native title claim group are. That is, an individual must be either a biological descendant of one of the named ancestors, or must be adopted by one of the named ancestors, or by one of their biological descendants. Noting that these descriptors were accepted by Carr J for the purposes of s 190B(3), I am similarly satisfied that the group has been described sufficiently clearly, and that with some factual inquiry, the members of the group could be ascertained.

[108] 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.

[109] Mansfield J in *Doepel* approved the approach of the Registrar's delegate at s 190B(4), where the test of identifiability applied was 'whether the claimed native title rights and interests are understandable and have meaning' – at [99]. The delegate also considered whether the rights and interests described could be identified as 'native title rights and interests', pursuant to the definition of that term in s 223(1) – at [99]. While I have had regard to that definition in my consideration here, I have not undertaken an assessment of each of the individual rights and interests against that definition, as it is my view that such an assessment is more appropriate at the merit condition of s 190B(6) regarding whether the rights and interests prima facie exist.

[110] Regarding the task at s 190B(4), in *Doepel*, Mansfield J further commented that 'it was a matter for the Registrar to exercise his judgment upon the expression of the native title rights and interests claimed', and that 'it was open to the Registrar to read the contents of Schedule E together, so that properly understood there was no inherent or explicit contradiction in Schedule E' – at [123]. In this way, I understand that the condition requires me to undertake some measure of evaluative judgment in determining whether I am satisfied of the sufficiency of the description of the native title rights and interests claimed, contained in the application – see also *Strickland* at [60].

[111] A description of the native title rights and interests claimed appears at Schedule E of the application. It includes a claim to a right of exclusive possession, and includes another 21 non-exclusive rights and interests. The list is followed by certain qualifications on the operation of the

rights and interests claimed, including that the rights and interests are subject to the valid laws of Queensland and the Commonwealth.

[112] I do not consider that there is anything within a broad claim to possession, occupation, use and enjoyment of the application area as against the whole world that offends the provision at s 190B(4) – *Strickland* at [60]. I have read the contents of Schedule E together, including the stated qualifications, and have formed the view that the rights and interests described are understandable and have meaning. I consider, therefore, that the description is sufficient to allow the native title rights and interests claimed to be readily identified.

[113] 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.

[114] The task of the Registrar's delegate at s 190B(5) was expressed by Mansfield J in *Doepel* in the following way:

> Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the 'factual basis on which it is asserted' that the claimed native title rights and interests exist 'is sufficient to support the assertion.' That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts – at [17].

[115] This approach was approved by the Full Court in *Gudjala 2008*. It was noted by the Full Court that the delegate was able to rely on the statements within the affidavits required by s 62(1)(a) sworn by the applicant persons that the statements in the application were true, in accepting the asserted facts as true – at [91]–[92].

[116] While s 62(2)(e) makes it clear that it is only a 'general description' of the factual basis that is required to be contained in the application, it is my understanding that for the purposes of s

190B(5), that description must be in sufficient detail to enable a 'genuine assessment of the application', and be 'more than assertions at a high level of generality' – *Gudjala 2008* at [92].

[117] It is the particular matters prescribed by subsections (a), (b) and (c) of s 190B(5) that the factual basis must address – *Doepel* at [130]. That is, the factual basis must provide information that relates to the particular native title claimed, by the native title claim group, over the land and waters of the application area – see *Gudjala 2007* at [39].

[118] I note that my consideration at this condition of the registration test is not restricted to information contained within the application, and for that purpose, I may have regard to the sources prescribed by s 190A(3) – *Doepel* at [16].

The applicant's factual basis material

[119] The information relied upon by the applicant as providing a factual basis in support of the claim, and particularly the three assertions at subsections (a), (b) and (c) of s 190B(5), is set out in Schedule F of the application. That information, contained in Attachment F to Schedule F, consists of copies of the following:

- excerpts from a report entitled, 'Supplementary Anthropological Report – Consolidated List of Apical Ancestors for the Birriah Claim Group Description', dated 14 February 2014 by *[Author 1 – name deleted]* (Supplementary Report);
- excerpts from a report entitled, 'Birriah People Native Title Claimant Application – Draft Connection Report', dated 26 July 2011 by *[Author 2 – name deleted]* (Connection Report);
- affidavit sworn by Algon Dermott Walsh dated 24 September 2012;
- affidavit sworn by Algon Dermott Walsh dated 2 May 2013;
- affidavit sworn by David Hal Miller dated 24 September 2012;
- affidavit sworn by David Hal Miller dated 20 May 2013;
- affidavit sworn by *[Claimant – name deleted]* dated 24 September 2012;
- affidavit sworn by Algon Dermott Walsh dated June 2013;
- affidavit sworn by Colin McLennan dated 27 March 2013;
- affidavit sworn by *[Claimant – name deleted]* dated 29 May 2013;
- affidavit sworn by *[Claimant – name deleted]* dated 3 June 2013;
- affidavit sworn by *[Claimant – name deleted]* dated 18 October 2013;
- affidavit sworn by *[Claimant – name deleted]* dated 19 December 2013;
- affidavit sworn by Frank Fisher dated 18 March 2014;
- affidavit sworn by *[Claimant – name deleted]* dated April 2014;

[120] The material before me is of a considerably detailed nature, and refers to numerous place names. In my reasons below, in trying to avoid excessive repetition of the material, I have sought to provide examples of the type of information contained within that material that I have relied upon in reaching a view on the matters prescribed by ss 190B(5)(a), (b) and (c).

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

Reasons for s 190B(5)(a)

[122] The assertion at s 190B(5)(a) is that 'the native title claim group have, and the predecessors of those persons had, an association with the area'. Where the factual basis addressing this association consists only of broad statements that lack geographical particularity to the land and waters of the claim area, or where the information fails to speak to an association with the entire area claimed, it is my understanding that it is unlikely to satisfy the condition at s 190B(5)(a) – *Martin* at [26].

[123] In *Gudjala 2007*, in an aspect of the decision not criticised by the Full Court on appeal, Dowsett J's comments indicate that the information required at this condition may need to address:

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

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

[124] Regarding an association of the Birriah apical ancestors set out in the native title claim group description in Schedule A and their descendants with the area covered by the application, Schedule F refers to information contained in the Supplementary Report by *[Author 1 – name deleted]* appearing at Attachment F.

[125] The Supplementary Report sets out information pertaining to each of the descent groups for the Birriah apical ancestors, including information about approximate dates of birth for the apical ancestors and their descendants, locations with which individuals were associated according to historical records, birth places of children, names of members of associated families and names of marriage partners. The Supplementary Report also includes a conclusion from the author regarding the basis for the inclusion of each named apical ancestor and their descent group within the Birriah People native title claim group.

[126] For example, the Supplementary Report provides the following information about apical ancestor Jinnie Tiers:

- Jinnie's approximate date of birth is 1860, based on the age of her daughter Lucy recorded at Barambah in 1913 as 38 years of age (indicating Lucy was born around 1875) – at [108];
- on this basis, Jinnie is likely to have been born around the same time as settlement in the area began – at [108];

- Jinnie is recorded as being 'Biri of Byerwen Station' – at [108];
- Jinnie had three children with Charlie Tears, Lucy, Donald and Maudie, all of whom are recorded as being associated with Byerwen Station (within the application area) – at [109];
- this indicates that the family have resided and worked on, or near the Birriah People claim area since at least the 1860s – at [110];
- the daughter of Donald was born at Havilah station (within the application area) – at [111];
- Lucy died at Barambah in 1922 – at [119];
- Maudie married Leo Conway at Woorabinda (east of the application area), and in the early 1940s they worked at stations around Clermont (within the application area), including Yacamunda Station and Bundeberoo Station – at [119] and [123].

[127] Information within the Supplementary Report about the places with which the apical ancestors and their descendants can be associated, in addition to the information about the descent group for Jinnie Tiers above, includes references to the place names listed below. Using the Tribunal's iSpatial database, I have identified the location of those places in relation to the boundaries of the application area and have set out that information below:

- Strathmore Station – within the application area in the centre part of the area;
- Birralee Station – within the application area in the centre part of the area;
- Yacamunda Station – outside the application area to the southwest;
- Emu Plains Station – within the application area in the eastern part of the area;
- Havilah Station – within the application area in the south eastern part of the area;
- Bowen River – running along the southern edge of the application area;
- Burdekin River – running along the eastern boundary of the application area;
- Ravenswood – within the application area in the western part of the area;
- Collinsville – within the application area in the eastern part of the area;
- Ayr – outside the application area to the north;
- Nebo – outside the application area to the southeast;
- Charters Towers – outside the application area, adjacent to the western border;
- Mackay – outside the application area to the southeast;
- Cherbourg – outside the application area to the far southeast;
- Palm Island – outside the application area to the far northeast.

[128] I note that Palm Island and Cherbourg are located some distance from the application area. The information pertaining to the apical ancestors and their immediate descendants explains the way in which government policies of the late 1800s and early 1900s led to many Birrah people being forcibly removed from their traditional country to Aboriginal settlements that had been established at those places.

[129] The Supplementary Report and the Connection Report contain further information relevant to the assertion at s 190B(5)(a), which I have summarised below:

- the region within which the application area is located was first explored in 1859 by G. E. Dalrymple and a small group of men looking for land suitable for pasture – Supplementary Report at [353];
- Strathmore run was one of the first properties established – Supplementary Report at [353];
- historical records from the time of first contact note similarities in language between the groups occupying the lands of the lower Burdekin River and extending inland to include the headwaters of the Burdekin and Bowen Rivers (this area can roughly be equated with the area covered by the application) – Connection Report at [344];
- linguistic research from the area indicates two dialects of the Biri language – the coastal dialect spoken by the 'Bowen mob', and an inland variety, spoken on the western side of the Great Dividing Range – Connection Report at [290];
- one now-deceased claimant stated that *Birri* means 'people of the rivers' and noted that the two biggest rivers in Queensland are in the Fitzroy and Burdekin Basin – Connection Report at [294];
- an old railway station south of Townsville was named *Birigaba* after the name of the people who inhabited the locality – Connection Report at [294];
- one claimant speaks of his grandmother telling him that his close family were people from the three big rivers, namely the Burdekin, Bowen and Fitzroy Rivers, and from the Ranges of the Great Divide east towards the coast, including the areas of the Seventy Mile, the Leichardt, the Clark, the Denham and the Eungala ranges (the Leichardt Range is in the west of the application area; the Clarke Range is in the north west of the application area) – Connection Report at [296];
- Tindale in his research during the 1930s and 1970s recorded a group he identified as *Biria* inhabiting the approximate area of the application – Connection Report at [299];
- Tennant-Kelly in research in 1935 placed the *Birigaba* tribe inland from Bowen in the same area as that used by Tindale for the *Biria* group – Connection Report at [303].

My consideration – s 190B(5)(a)

[130] The requirement at s 190B(5)(a) is that I am satisfied that the factual basis material before me is sufficient to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the land and waters covered by the application. The information before me regarding an association of the apical ancestors with reference to whom the native title claim group is defined is, in my view, of a detailed nature. It provides facts regarding their dates and places of birth, the names, birth dates and birth places of their children, and the areas with which they are associated according to historical records made during the course of those ancestors' lives.

[131] Having turned my mind to this type of material provided in relation to each of the named apical ancestors, I have formed the view that all of those persons were associated with some part of the application area for a predominant part of their lives. For example, Jinnie Tiers is stated as being associated with Byerwen Station (within the application area); Kuburu is stated as being associated with the Bowen River (within the application area); Rosie Schilling is stated as being

associated with Bowen (outside but adjacent to the eastern boundary of the application area), but having also spent time at Ravenswood (within the application area); Peggy Barker is stated as being associated with Strathmore Station (within the application area); Tommy Dodd and Tommy Morgan are stated as being associated with places including Strathmore Station, Collinsville and Bowen River (all within the application area), and; the mother of Lizzie Limburner is stated as being associated with Stations that may have included Byerwen, Birralee and Emu Plains Station (all within the application area). In this way, I am satisfied that there was a physical association between these persons and the application area.

[132] I note that the Supplementary Report does not provide this type of information pertaining to apical ancestor John Smallwood. In my view, however, in considering the rules of group membership set out within the material, which primarily focus on bloodline descent from an apical ancestor who was born in, or occupied, the application area around the time of settlement (see Connection Report at [28]), I accept the material to assert that John Smallwood had an association with the area. There is nothing in the material before me to suggest otherwise.

[133] As held by Dowsett J in *Gudjala 2007*, the requirement is that the factual basis support an assertion of an association of the group's predecessors with the area back to the time of sovereignty. The Supplementary Report provides that first European contact in the area took place in 1859. My understanding of the facts within the material is that settlement proceeded to occur over the following decade or so. Consequently, I have inferred the material to assert that settlement occurred during the 1870s and 1880s.

[134] In providing information about the lives of each of the named Birriah apical ancestors, the Supplementary Report concludes that:

- Jinnie Tiers was born in approximately 1860, which means her parents were persons who would have been occupying the area at the time of first contact – at [127];
- Kuburu was in the application area in the vicinity of the Bowen River near to or at the time of first contact – at [164];
- the mother of Rosie Schilling was in the application area around the time of first contact – at [255];
- it is reasonable to assume that the parents of the mother of Peggy Barker were present in the application area at the time of first contact – at [294];
- the parents of Tommy Dodd and Tommy Morgan were probably members of the pre-sovereignty land holding group living on or in the vicinity of the application area – at [350];
- the mother of Lizzie Limburner was living on or in the vicinity of the application area from the 1860s onwards – at [370].

[135] In light of this information before me, I consider that the factual basis is sufficient to support an assertion that the predecessors of the Birriah People native title claim group had an association with the land and waters of the application area at the time of settlement in the area.

[136] The Supplementary Report also includes information about the descendants of the apical ancestors, including genealogies for each of the ancestors that include persons comprising the three or four generations succeeding the apical ancestor. Further information such as the names, birth places, places of passing and/or burial of the apical ancestor's children and grandchildren is provided, and as above, the majority of those places referred to are within, or in the vicinity of, the application area. In this way, I consider that I have before me information asserting an association of the descendants of the apical ancestors (that is, the predecessors of the native title claim group) throughout the period from settlement to the mid-1900s. From the material in the affidavits at Attachment F, I understand that certain members of the native title claim group were born around this time, which, in my view, allows me to be satisfied that the factual basis supports an association of the predecessors of the group with the area from settlement until the present generation.

[137] The question that I must now consider, therefore, is whether the factual basis is sufficient to support an association of the group presently with the application area. As above, Schedule F of the application contains thirteen affidavits sworn by members of the native title claim group. In my view, those affidavits contain detailed information that speaks to a present association of certain members of the group and their families with the application area. While the requirement is that the group *as a whole* has an association with the area presently, I have taken the statements made by members of the group in their affidavits as examples of the wider group's association with the area. I also consider that an association of the whole group is indicated through claimants' statements in the way they speak of spending time on the area with other Birriah People families beyond their own.

[138] For example, one claimant speaks of the strong relationship he and his family, and members of another Birriah family, have with the owner of Strathmore Station (located in the central part of the application area), through the long-term physical connection he and his predecessors have had with that part of the application area:

> The Birriah people have and always will have a close connection to Strathmore Station. My family still to this day have a very close relationship with the Cunningham family, who still own the station. It is known to them that the Birriah have a right of place there on Strathmore Station and it will always be that way regardless of what any white man says. The Cunninghams are like family to the Walshs and Millers. To this day we still visit there. It is our heritage. It is where we come from – affidavit of *[Claimant – name deleted]* of 24 September 2012 at [49].

[139] Through the statements made in the affidavits, it is clear that members of the native title claim group have a solid understanding of the boundaries of their traditional country, and similarly, know the natural features that mark the boundaries of the application area. For example, one claimant states that:

> Birriah country is the Bowen River valley, the Bogie River valley, and the Ravenswood area that has the Burdekin River along its western edge and a chain of mountains along the east. The boundaries of country are the hills that divide the flow of water – affidavit of *[Claimant – name deleted]* of 24 September 2012 at [10].

[140] It is clear, in my view, that members of the claim group continue to spend time on the application area today. One particular reason claimants visit the area, as stated within the affidavits, is to undertake cultural heritage work on their traditional country at regular intervals. For example one claimant states that:

> Since 1998 I have regularly visited Birriah country for the purpose of undertaking cultural heritage work. I have visited Birriah country perhaps every month, or at the least every two to three months, since 1998. I would say that over the years I have walked from top to bottom, from one end to the other, of Birriah country – affidavit of *[Claimant – name deleted]* of 24 September 2012 at [25].

[141] In my view, it is also clear from statements made by members of the group that the association they have with the land and waters of the application area is a spiritual as well as physical one. The following statement where a claimant shares their knowledge of sacred and significant sites on the application area and sites where ceremony once took place I consider to be an example of this type of material:

> The main types of sites are art sites, ceremonial sites (such as totem sites) and geographical features (mountains and waterfalls) associated with the *moondaghara* (the creator serpent) and *Gidgaree* ("the white cockatoo"). There are caves rock/overhangs/ledges and walls containing art, at places like Brialba, Strathalbyn, Emu Creek, Mount Leslie; Mt Herbert, Blue Valley, Mt Devlin, Pelican Creek, Eastern Creek, Cunningham's Gap, Pelican creek and many other places all through the Leichardt range. Whenever I am on Birriah country and nearby any of these sites, I take the opportunity to visit them – affidavit of *[Claimant – name deleted]* of June 2013 at [15].

[142] And another claimant states that:

> The spirits of our Elders linger within us and all around us. Whenever we visit country the hairs on the back of my neck stand when I go to our sacred sites. The spiritual connection to country is still strong. The initiation grounds where the rituals took place at Urannah Station, as it was outlawed on Strathmore Station, is still there and I can feel the presence of our people there in the spirit whenever I am there. The camping grounds where all the daily activities such as the cooking places, tool making, grinding stones and where the women ground the grass seeds for not far from the main homestead on Strathmore Station are still there – affidavit of *[Claimant – name deleted]* of 24 September 2012 at [56].

[143] The physical association of members of the group with the application area is seen in the numerous statements speaking of time those persons have spent on the area, visiting various locations. Claimants' statements show that many of them have throughout their lives lived and worked on their traditional country. For example, one claimant states that:

> The reason I know where the Birriah boundaries are located is I was born on and have lived most of my life on Birriah country. It is also because I have worked as a stockman throughout Birriah country and I was told by old Birriah stockmen who I worked with that it was Birriah country. My brothers (*[names deleted]*) also worked on these properties as well. Some of the Birriah men I worked with in those days were: *[names deleted]* and his sons (*[names deleted]*). I worked with these men on stations around Collinsville and other places either nearby or in Birriah country such as: Blenheim, Turrawulla, Hazlewood, Exe Creek, Stockton, Exmoor, Emu Plains, Byerwen, Stoney Creek, Urannah, Bungobine, Yacamunda, Scartwater, Birralee, Strathmore, Havilah, Cerito, Weetabalah, Desmond and Briaba. Many of these properties are within the Bowen River Valley. I have travelled from the head of the Bowen River to its mouth. Most of that country is Birriah – affidavit of *[Claimant – name deleted]* of 27 March 2013 at [8].

[144] Statements by claimants also indicate that maintaining a physical association with their traditional country, and maintaining an association of their children with their traditional country, is of great importance to them. For example, one claimant explains the way she continues to take her family out on country in the following way:

> … Although it is harder than it used to be to travel through our country, my family and I have regularly camped, fished and hunted at places up and down the Burdekin and Bogie Rivers and sometimes went down to the Bowen River too, especially around Collinsville. Strathmore and Emu Plains and other places where my parents and my father's parents lived and worked are important places for me and my extended family. About twenty years ago, I felt a strong urge to go back to my ancestor's country at Strathmore. I also felt that my oldest son *[name deleted]* should go back there as well. So, we drove up there and spent some time looking at the old station where my father and his father lived – affidavit of *[Claimant – name deleted]* of 19 December 2013 at [38].

[145] And another claimant speaks of the comfort he has from knowing his children continue to be physically connected to the area, through working at mines and undertaking cultural heritage work within the application area:

> My wife and I have six children, three boys and three girls. They all identify as Birriah and so do my grandchildren too. Just like my Dad taught me, I make sure my children and grandchildren know where they come from. I took my oldest son to country soon after he was old enough, not long after the claim was filed. I also took him out with me onto country when I was on a trip with my nephew *[name deleted]* where we stayed at Ravenswood overnight. It gives me a lot of satisfaction to know that some of my children now work on country. My eldest son works at the Sonoma mine, south of Collinsville and my youngest works at the Mt Carlton mine. I also took my eldest daughter to Ravenswood about five years ago. Not long ago, I also took five of my grandchildren with me on a cultural heritage walk I was doing. It is important for them to get to know the country and for the country and the ancestors to get to know them – affidavit of *[Claimant – name deleted]* of 18 March 2014 at [37].

[146] I note that at s 190B(5)(a), I must be satisfied that the factual basis is sufficient to support an association with the entire area claimed. In this regard, I understand that the factual basis must be

more than broad statements that lack geographical particularity to the land and waters of the application area. Based on the information contained in the statements within the affidavits, including those excerpted above, and from the information contained in the Supplementary Report and in the Connection Report, I have formed the view that the information is sufficient to support an assertion of an association with the entirety of the application area. I consider that the facts before me are of a detailed nature, and include numerous references to locations that are within the application area, and in areas adjacent to the application area. It is clear that Birriah families have spent, and continue to spend, time within the area, and travel across the area to visit sites of importance and/or family members who continue to live within or in the vicinity of the application area. In this way, I am satisfied that the factual basis is sufficient to support an association of the members of the group and their predecessors with the whole of the application area.

[147] In light of this conclusion, and in light of my view above that the factual basis is sufficient to support an assertion of an association of the predecessors of the group with the area over the period since settlement, I have formed the view that I am satisfied that the factual basis is sufficient to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the application area.

[148] The condition at s 190B(5)(a) is met.

Reasons for s 190B(5)(b)

[149] The requirement at s 190B(5)(b) is that I am satisfied that the factual basis is sufficient to support an assertion that there exist 'traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title'. Noting the focus of the assertion on the claimed native title, it is my view that the task at s 190B(5)(b) should be undertaken with regards to the definition of 'native title rights and interests' at s 223(1).

[150] Pursuant to subsection (a) of that definition, native title rights and interests are those communal, group or individual rights and interests in relation to land and waters where 'the rights and interests are possessed under the traditional laws acknowledged and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders'. In light of the similarities between this definition and the terms of s 190B(5)(b), I consider it appropriate that I have regard to the leading authority in relation to s 223(1), namely the decision of the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (*Yorta Yorta*).

[151] The High Court held that not only were 'traditional laws and customs' those that had been passed down from generation to generation of a society, by word of mouth and/or common practice, but there were two further crucial elements that attached to the definition of that term – *Yorta Yorta* at [46]. Firstly, the High Court held that the origins of the content of the law or custom concerned must be found in the normative rules of the relevant Aboriginal pre-sovereignty

society, and secondly, the normative system under which those rights and interests were possessed must have continued substantially uninterrupted since sovereignty – at [46]–[47], [79] and [86]–[87].

[152] In *Gudjala 2007*, again in an aspect of the decision not criticised on appeal, Dowsett J approved this approach to the task at s 190B(5)(b). His Honour summarised the principles from *Yorta Yorta* and then sought to apply them to the factual basis material before him. Dowsett J again revisited the requirement in *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*). His Honour's comments from each of those decisions suggest the following types of information may be required to satisfy the condition at s 190B(5)(b):

- information addressing how the laws and customs currently observed have their source in a pre-sovereignty society and have been observed since that time by a continuing society – *Gudjala 2007* at [63];
- information that speaks to the existence at European settlement of a society of people living according to a system of identifiable laws and customs, and that identifies the persons comprising that society who acknowledged and observed the laws and customs – *Gudjala 2007* at [65] and [81]; *Gudjala 2009* at [37] and [52];
- an explanation of how current laws and customs can be said to be traditional (that is, laws and customs derived from those of a pre-sovereignty society), and more than an assertion that those laws and customs are traditional – *Gudjala 2009* at [52] and [55];
- an explanation of the link between the claim group described in the application and the area covered by the application, which may involve identifying some link between the apical ancestors named in the application and any society existing at sovereignty, even if the link arose at a later stage – *Gudjala 2007* at [66] and [81];
- information addressing the claim group's acknowledgement and observance of the asserted traditional laws and customs pertaining to the claim area – *Gudjala 2009* at [74].

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

[153] I have summarised below the information contained in the application before me that speaks to the assertion at s 190B(5)(b):

- the first exploration of the area occurred in 1859 when Dalrymple rode through the area for the purposes of identifying suitable pastoral land – Supplementary Report at [353];
- apical ancestor Jinnie Tiers was born in the vicinity of the application area circa 1860, and consequently her parents would have been living in the area at the time of first contact - Supplementary Report at [108] and [127];
- the son of apical ancestor Kuburu, Billy Lightning was born in the Bowen River area sometime between 1876 and 1889, therefore Kuburu himself would have been occupying that region at the time first contact occurred - Supplementary Report at [147] and [164];
- the daughter of apical ancestor Rosie Schilling was born in 1886, therefore it is likely Rosie's mother, Nellie, was living in the area around the time of first contact in the area - Supplementary Report at [245] and [255];

- apical ancestor Sambo Callaghan was born in Bowen in the vicinity of the application area in approximately 1885, therefore it is likely his mother, Maggie, was living in the area at the time of first contact - Supplementary Report at p 46 and [294];
- apical ancestor Tommy Dodd was born in approximately 1860 in, or in the vicinity of, the application area, making it likely that his parents were living in the area at the time of first contact - Supplementary Report at p 57 and [350];
- apical ancestor Tommy Morgan died in 1913 at Barambah (in the vicinity of the application area), which makes it likely that he was living in the region around the time of first contact - Supplementary Report at p 57 and [350];
- Lizzie Limburner was born in the vicinity of the application area in 1880, and it is therefore likely that her mother, one of the Birriah apical ancestors, was present in the area around the time of first contact - Supplementary Report at [352] and [370];
- apical ancestor Peggy Barker was born in approximately 1885 and was associated with Strathmore Station (within the application area) – this makes it likely that her mother, Maggie Callaghan, was occupying the application area around the time of first contact - Supplementary Report at p 46 and [257] and [294];
- there is limited anthropological or ethnographic evidence from the time of first contact addressing a 'Birri Gubba' society – Connection Report at [290] and [343];
- Tindale identified a *Biri* or *Biria* group in the area covered by the application, and recorded *Biri Kaba* as an alternative name for the group - Connection Report at [293];
- Tennant-Kelly in 1935 also identified a *Birrigaba* tribe, inland from Bowen covering approximately the same area identified by Tindale - Connection Report at [303];
- the meanings attributed to the term *Birri gubba* indicate that those to whom the term applies are regarded as 'one people' - Connection Report at [294];
- claimants express their understanding that *Birri* means 'people of the rivers', and that the application area is sourced by the two biggest rivers in Queensland, the Fitzroy and the Burdekin - Connection Report at [294];
- oral evidence from claimants further suggests the Birri Gabba are the people from the three big rivers, namely the Burdekin, Bowen and Fitzroy Rivers - Connection Report at [296];
- through oral testimony from claim group members, passed down to them by their predecessors, Birri Gubba is understood as an over-arching concept, described as a 'tribal nation', which is comprised of smaller, more localised entities or clan groups - Connection Report at [301] and [304];
- Birri Gubba represents a singular linguistic and cultural identity, however in past periods in history, and before Tindale's research in the area in the 1930s and 1970s, individuals adopted specific geographic terms to refer to localised groups within this single 'nation' – for example, the "Burdekin River mob", the "Strathmore mob", the "Bowen families" - Connection Report at [299];
- informants of certain anthropologists working in the area at various points since contact can be identified as the descendants of Birriah apical ancestors - Connection Report at [308];
- Sutton (early 1970s) identified two dialects of Biri language, one on the coast and one inland - Connection Report at [310];
- various other linguists published accounts of the Birri Gubba language, including earlier historical accounts dated as early as 1889 - Connection Report at [310];

- vocabulary take from 11 groups of the Burdekin River in the mid 1880s bears a strong resemblance to the language of the Birriah people - Connection Report at [311] and [312];
- Sutton's research also referred to a camp of Birigaba native police in early settlement times, on the upper Burdekin River - Connection Report at [312];
- despite the limited anthropological and ethnographic evidence addressing a Birri Gubba society in early historical accounts, it can be concluded that such a society existed due to the following reasons: (i) historic literature from around the time of first settlement noted many language similarities among the groups occupying the lands of the lower Burdekin River and extending inland to include the headwaters of the Burdekin and Bowen Rivers; (ii) while historic literature only records some of the aspects of the culture of these groups, those aspects that are addressed in detail indicate that laws and customs were shared with other groups in the region; (iii) literature of the 1890s refers to a shared system of group naming across a wide region from Proserpine near the coast, inland to Charters Towers; (iv) records from the twentieth century indicate a regional system of social classification (including sections, totem usage, kinship systems and common language); (v) a connection report prepared in relation to another Birri Gubba subgroup provides support for common rules surrounding group membership between Birri Gubba subgroups - Connection Report at [343] to [348];
- four elements have been observed as binding people of the Birri Gubba society together: (i) the acknowledgment of a common Biri language; (ii) knowledge of the geographical limits of the spread of that language and of the people who speak it; (iii) identification of the various clans or subgroups comprising the wider society; and (iv) self-identification as Birri Gubba people - Connection Report at [349];
- the essential laws and customs of the society today include at least language, totems, bloodlines, authority of elders, kinship - Connection Report at [350];
- it is clear, through the testimony of claimants, that some of the laws and customs associated with the Birriah group and outlined in the literature, are no longer in existence - Connection Report at [350];
- four rules of group membership were identified by an anthropologist in relation to another Birri Gubba subgroup: bloodlines, acknowledgement and observation of laws and customs, wider recognition or exclusion from the group, and adoption - Connection Report at [26];
- it is apparent that the Birriah claimants and family members place a greater emphasis on bloodlines when considering group membership - Connection Report at [26];
- membership to the Birriah group is largely determined by an individual being able to establish a genealogical connection to an apical ancestor who was born within the Birriah People claim area - Connection Report at [28];
- it is also a crucial requirement of membership that an individual acknowledges and observes the Birriah laws and customs that apply to the group – only at this point will rights and interests flow to that person - Connection Report at [31];
- claimants today are generally able to identify the particular Birriah ancestor through whom they asserted membership of the group - Connection Report at [37].

My consideration – s 190B(5)(b)

[154] The starting point when undertaking the task of the Registrar at s 190B(5)(b), is the identification of an indigenous society at the time of settlement in the area. This is on the basis that there cannot be relevant traditional laws and customs unless there was such a society defined by recognition of those laws and customs from which the traditional laws and customs are derived – *Gudjala 2007* at [65] and [66].

[155] My understanding of the information contained in the application and summarised above, is that the native title claim group assert that they are a subgroup of a wider regional society, which they identify using the term 'Birri Gubba'. It is clear from the information, however, that literature from around the time of first contact is largely unable to provide evidence of a Birri Gubba society. The Connection Report argues that notwithstanding this, the existence of the society is evidenced for a number of reasons. These reasons I have set out in my summary above and I address them further below.

[156] From the information contained in the Supplementary Report, it is my understanding that each of the Birriah People apical ancestors named in Schedule A, with reference to whom the group is described, were either born around the time of first contact (approximately 1860), or in the early settlement times of the 1880s. On this basis, it is my understanding that the apical ancestors were either part of, or born into (meaning their parents were occupying the area at first contact), the Birri Gubba society asserted within the application. In this way, I accept that the information is sufficient to support an assertion regarding a link between the apical ancestors and the relevant society occupying the area at the time of first contact.

[157] In supporting the existence of a Birri Gubba society, the Connection Report refers to similarities in language between the groups occupying the area covered by the application as recorded in historic literature around the time of first contact. The Connection Report argues that these similarities provide support for the existence of a single regional society across that area. Other information in the application, in particular the oral testimony of claim group members regarding information passed down to them by their predecessors, in my view, is consistent with, and supports this assertion. Claim group members explain the importance and centrality of language to Birri Gubba people, and the way in which language unites them. The Connection Report also refers to the linguists working within the area in early settlement times, and states that each published accounts of the Birri Gubba language.

[158] It is my view that the information before me also addresses who the persons comprising that society were. As above, from the Supplementary Report, I accept that the apical ancestors and/or their parents were such persons. In my view, the Supplementary Report provides relatively detailed genealogical information pertaining to each of the family lines for the native title claim group. I note that the application emphasises the importance of family names and bloodline connections in an individual being able to demonstrate their Birriah identity. Further, it is noted that throughout the generations since settlement, it has been an on-going practice for

Birriah individuals to be named after a predecessor, most often reusing a European name that the predecessor adopted from the owner of the pastoral property where that predecessor was born and/or worked, around early settlement times – Connection Report at [333].

[159] From this type of information, I have formed the view that the factual basis supports the existence of distinct family groups that comprise the Birriah People native title claim group, and that these family groups derive directly from the named Birriah People apical ancestors occupying the area at the time of settlement. In most cases, the Supplementary Report is able to identify the persons comprising the generation prior to, and a number of generations following, each apical ancestor. In this way, I consider the factual basis is sufficient to support an assertion regarding the identity of the persons who comprised the Birriah People subgroup of the society at settlement.

[160] The requirement at s 190B(5)(b) is that the factual basis is sufficient to support the existence of traditional laws and customs. I note that there cannot be any traditional laws and customs unless there was, at settlement, a society defined by recognition of laws and customs from which the asserted traditional laws and customs derive – *Gudjala 2007* at [66]. The Connection Report speaks to historical literature indicating shared aspects of laws and customs amongst the clans occupying the application area at the time of settlement in the area. For example, the Connection Report states that informants of Edward Curr in the 1880s described participation in larger-scale ceremonial and other activities by groups occupying a wide region including the application area, including hunting and gathering activities, practices such as tooth avulsion and body scarification and other forms of bodily decoration. The Connection Report also refers to historical literature from around settlement times that speaks to similar group naming practices across a wide region from Proserpine on the coast inland to Charters Towers, and twentieth century anthropological sources that speak to a regional social classification system, with shared totem and kinship terminologies. Further, the Connection Report speaks to common forms of group membership identified in anthropological research, as between the Birrah People and another Birri Gubba subgroup, involving the operation of cognatic descent principles and inherited rights to country through 'bloodlines' – Connection Report at [348].

[161] It is my understanding of the information contained in the application before me, that the native title claim group, as a subgroup of the Birri Gubba regional society, assert that they alone have native title rights and interests in the application area. The Connection Report provides various information, including statements from claimants, regarding the geographically-defined subgroups that comprise the wider Birri Gubba society. It is also my understanding of the information before me, that it is primarily this fact that distinguishes the Birriah People from the Birri Gubba regional society, and that otherwise, the laws and customs acknowledged and observed by the Birriah People are largely shared with the rest of the Birri Gubba society. I note that the report states that recognition of the various clans within the Birri Gubba society is a key

element in the system of laws and customs that bind the people comprising the society. As discussed above, the information contained in the application includes a number of references to historical sources at the time of first contact and settlement that noted the similarities in customs and practices, including language, between the clans occupying the wider region of the Birri Gubba society. In light of the material before me, therefore, I am satisfied that the factual basis is sufficient to support an assertion of a Birri Gubba society, of whom the apical ancestors of the native title claim group were members, and who occupied the specific lands and waters of the application area at settlement.

[162] I now turn to consider whether the laws and customs acknowledged and observed by the group today can be said to be traditional, that is, laws and customs derived from those acknowledged and observed by the society at settlement, having a normative content – *Gudjala 2007* at [66]; *Gudjala 2009* at [52] and [55]. The Connection Report states that 'the essential laws and customs of this society […] include at least language, totems, bloodlines, elders and kinship'. As set out in my summary of the factual basis material above, I note that all of these elements are discussed within the material as comprising part of the laws and customs acknowledged and observed by the Birri Gubba society at first contact, or settlement.

[163] A large part of the information within the application comprises statements by claim group members regarding their knowledge of Birriah laws and customs. In almost all of these statements, claimants explain the way in which this information was passed down to them by their predecessors, such that I accept the material to assert that this method of passing on knowledge is a traditional practice of teaching pursuant to those laws and customs. For example, one claimant states:

> My father told me that my Bulloo and my Bulloo's uncle Sambo Callaghan (who was also a full initiated customary lawman) had passed onto him his authority to speak for his country and for the Birri people. They had done this by taking my father out onto country, teaching him about Birri law and custom, of their history about our totem and the stories and dreaming. My Bulloo and Sambo Callaghan passed onto my father the authority that had been vested in them as lawman [*sic*] and the knowledge and understanding they had. The fact that this knowledge and authority was passed onto my father was something special and of significance because it was something that was in addition to the authority he had by birthright as a lawman… - Connection Report at [338].

[164] I note that Sambo Callaghan is the son of Maggie Callaghan, one of the Birriah apical ancestors, and that this statement suggests, therefore, that there are only four or five generations separating claimants today from the apical ancestors comprising the society at settlement. It is also my view that this statement (along with others contained in the application) speaks to the elevated position of elders within the Birriah People native title claim group, and suggests that this aspect of Birriah laws and customs is one that has been passed down through the generations, including back to the time approximately associated with settlement in the area

(Sambo Callaghan is stated as being born in 1885). Another such statement by a claimant regarding laws and customs about elders is as follows:

> It is not only the boss of the family who is an elder. My younger brother Algon ("Dermy") is also an elder because he has special knowledge of Birriah Country that was passed to him from our Nanna and Bulloo Eddie but his status as an elder doesn't make him the boss of our family but only the boss of the things and places he was told to take care of. Whether a person is an elder because they are the boss of a family or because they hold special knowledge, it is our way that our children must respect their elders and follow our traditional ways – affidavit of *[Claimant – name deleted]* at [5].

[165] In this way, I understand that the position of elders and the requirement for claimants to respect that authority and those specific roles, is an aspect of Birriah traditional laws and customs, that has been passed down to them by their predecessors.

[166] Another key aspect of Birriah traditional laws and customs asserted within the application is language. Regarding the importance of language in uniting the Birri Gubba people, one claimant states that:

> The Great Dividing Range, my father told me, on the coastal side, it's *Birr gubba* and on the inland side is the *Birralee*. Birralee and Birri Gubba they speak pretty much the same language only some of the language there is spoken back to front and that's what the difference is – Connection Report at [290].

[167] And another claimant states that:

> Our father's side we are Birri Gubba. It's a tribal nation with different clan groups. It includes Bindal, Juru, Jangga, Wiri, Biri, Gia, Ngaro, Yilba, and four other clan groups… I was told by our elders that our language is Biri… our mob is Birri Gubba – Connection Report at [304].

[168] In light of the information set out above, therefore, I have formed the view that the factual basis is sufficient to support an assertion that pursuant to Birriah laws and customs, there is a clear pattern of passing down knowledge to younger generations in accordance with particular rules and practices. I have also formed the view that the factual basis is sufficient to support an assertion that the elements of the laws and customs that were recorded as being acknowledged and observed by the groups occupying the application area at the time of settlement, remain present in the laws and customs that are acknowledged and observed by the members of the native title claim group in relation to the land and waters of the application area today. Claimants' statements indicate that these aspects of Birriah laws and customs were passed down to them by their elders, in accordance with traditional patterns of teaching.

[169] The material states that some of those laws and customs previously associated with the Birriah People are no longer acknowledged and observed by the group – Connection Report at [350]. It does, however identify those laws and customs which continue to be central to the

society, and which have been passed down through the generations from the Birri Gubba society occupying the area at settlement.

[170] I have, therefore, formed the view that the factual basis is sufficient to support an assertion that the laws and customs acknowledged by the native title claim group are rooted in the laws and customs of the relevant Birri Gubba society at settlement, that is, that they are traditional laws and customs.

[171] I am satisfied that the factual basis is sufficient to support an assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests.

[172] The requirement at s 190B(5)(b) is satisfied.

Reasons for s 190B(5)(c)

[173] At section 190B(5)(c) I am required to be satisfied that the factual basis is sufficient to support an assertion that 'the native title claim group have continued to hold the native title in accordance with those traditional laws and customs'. The phrase 'those laws and customs', in my view, is a direct reference to the laws and customs that answer the description in s 190B(5)(b) – *Martin* at [29]. In this way, where the factual basis is not sufficient to support the assertion at s 190B(5)(b), I do not consider that it can be found sufficient to support the assertion at s 190B(5)(c).

[174] My understanding of the assertion at s 190B(5)(c) is that it is referable to the second element of the meaning attributed to the term 'traditional laws and customs' by the High Court in *Yorta Yorta*. That is, that the acknowledgement and observance of the laws and customs of the relevant pre-sovereignty society by the native title claim group has continued in a substantially uninterrupted way – *Yorta Yorta* at [47] and [87].

[175] In *Gudjala 2007*, Dowsett J's comments suggest the following types of information may be required to satisfy this condition:

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

[176] I have set out above the reasons for which I am satisfied that the factual basis is sufficient to support the existence of a Birri Gubba society, at settlement in the area, of whom the apical ancestors for the native title claim group were members, being a society bound by the common observance of laws and customs of a normative character. The requirement at s 190B(5)(c) is that I must be satisfied that the factual basis is also sufficient to support an assertion regarding a

continuity of the acknowledgement and observance of those laws and customs by the group over the period back to sovereignty, or at least European settlement.

[177] As discussed in my reasons above at s 190B(5)(b), the factual basis material addresses in some detail the way in which knowledge regarding the laws and customs of the group have been passed down to the members of the native title claim group today by their predecessors, and that this is a traditional method of teaching. A statement by a claimant reproduced in my reasons above at [163], in my view, indicates that this method of teaching has continued since at least later settlement times, noting that Sambo Callaghan is the son of apical ancestor Maggie Callaghan and was born in the area in approximately 1885.

[178] I explain in my reasons at s 190B(5)(b) above, my view that the factual basis supports an assertion that there are roughly four or five generations separating the members of the claim group today and the apical ancestors named in Schedule A of the application. Statements made by claimants throughout the application, in my view, indicate that they have a solid understanding of the identity of the persons comprising those intervening generations, and the way in which those persons acknowledged and observed laws and customs, including the practice of passing on knowledge about laws and customs to younger Birriah people. For example, one claimant states that:

> I call Eddie Barker "Bulloo", meaning grandfather or grandchild. I call him "Bulloo" and he calls me "Bulloo". Out of respect I also call other old men Bulloo. I knew Bullo Eddie for many years. He died at Palm Island in 1984. He was a great Birriah elder and he taught my father, my uncles, and my older siblings and cousins a lot about our culture – affidavit of *[Claimant – name deleted]*, dated 24 September 2012 at [8].

[179] All of the claimants who provide statements in support of the application refer to their understanding of how Birriah laws and customs have been passed down to them by their predecessors, including how they were passed down to their parents and grandparents, and who the persons were who had the requisite authority to take on the role of elder and teacher.

[180] As discussed in my reasons above at s 190B(5)(b), the application addresses the way in which language plays a central role in the system of laws and customs acknowledged and observed by the claim group members. In particular, the Connection Report provides that 'Birri Gubba is recognised as the language spoken by claimant families' forebears and continues today to be spoken, for example, when "speaking to country"' – at [430]. The Connection Report also includes a statement by a claimant that: 'I have spoken and can speak some of the Birri language. I speak my language when I am with my elders for family meetings or when I attend traditional ceremonies' – at [430]. In my view, the information pertaining to this retention of Birri language indicates that laws and customs have been acknowledged and observed continually, or without

substantial interruption, since first contact and settlement times, when the application provides that that language was first recorded.

[181] In light of this material before me, and the discussion above, it is my view that the factual basis is sufficient in supporting an assertion that the native title claim group have continued to hold the native title in accordance with their traditional laws and customs.

[182] The requirement at s 190B(5)(c) is satisfied.

Conclusion

[183] 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.

[184] The wording of s 190B(6) makes it clear that there is no requirement that I consider that all of the individual rights and interests claimed are, prima facie, established, in order for the condition to be met – see *Doepel* at [16].

[185] In undertaking the task at s 190B(6), it is my view that an understanding of the meaning to be applied to the term 'prima facie' is central. In *Doepel*, the court approved the approach taken by the High Court in *North Ganalanja Aboriginal Corporation v Queensland* [1996] HCA 2, where it was held that the ordinary meaning of the phrase was to be adopted – *Doepel* at [134]. That ordinary meaning is 'at first sight; on the face of it; as appears at first sight without investigation'. In *Doepel*, in relation to the task at s 190B(6), Mansfield J further held that 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis' – at [135].

[186] In considering each of the rights and interests claimed, it is my view that for the purposes of s 190B(6) they must, prima facie, be shown to be 'native title rights and interests' as defined in s 223(1). That definition provides that:

> (1) The expression ***native title*** or ***native title rights and interests*** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those law and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

[187] In light of this definition, it is my view that to satisfy the requirement at s 190B(6), those rights and interests claimed must prima facie exist under traditional law and custom, be rights and interests in relation to land or waters, and, be rights and interests that have not been extinguished over the whole of the application area. Noting the requirement that rights and interests must, prima facie, exist under traditional law and custom, it is my view that where the application is unable to satisfy the condition at s 190B(5)(b), it will similarly be unable to satisfy the condition at s 190B(6). That is, where there is not a sufficient factual basis to support an assertion that there exist traditional laws acknowledged and traditional customs observed by the native title claim group giving rise to the claimed native title rights and interests, I cannot consider that those rights and interests are, prima facie, established.

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

Consideration

Right to exclusive possession

[189] There are various case law authorities on the meaning and substance of a native title right to 'possession, occupation, use and enjoyment as against the whole world'. In *Western Australia v Ward* [2002] HCA 28 (*Ward HC*), the High Court held that:

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

[190] A similar approach was taken by the Federal Court in *Sampi v State of Western Australia* [2005] FCA 777 (*Sampi*) where it was held that:

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

[191] The content of a native title right to exclusive possession was again the subject of consideration in *Griffiths v Northern Territory* [2007] FCAFC 178 (*Griffiths*). The Full Court of the Federal Court held that the question of exclusivity depends upon a consideration of what the evidence discloses about the content of the right under the traditional laws and customs of the

group, rather than a consideration of common law concepts of proprietary rights – at [71]. Further, the Full Court held that 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' – at [127]. Comments from the Full Court suggest that what is required is that the applicant show how, under their traditional laws and customs, they are able to 'effectively exclude from their country people not of their community' – at [127].

[192] Having considered the material in the application before me, it is my view that it does speak to a right of the members of the native title claim group to exclusive possession of the application area. Information within the material speaks both to a right of Birriah people to speak for their country, and to a right to be asked permission by other non-Birriah people to access traditional Birriah country. Examples of this type of information include the following statement by a member of the claim group:

> Birriah Elders have the final say over whether other people can come onto our land. My father and older brothers taught me that. In my family, Edward Walsh senior would be the person to make decisions about those places, although he would not be able to speak for our women's places. Dad and my brothers told me that only Birriah men could go to our bora rings and our women the only ones who could go to their places such as the one at Strathmore Station – affidavit of *[Claimant – name deleted]* of 1 May 2013 at [11].

[193] And also the following statement:

> My grandparents and parents told me that Birriah people belong to Birriah country because it is the country of our ancestors. We have rights in that country that other murris do not have. Birriah people have the rights to access and use Birriah country and all of the things in it. For example, being descended from Birriah ancestors allows us the right to do things on Birriah country such as camping, visiting important places, taking bush tucker and medicine, taking water and doing our traditional business. Other people don't have that right and must only come into Birriah country with our permission. Under Birriah laws and customs, other people should consult us first and get our permission before coming in and taking anything. We get upset and offended if we find out that someone has come into Birriah country without asking us first. These are the ways of our old people and they should be followed out of respect to them – affidavit of *[Claimant – name deleted]* at [5].

[194] And also:

> I was taught by Nanna Woodja, Buloo Eddie and other Birriah people that we are the custodians of our ancestor's country and that other people must get our permission to access our country. The Birriah people who have the authority to make such decisions are Elders. Some Elders, like Buloo Eddie, and now Edward Walsh, may have particular knowledge about the places in question and Birriah people would respect their authority in that case but it is our Elders who decide who can go onto Birriah country. As I have said earlier in this statement, our male and female Elders regulate

> access to our women and men's business places – affidavit of *[Claimant – name deleted]* of 20 May 2013 at [29].

[195] From these statements, I consider the factual basis to assert that the Birriah people possess a right to exclusive possession of the application area, and that their understanding of the right has been passed down to them by their elders, pursuant to traditional patterns of teaching. The material further suggests that they understand the right to be based upon the premise that the land and waters of the application area belonged to their ancestors. In this way, I accept the right to be one held pursuant to the traditional laws and customs of the group, and that it is, therefore, prima facie, established.

[196] **Conclusion:** Prima facie, established.

Right to access the application area

[197] I consider that the right to access the application area is both implied and overtly expressed throughout the factual basis material for me. The following statements made by members of the claim group are, in my view, examples of this type of material:

> Birriah people belong to Birriah country. We call it *nia nanhi* – "my country". We have rights in that country that other people do not have. Birriah people have the rights to access and use Birriah country and all of its natural resources. Other people can only come into Birriah country and use it with our permission. They should consult us first and get our permission before and we would be upset and offended if we found out that someone has come into Birriah country without asking us first. Being Birriah allows us to do things on Birriah country as of right, such as camping, visiting important places, taking bush tucker and medicine, taking water and conduct traditional business such as ceremonies – affidavit of *[Claimant – name deleted]* at [13].

[198] And also:

> Following the removal of our people from Strathmore Station in 1914/15, in the heart of Birriah country, to Yarrabah, where many of our people were taken, many attempted to return by absconding to Strathmore. My Great Grandmother Peggy, including my Grandmother Annie who was only five years old at the time, were arrested several times and taken to Cairns jail for trying to flee Yarrabah – affidavit of *[Claimant – name deleted]* of 24 September 2012 at [27].

[199] From these statements, I consider that the claimants understand themselves as possessing a right to access Birriah country, purely on the basis that they are Birriah People, and, in accordance with the laws and customs passed down to them by their predecessors, they have rights and interests in the application area that no other group holds. Similarly, even where government policies have resulted in the forced removal of Birriah people from their land, they have continued to seek to exercise the right.

[200] I consider, therefore, that a right to access the application area is, prima facie, established.

[201] **Conclusion:** Prima facie, established.

Right to camp on the application area

[202] There is, in my view, considerable information before me that speaks to a right of the native title claim group to camp on the application area. Examples of that type of information include the following statements made by claimants:

> Granny Lorna also took me to other places in Birriah country where a lot of Birriah and other Birri Gubba used to camp, such as Strathmore. She told me that in the days when Strathmore was a much bigger station, there was a big camp there and many Birriah people lived and worked there. I also went with Granny Lorna and my parents to other big camps outside of Birriah country at Mt Coolon and Glen Eva. At these big camps, I learnt about Birriah culture by listening to stories about spirits, totem animals and many other things – affidavit of *[Claimant – name deleted]* at [18].

[203] And also:

> The spirits of our Elders linger within us and all around us. Whenever we visit country the hairs on the back of my neck stand when I go to our sacred sites. The spiritual connection to country is still strong. The initiation grounds where the rituals took place at Urannah Station, as it was outlawed on Strathmore Station is still there and I can feel the presence of our people there in the spirit whenever I am there. The camping grounds where all the daily activities such as the cooking places, tool making, grinding stones where the women ground the grass seeds not far from the main homestead on Strathmore Station are still there – affidavit of *[Claimant – name deleted]* of 24 September 2012 at [56].

[204] From that information, it is my understanding that claimants today assert this right on the basis that it is one that was possessed by, and habitually exercised by, their predecessors who inhabited the application area including back to the time of settlement. I understand the material to assert, therefore, that it is a right held pursuant to the traditional laws and customs of the Birriah People that have been handed down through each generation since the time of the Birriah apical ancestors.

[205] Consequently, I consider that the right is, prima facie, established.

[206] **Conclusion:** Prima facie, established.

Right to erect shelters on the application area

[207] Having considered that the right to camp is, prima facie, established, in my view, it is reasonable to infer that a right to erect shelters is also asserted by the material, and can be prima facie established. I note that the statements made by claimants suggest that long periods of time were spent at the camps on pastoral stations, and I accept, therefore, that shelters would have been necessary to protect the Birriah predecessors and their families from the elements and that these predecessors are likely to have erected such structures.

[208] In addition to this, there is the following statement by a claim group member regarding how he was taught by his predecessors to set up camp in the proper way, and how this right was exercised:

> Choosing the right place and setting up your camp properly were things that I was also taught by father [*sic*], older siblings and Uncles/Aunts when I was a child and my family was out camping. We always made camp in shaded, high points that were close to water. My father explained that this was to make sure that we were not washed away if a big flood came from upstream. He also said that in the saltwater country, it was important to make camp in places where the crocodiles cannot reach. Another thing we were taught to do was to look up and see if there were any loose branches in the trees we made our camps under. If there were, we knocked them down so they would not fall on us if it became windy. When making camp, my family often cut a small tree for a pole to string our tarps onto or otherwise strung some rope between two trees to hang the tarp over – affidavit of *[Claimant – name deleted]* at [17].

[209] On the basis of this material, and my view above regarding the right to camp being prima facie established, I consider that the right to erect shelters is, prima facie, established.

[210] **Conclusion:** Prima facie, established.

Right to live on the application area

[211] From the material before me, I consider that it is clear that both members of the claim group today, and their predecessors, including at settlement, have lived considerable parts of their lives on the application area. The following statements, in my view, are examples of this type of material:

> Although I was born at Mackay, I have lived most of my life on Birriah country. My father and brothers (*[names deleted]*) worked as stockman [*sic*] throughout Birriah country. In fact, both of my parents worked as stockmen and drovers on stations in Birriah country like Heidelberg, Sandalwood and Milaroo. Other members of my extended family have lived and worked on our country. For example, my oldest step-sister *[name deleted]* was a horsewoman who worked on stations in our country like Strathmore. Dad used to ride in rodeos too, at places like Bowen River, Bowen itself, Collinsville and Nebo. I worked as a housemaid at a station in Birriah country called Woodhouse when it was a much bigger station than it is now. I also did lots of different jobs in and around Collinsville. My brother *[name deleted]* is always out on country – affidavit of *[Claimant – name deleted]* at [11].

[212] And also:

> Strathmore Station near Collinsville is a very important station. It is where Woodja and her mother and grandmother were born and lived. Other Birriah People and other Birri Gubba people also lived there. The station has a museum which holds the ledger book recording the Birriah and other peoples who lived there. It also has a collection of traditional implements made by my ancestors,

including spears, woomeras and digging sticks – affidavit of *[Claimant – name deleted]* of 24 September 2012 at [38].

[213] On the basis of this type of information before me, I consider that a right to live on the application area is one held pursuant to the traditional laws and customs of the Birriah People and that it is, prima facie, established.

[214] **Conclusion:** Prima facie, established.

Right to move about the application area

[215] The following statements I consider to be examples of material addressing a right of the native title claim group to move about the application area:

> My mother and Uncle Algon and Uncle Keith, as they were the eldest at that time, often travelled from Bowen to Strathmore Station on their school holidays. When my Grandmother Annie worked there after leaving Palm Island my mother always travelled there on her school holidays. She did that until she reached the age of 12 years. Mother often spoke of how they used to walk from Strathmore Station across to Midge Point on the coast. She told me often how they would hunt and gather food along the journey which took a whole day, often looking out for moondah (snake), camping overnight along the track close to gumul (water) for drinking, then resuming early next morning arriving around 10am – affidavit of *[Claimant – name deleted]* of 24 September 2012 at [46].

[216] And also:

> Granny Lorna would travel by buggy, horseback or walk. We would often visit and stay with members of our extended family at Collinsville. For example, we would visit Granny Alice Tears, whose father Donald Tears was the brother of Charlie Tears. Later on, I lived with another brother Fred Tears who had lived at Collinsville for as long as I could remember. On these trips, Granny Lorna taught Colin and I about our country and about Birriah traditional laws and customs. She told us that she was teaching us many of the things that she had been taught by her mother when she was a young girl – affidavit of *[Claimant – name deleted]* at [8].

[217] In my view, these statements make it clear that claimants and their predecessors have always maintained an understanding of their right to move about their traditional country, on the basis of their territorial rights and interests in the area. The way they gathered natural products as they travelled across the area I consider to suggest they had an understanding that they were able to move on the land, and take from the land, in accordance with their laws and customs. From the above statements, this right appears to be one that has been passed down through the generations to the claimants today by way of traditional teaching methods, and I consider, therefore, that it is a right held pursuant to the traditional laws and customs of the group.

[218] The right to move about the application area is, prima facie, established.

[219] **Conclusion:** Prima facie, established.

Right to hold meetings on the application area

[220] There are various statements within the material that speak to claimants and their predecessors spending time on their traditional country for the purpose of meetings and gatherings. The following statements I consider to be examples of this type of material:

> The next chance I got to go to Birriah country was in the lead up to the filing of our claim. During the late eighties and early nineties, people from different tribal groups would gather at Sarina and Mackay to talk about how to get recognised as traditional owners. For example, people from Bindal, Jangga, Wiri, Yulbera, Gia, Juru and Birriah came to these meetings to talk about what they were going to do. Two of the people who were involved in organising these meetings were *[Claimant – name deleted]* who lived near our camp at Cherbourg when I was a kid and *[Claimant – name deleted]*. My cousin *[Claimant – name deleted]* lived at Mackay at the time and he was involved in these early meetings. He was often called *[Claimant – name deleted]* for short and rang me about the meetings. *[Claimant – name deleted]* said he had chosen to represent Grandfather Frank Fisher's side for our country at Clermont and that I should represent our Grandmother Rosie's Birriah country at the meetings at Sarina/Mackay. *[Claimant – name deleted]* said that he knew *[Claimant – name deleted]* from working together on the railways around Mackay and that he had told *[Claimant – name deleted]* that our family needed to be involved in any business to do with old Rosie's and Dad's country. *[Claimant – name deleted]* called me and told me where the next meeting was and I made my own way up for it. That was how I became involved in the meetings at Mackay and Sarina which led to our native title claim being filed… - affidavit of *[Claimant – name deleted]* at [28].

[221] And also:

> In my youth, lots of murris would meet at the rodeos at Collinsville, Bowen, Mount Coolon and Nebo where there was a big camp at Nebo Creek. At those camps, I would socialize with other Birriah People as well as people from other Birri Gubba groups. People would talk around the camp fire, about their country and their families. In this way, I learnt a lot about my extended family and the families which now go under the other Birri Gubba groups. At those big gatherings, the older people would often hold corroborees but the kids were not allowed to attend them. I remember some of the songs they would sing which were accompanied by clap sticks or someone keeping time on a hollow log – affidavit of *[Claimant – name deleted]* at [16].

[222] I note that the material speaks to the right as exercised by present members of the native title claim group, but also speaks to the way in which predecessors of the native title claim group exercised this right. Other statements within the material indicate that a right to hold gatherings of Birriah People on the application area is a right understood by the claimants to flow from the fact that they consider themselves the rightful inhabitants of the area, and are therefore able to undertake such activities on the area freely and without restriction.

[223] Consequently, in my view, this material is sufficient in allowing me to consider that the right to hold meetings on the application area is, prima facie, established.

[224] **Conclusion:** Prima facie, established.

Right to hunt on the application area

[225] The right of members of the native title claim group to hunt on the application area is spoken of throughout the material, including in statements made by claimants in their affidavits. The following statement is an example of this:

> During my regular visits to the Birriah country over the last 15 years I often fished at the Bowen River weir near Collinsville. We also catch clawfish (a type of yabbie). I have done this with my sons, *[name deleted]* and *[name deleted]* in particular. One time, about three years ago, *[name deleted]* killed a wallaby by running it down and getting close enough to use a rock to hit it in the head. He then prepared the meat by using fire to singe the fur off. We always light a fire there, using wood from around us, to cook food and boil the billy for tea. Then *[Son 2 - name deleted]* used a stone flake he had collected during earlier cultural heritage work to cut the skin and meat. He then cooked it in the fire – affidavit of *[Claimant – name deleted]* of 24 September 2012 at [33].

[226] Statements also indicate, in my view, that the right to hunt has been exercised and held by the predecessors of the native title claim group, pursuant to their laws and customs, and passed down to the claimants in accordance with traditional patterns of teaching. An example of such a statement is as follows:

> The teaching I received from these old Birriah men and women was mostly by sign language as it is important to be quiet when you are hunting. Otherwise the animals get startled. They would point and show me different signs or tracks. It was easiest to track on sand or gravel but I was taught to observe things even on hard, rocky country such as looking at the twigs and leaves on the ground. They taught me to interpret these sorts of things to work out which animal had gone through, how fresh its trail was, which way it was going and how fast. I was taught by them to use my *dilli* and *wale* (ears) or I was given a good hiding. Respecting your elders is part of Birriah law. Listening to them respectfully and not being cheeky is important. Break that law and you will get a hiding. The old Birriah men and women I named earlier in this statement taught me to see and hear things in Birriah country that we use to get food and medicine. The things they taught me and the places they showed me, I have never forgotten. They have stayed in my mind and come back to me when I am on Birriah country. I just need to wait and there will be a sign from the country that I will either see or hear. People who are not Birriah cannot see or hear these things because they were not born and bred there – affidavit of *[Claimant – name deleted]* at [17].

[227] In this way, I consider that the right to hunt is one that is held pursuant to the traditional laws and customs of the Birriah People, and that it is, prima facie, established.

[228] **Conclusion:** Prima facie, established.

Right to fish on the application area

[229] In the same way, the material speaks in some detail of the right to fish being exercised by both members of the claim group today, and their predecessors over the period since, and around the time of settlement. The following statements I consider to be examples of this type of material:

> During breaks in work we fish on Birriah country. We mostly do this at the Bowen River weir near Collinsville. It is my children and nephews who do the fishing. They share the catch with their elders, like me. It is our Birriah way to share, especially with elders – affidavit of *[Claimant – name deleted]* of 24 September 2012 at [34].

[230] And also:

> Throughout my life, I have used the skills I was taught as a boy to hunt and fish on Birriah country. For example when we were children before we moved to Palm Island, my Buloo Eddie, my mother, my cousins *[name deleted]* and *[name deleted]* would over many years all go fishing on the Bowen River, O'Connell River at Bloomsbury, Midge Point, Burdekin River and Bowen Rivers to name but a few. We fished in the waterways of the Moondagurah. They were our dreaming waterways. We fished using woomera and spear; we built and used some of the old fish traps in the Bowen River. Some of the old fish traps had been in the Bowen River for a very long time. I was told they had been built by our ancestors – affidavit of *[Claimant – name deleted]* of 20 May 2013 at [12].

[231] My view of this type of information within the material is that it evidences that claimants understand their right to fish on the application area as a right that exists pursuant to the group's traditional laws and customs, as passed down to them by their predecessors.

[232] I consider, therefore, that the right is, prima facie, established.

[233] **Conclusion:** Prima facie, established.

Right to have access to and use the natural water resources of the application area

[234] The following statements, in my view, are examples of the type of material before me that speaks to a right of the native title claim group to have access to and use the natural water resources of the application area:

> Granny Lorna, and later my parents, would often take me and my brothers and sisters fishing in the creeks, rivers and waterholes on Birriah country – mostly on the Bowen River, Bogie River, parts of the Burdekin River around Ravenswood and on the Suyyor River, in the south of Birriah country. We would camp on the high banks to make sure that we were safe from floods upstream. We would use cotton for line and safety pins for hooks. For bait, we'd use grubs or worms we'd dug up or else freshwater mussels which are also good to eat. The fish we'd catch were mostly black bream, perch and eels. As well as fish, we'd also catch "clawfish" (yabbies) and short-necked turtle from the water. Sometimes, we would find and eat the turtle's eggs too. Clawfish can be caught with a piece of meat on a string but also caught in traps which we'd make out of a hollow log or drum with holes punched into it. We would also use traps that we would make out of chicken wire that were shaped

> like a cylinder with only one way in. Granny Lorna told me that her old people used the sap from the bendi tree to stun fish. I saw her do this on the Bowen River, Burdekin River, Police Creek at Mt Coolon and at Pelican Creek on Strathmore station. Another thing we'd take from the water was water lilly bulbs. We would collect lots of them, which are peeled and cooked in the coals like potato. When we were camped at watercourses, we would also take whistler, wood and other types of ducks – affidavit of *[Claimant – name deleted]* at [23].

[235] And also:

> My late brother *[Claimant – name deleted]* told me about a bora site which is now under Lake Dalrymple. He said that there were also a couple of art sites that were flooded when the Burdekin Dam was flooded. There are several important sites for the Birriah People located not far including several fresh water springs. These fresh water springs are inhabited by water spirits. My brothers and I regularly go fishing and camping on Lake Dalrymple with our families. When we go, I am always careful to observe our tradition of letting our ancestors know who we are and I thank them for the feed of fish we usually catch – affidavit of *[Claimant – name deleted]* of June 2013 at [17].

[236] It is my understanding of these statements that claimants today assert and exercise this right, and that they do so on the basis that it is a right that was held by their predecessors, pursuant to the traditional laws and customs of the group, and it has been passed down to them accordingly.

[237] I consider, therefore, that the right to have access to and use the natural water resources of the application area is, prima facie, established.

[238] **Conclusion:** Prima facie, established.

Right to gather and use the natural products of the application area

[239] Examples of the material before me that speaks to a right of the native title claim group to gather and use the natural products of the application area include the following statements made by claimants in their affidavits:

> I was taught by my father, older siblings and Uncles/Aunts to recognise and harvest lots of bush tucker as a young boy. For example, there are two types of yams we used to get, a red one which you find in the scrubby and wetter areas and a white one which is found in drier places. As well as yams, there are also bush tomatoes and water lily bulbs that are both good to eat. Lily bulbs grow underwater at the base of the plant so you need to dive down to get them. Like the yams, they need to be peeled and cooked on the fire. There are also a lot of fruit which we were taught to recognise and eat when I was a young boy. Some of these include: Burdekin plums; conkerberries; chonky apples; split jacks; wild passionfruit; wild macadamias and another purple fruit like the Burdekin plum but which [*sic*] from a smaller tree – affidavit of *[Claimant – name deleted]* at [15].

[240] And also:

> I was also taught by Birriah elders about bush medicines that grow on our country. One which is well known is called gumbi gumbi. It is small tree/large bush [*sic*]. There are two types – the thin leaved one and the wider leaved one that grows up on the rocky ridges. The leaves are boiled down and strained to make a liquid that can be drunk for a range of things such as stomach aches, cold and flu. Quinine is another plant which is used to treat colds, flu and even diseases like malaria. The leaves and seeds are boiled down and the liquid drank. It is very sour. I was taught by Granny Lorna to use to treat colds. The leaves from the commercial sandalwood can be boiled to make a purple liquid which is used in place of condy's crystals – it is good for disinfecting cuts. The dried leaves can are [*sic*] burnt and the ash made into a powder which is used for rashes and other skin irritations. For stomach cramps and diarrhea, I was taught to use the yellow fluffy stuff inside the bulbs of the bush orchid. On the other hand, the seeds and flesh from the dilly bean are used for constipation. It has a pretty flower which comes out in October. The bark from the Beefwood tree can be boiled up to make a liquid to treat itches and sores. The flowers from the swamp bloodwood tree are squashed in water and the liquid used to treat ear complaints. The smoke from leaves of the false sandalwood when burnt has a calming effect. I have seen it used to stop kids being hyperactive – affidavit of *[Claimant – name deleted]* at [31].

[241] Again, I consider that this type of material evidences that the right to gather and use the natural products of the application area is held pursuant to the traditional laws and customs of the Birriah People in the way that claimants have been passed knowledge of the exercise of the right in accordance with traditional patterns of teaching about country.

[242] Consequently, I consider that the right is, prima facie, established.

[243] **Conclusion:** Prima facie, established.

Right to conduct ceremony on the application area

[244] In their affidavits and in statements included in the Connection Report, claimants speak frequently of the way in which they and their predecessors exercised a right to conduct ceremony on the application area. The following statements are examples:

> I have a clear recollection of my father and my bulloo going away for days or weeks at a time and going back to Birri country – generally around Strathmore to attend ceremony. My father and my bulloo were secretive about where they went because they told me that they had attended sacred places and that they had to sneak back onto their country as it had been taken off them and they were not allowed back – statement of *[Claimant – name deleted]* in Connection Report at [425].

[245] And also:

> I remember Buloo *[name deleted]* telling me about a special ceremony that involved a dance which was performed after a Birriah man had died. He said that he and Buloo *[name deleted]* and Buloo *[name deleted]* performed this ceremony at bora rings on Birriah country at Urannah. He said that box trees in which the dead had been buried were burned and the ashes taken to the bora ground. He said that the men from the deceased family would invite the men from other families to perform the

> ceremony which involved stamping the ashes into the nearest bora ring, accompanied by a song. Buloo *[name deleted]* told me that the purpose of the ceremony was to reunite the dead with their ancestors. He told me that bora rings on Birriah country where these and other ceremonies were performed are located at Urannah, Pretty Bend, Havilah, Byerwen, Mt Leslie, at Johnnycake on Strathmore, Midge Point and at the ring behind the Collinsville Coal mine. I have visited the ones at Urannah, Collinsville and Johnnycake – affidavit of *[Claimant – name deleted]* of 20 May 2013 at [22].

[246] From the information before me of this nature, I understand that the claimants have been passed knowledge about the conduct of ceremonies on the application area by their predecessors. Noting that this knowledge has been passed down in accordance with traditional patterns of teaching, I consider that the right is evidenced as being one held pursuant to the traditional laws and customs of the native title claim group, and that it is, prima facie, established.

[247] **Conclusion:** Prima facie, established.

Right to participate in cultural activities on the application area

[248] The statements made by claimants in their affidavits include references to a range of cultural activities, including corroborees, initiation ceremonies, smoking ceremonies, burials and teaching sessions, where elders take younger Birriah persons out on country and pass on knowledge about Birriah country. The following statements are examples of this type of material:

> My sons perform aboriginal dances throughout Queensland. I have never been much of a dancer but I have been to plenty of corroborees ever since I was young. When my family dances we paint up. As an elder I paint up my face with yellow ochre. Our young men paint their faces with white ochre (they must not use yellow) and use red, white and black on their bodies depending on the dance they are performing and the availability of ochre. When my sons dance or I dance, we paint up to show our family totem, the Wedge-Tail Eagle. We do the dance of our totems. I have seen many tribal dances, and even though some are about the same things (animals and spirits and dreamtime stories), Birriah people do their dances differently to the other ones I have seen. Our story is sung by only one person in our way, not by a group. If the song is about a totem, only an elder may sing about it and only the persons who have that totem may dance. It is forbidden for a person to perform a dance about hunting their totem but they are the only people who may dance to welcome the spirit of their totem to our country. Some dances are only performed by Birriah people. One dance I remember that I was told about by Bulloo *[name deleted]* was the Sugar Bag dance. One boy acts as a tree and the others dance around him chopping the tree with an imaginary stone axe. The tree falls and the boys scatter as they are chased away by the spirit of the bees. The dance is a warning not to take all the sugar bag or do something like chopping down a tree so that the bees can't rebuild their hive – affidavit of *[Claimant – name deleted]* of June 2013 at [10].

[249] And also:

> It was very important to *[name deleted]* that I was initiated. I have the mark of my initiation on my left arm. I was not initiated on Birriah Country but at a Bora ground that was located to the north of our

> country. I am not prepared to say where exact [*sic*] location of this Bora ground is. *[Name deleted]* told me that in the old days, it was common to combine these ceremonies with the neighbours of our people. My initiation took place when I was about 15 or 16 years old. *[Name deleted]* said that I was a little old to be initiated and that it should have taken place a couple of years earlier but it was very difficult to get away from Palm Island and the white authorities were not to know what we were up to. There were other boys about my age present at the time and I remember some of their names. I haven't seen them for a long time and I couldn't say whether they are alive today. It is against our law to tell you what happened at my initiation. I can say that I was introduced to the assembled elders by an uncle and he 'sung' the sacred places of Birriah country. I was 'painted up' in the way to show my totem and my tribe. The uncles of the other boys did the same for their country. Before I was marked, I was given a potion made from the leaf of the Catabush and mixed with the root of the black wattle and after this I felt no pain and did not call out – affidavit of *[Claimant – name deleted]* at [15].

[250] In my view, statements of this nature throughout the material indicate that the predecessors of members of the claim group have passed down to them knowledge and practice regarding specific cultural activities that take place pursuant to Birriah laws and customs. I understand, therefore, that the right to undertake such activities on the application area is a right that is held pursuant to Birriah traditional laws and customs, and that it is, prima facie, established.

[251] **Conclusion:** Prima facie, established.

Right to maintain and protect places of importance under traditional laws, customs and practices in the application area

[252] I do not consider that there is any substantial difference between a 'right to maintain' and a 'right to protect' places of importance under traditional laws, customs and practices in the application area, and understand that the exercise of each of these rights would largely result in the same activities being carried out by the claim group members on the application area. Consequently, I have considered the rights together below.

[253] There is considerable information pertaining to a right to maintain and/or protect places of importance under traditional laws, customs and practices in the application area. I consider the following statements to be examples of this:

> Along with the right to use Birriah country, I was taught that I also had a responsibility to look after it. This was impressed upon me by my father and older brothers. For example, they told me that water gives life to us, the country and the plants and animals in Birriah country. They told me that protecting and preserving Birriah country, especially our important places, is vital because it is part of us and we are part of it. I believe that this is what I am doing in my role as a cultural heritage officer. In that role, I do everything I can to minimize damage to Birriah country and our sites. For example, other Birriah people and I demanded that rail infrastructure was relocated away from the important sites I know of at Breeaba. Where infrastructure cannot be moved, I salvage and relocate

> artefacts that would be destroyed but always ensure they are put back onto country – affidavit of *[Claimant – name deleted]* of 1 May 2013 at [15].

[254] And also:

> My mother, *[name deleted]*, *[name deleted]* and other Elders like my Aunties and Uncles told me that it was my duty to protect our country. They told me that important places such as women's and men's places, old campsites, burial sites and the art sites in our country were places which our ancestors had looked after and that we should too. I do this as much as I can as an applicant by making sure that the impact of development within our country is minimized to the greatest extent – affidavit of *[Claimant – name deleted]* of 20 May 2013 at [16].

[255] From these statements and others within the material, it is my understanding that the right or duty of members of the claim group to maintain and protect places of importance is one that has been passed down to them by their predecessors in accordance with traditional patterns of teaching. Similarly, the knowledge shared by their predecessors indicates that this duty is a crucial aspect of Birriah law and custom, and that it flows from the right they possess to enjoy the land and resources of the application area.

[256] In this way, I understand that the right to maintain and protect places of importance under traditional laws, customs and practices is held pursuant to Birriah traditional law and custom, and that it is, prima facie, established.

[257] **Conclusion:** Prima facie, established.

Right to conduct burials on the application area

[258] The right to conduct burials on the application area is spoken about frequently by claimants in their affidavits. The following statements are examples of this type of material:

> Under Birriah law and custom, a person's spirit returns to its home. That means that wherever possible, Birriah people try to bury their family members on country. If Birriah people are old and dying, they come back to Birriah country to die so their spirit can rest. Many members of my family and the extended Barker family are all buried at Collinsville. It is *yumba*, our spiritual home. Wherever we are, we come back to our yumba so our spirit can rest – affidavit of *[Claimant – name deleted]* at [38].

[259] And also:

> Strathmore is also where, in 2008, there was a reburial of a set of ancestral remains (a skull). It was buried at the station's cemetery. I was there with Frank Fisher (a Birriah applicant), David Miller (a Birriah applicant), *[Claimant – name deleted]* (a cultural heritage officer with DERM and a Birri Gubba Man), and others. We conducted a Smoking Ceremony while the remains were buried.

> As an elder I conduct Smoking Ceremonies. I was taught how to do so by my older brothers *[Claimant – name deleted]* and *[Claimant – name deleted]*, who in turn had learnt it from their elders like *[name deleted]*. They are conducted as a way to cleanse an area of bad spirits, or to ward off the bad spirits. It is always done at funerals…
>
> During funerals for my family members we use sandalwood collected from Birriah country for the Smoking Ceremony. I did this in 2006 at the funeral of my brother *[Claimant – name deleted]*. Into his grave I also placed sand, soil and water I had collected a few weeks earlier from Strathmore.
>
> We also have a custom of burying our own. Only members of the family are to fill in the grave once the coffin has been placed into it. This is the last show of respect to that spirit – affidavit of *[Claimant – name deleted]* of 24 September 2015 at [40]–[43].

[260] In these explanations from claimants about the way in which burials have been conducted on the application area it is clear, in my view, that they understand these practices to be in accordance with Birriah laws and customs. It is also clear that such practices have been handed down to them by their predecessors through traditional patterns of teaching.

[261] In this way, I understand that the right to conduct burials on the application area is one held pursuant to the traditional laws and customs of the native title claim group, and that it is, prima facie, established.

[262] **Conclusion:** Prima facie, established.

Right to speak for and make non-exclusive decisions about the application area

[263] As above, in *Ward HC*, the High Court suggested that to adopt those terms associated with exclusive possession in framing a non-exclusive right, was 'apt to mislead' – at [52]. The High Court's view was that without a right of exclusive possession, it was doubtful whether an applicant could possess a constituent element of that right, such as a right to control access or a right to make decisions about the use of the land – see [52] and [89].

[264] In *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC (*Alyawarr*), the Full Court disallowed a non-exclusive right to make decisions about the use and enjoyment of land, however, did not give clear reasons as to why – see at [141] to [151]. The right has, subsequently, been included in a number of consent determinations. I note that in most of these consent determinations, the right is limited in its operation against other Aboriginal persons governed by the traditional laws and customs of the native title holders – see for example, *Ngadjon-Jii People v State of Queensland* [2007] FCA 1937 at [paras 3.2 (vii)].

[265] The right before me in this instance is not limited in this way. Further, I consider that a right to speak for country is inherent in a right of exclusive possession, such that to express the right as a non-exclusive one, is 'apt to mislead'.

[266] I consider, therefore, that a right to speak for and make non-exclusive decisions about the application area is not, prima facie, established.

[267] **Conclusion:** Not, prima facie, established.

Right to speak authoritatively about the application area among other Aboriginal People in accordance with traditional laws and customs

[268] I note that the particular terminology used to describe this right has not yet been the subject of the Court's consideration. While I have expressed my view above that a right to 'speak for' country entails an assertion of exclusive possession and ownership of country, I consider that a right to 'speak authoritatively about' is something less than the former. It is clear from the way the court has dealt with rights of this nature, that where the exercise of the right is limited to Aboriginal persons bound by the laws and customs of the native title holders, it is more likely to be upheld by the courts. I note that the exercise of the right before me is limited in this way, as having effect as against 'other Aboriginal People in accordance with traditional laws and customs'.

[269] Having considered the material contained in the application, I consider that there is information that speaks specifically to this right. The following statements made by members of the claim group are, in my view, examples:

> My older brother *[Claimant – name deleted]* is a Law Man. He has been given certain knowledge, like that about male initiation rituals. He has told me this information, but I am not permitted to tell others. It is *[Claimant – name deleted]*, as the appointed Law Man, who has the authority to tell others such information. More generally, as a Law Man, *[Claimant – name deleted]* is vested with authority to speak about certain matters, like particular sacred sites. He also holds the ability to decide who will inherit this status and its authority. Before *[Claimant – name deleted]*, the Law Man was our father *[name deleted]*, and before him it was *[name deleted]*. My older brother has also given me the authority to speak for, and to act on, country business on behalf of our family – affidavit of *[Claimant – name deleted]* of 24 September 2012 at [47].

[270] And also:

> Earlier on in this statement, I described what my Dad told me about getting permission from traditional owners before going onto their country. Because of what he taught me, I take this very seriously and get upset when I hear about people doing things on Birriah country without getting our permission first. For example, after our claim was filed, we heard that the Gudjala people from Charters Towers had made an overlapping claim over a part of Birriah country. That area is to the south-east of Charters Towers, on the southern and western sides of the Burdekin. That made *[Claimant – name deleted]* and I really mad and we went up there to Charters Towers many times to try to get them to pull back. I remember *[Claimant – name deleted]* telling them: "You put a claim over our boundary. You should've spoken to us first". It was a waste of time. They were so stubborn and

> refused to pull back. We told them they were not welcome on Birriah country as they had broken an important rule: always ask permission – affidavit of *[Claimant – name deleted]* at [33].

[271] From this information, in my view, it is clear that there are rules and practices surrounding the role of particular Birriah people who possess knowledge about country, and the way in which the possession of this knowledge gives them authority to speak on certain matters about country. In my view, the material indicates that they can speak authoritatively amongst the members of the native title claim group, and amongst others who acknowledge the laws and customs of the claim group.

[272] I also note that these rules and practices have been handed down through the generations to the members of the claim group today by their predecessors, in accordance with traditional patterns of teaching. In this way, I understand that the right to speak authoritatively about the application area is one that is held pursuant to the traditional laws and customs of the native title claim group. I consider, therefore, that the right is, prima facie, established.

[273] **Conclusion:** Prima facie, established.

Right to control access to the application area by other Aboriginal People in accordance with traditional laws and customs

[274] In my view, a right to control access to the application area is inherently an exclusive right. That is, it is only where a right of exclusive possession is found to exist that a native title claim group can claim a right to control access of other persons to that area. This was the approach of the Full Federal Court in *Attorney-General of the Northern Territory v Ward* [2003] FCAFC 283 (*Ward FC*), where it was held that a native title right to control access was incompatible with the rights of a pastoral lessee over an area subject to a pastoral lease. This approach was upheld by the Federal Court in *Jango v Northern Territory* [2003] FCA 318 (*Jango*) at [569]–[571].

[275] Further to this, in discussing the nature of a right to exclusive possession, the High Court in Ward HC commented that 'without a right of possession of that kind, it may greatly be doubted that there is any right to control access to land' – at [52]. The High Court commented that 'to use those expressions in such a case is 'apt to mislead' – at [52].

[276] I note that in the consent determination of *Mundraby v Queensland* [2006] FCA 436, the Court recognised the non-exclusive right of the native title holders 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' – at [para 3(c)(ii)]. In my view, however, the general approach of the courts has been that a right to control access possesses inherent exclusive qualities, such that where the right will not be recognised where it is framed in non-exclusive terms.

[277] I do not consider, therefore, that the right to control access to the application area by other Aboriginal People in accordance with traditional laws and customs is, prima facie, established.

[278] **Conclusion:** Not, prima facie, established.

Right to control use of the application area by other Aboriginal People in accordance with traditional laws and customs

[279] In the decision of *Jango*, the Court considered a case involving a claim to a 'right to make decisions about the use and enjoyment of the application area by Aboriginal people who are governed by the traditional laws and customs of the Western Desert Bloc', over an area subject to a pastoral lease. The Court referred to the decision of the Full Court in *Ward FC*, and held that the right was not inconsistent with, that is, was not extinguished by, the pastoral leases granted – at [569]–[571].

[280] There is, in my view, information within the material before me that speaks to a right of the Birriah People to control the use of the application area by other native title holders. The following statements are examples of this material:

> My father told me I must respect my elders. I am the "boss" or law man of our extended family (just as other Birriah Elders are the boss of their extended families). A person does not need to be initiated to be an elder. The right to be an elder was passed down to my eldest brother from my father and then to me on the death of my older brothers. You become a man at 13 or 14 years of age and then you wait your turn to become an elder. A Woman can be an elder. This is because women have their own business which as men, we have nothing to do with. The right for them is passed on from the matriarch of the family. As an elder, all my brothers and their children must ask my permission before doing anything on country. For example, they must not remove or shift artefacts from one place to another and they are not entitled to give somebody permission to do something on our country without my say so. When one of my family wants to marry they must come to me to find out the right way to marry and I tell them if it is wrong. If I tell them it is wrong, they must not have that woman. It is against our law – affidavit of *[Claimant – name deleted]* of June 2013 at [4].

[281] And also:

> My older brother *[Claimant – name deleted]* is a Law Man. He has been given certain knowledge, like that about male initiation rituals. He has told me this information, but I am not permitted to tell others. It is *[Claimant – name deleted]*, as the appointed Law Man, who has the authority to tell others such information. More generally, as a Law Man, Edward is vested with authority to speak about certain matters, like particular sacred sites. He also holds the ability to decide who will inherent this status and its authority. Before *[Claimant – name deleted]*, the Law Man was our father *[name deleted]*, and before him it was Bullo Eddie. My older brother Edward has also given me the authority to speak for, and to act on, country business on behalf of our family – affidavit of *[Claimant – name deleted]* of 24 September 2012 at [47].

[282] In my view, these statements clearly explain the way in which the right is one that operates pursuant to the traditional laws and customs acknowledged and observed by the group. On this basis, therefore, I consider that the right is, prima facie, established.

[283] **Conclusion:** Prima facie, established.

Right to determine and regulate membership of and recruitment to the native title claim group

[284] I refer to the definition of 'native title rights and interests' in s 223(1) of the Act that I have excerpted above. Sub-provision (b) of that definition provides that a native title right or interest is one possessed under the traditional laws and customs of the relevant native title claim group where, 'by those laws and customs, [the group] have a connection with the land or waters'. As set out above, it is my understanding, therefore, that any right or interest claimed must be one in relation to land and waters in order for it to be a native title right or interest.

[285] The right to determine and regulate membership of and recruitment to the native title claim group, in my view, is not such a right. This is on the basis that it is primarily concerned with relationships between people, not between people and land or waters. In seeking to enforce rules surrounding membership to the native title claim group, those rules are enforced as against people, and do not directly involve land or waters.

[286] Consequently, I do not consider that the right is, prima facie, established.

[287] **Conclusion:** Not, prima facie, established.

Right to transmit the cultural heritage of the native title claim group including knowledge of particular sites

[288] As discussed above in relation to a right to determine and regulate membership of and recruitment to the native title claim group, a native title right or interest must be one that is in relation to land or waters. While the right here involves knowledge about land and waters being transmitted, the exercise of the right, again, is primarily concerned with relationships between people, not people and land.

[289] On that basis, I do not consider that the right is, prima facie, established.

[290] **Conclusion:** Not, prima facie, established.

Conclusion

[291] 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.

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

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

[293] Consequently, it is my understanding that the material addressing the requirement at s 190B(7) must show how the physical connection asserted is in accordance with the laws and customs of the group which have their origin in the laws and customs of a pre-sovereignty society. It flows from this, that where the factual basis is insufficient to support the assertion at s 190B(5)(b), it may be that the material is unable to show the traditional physical connection required at s 190B(7).

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

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

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

[297] The application provides that Mr McLennan was born on the application area in 1951 at Collinsville, and that his great grandmother is apical ancestor Jinnie Tiers. Mr McLennan provides a number of statements in his affidavit sworn 27 March 2013, which in my view, indicate that he has had a physical presence on the application area at various times throughout his life. For example, he states:

> I go to Birriah country all the time. I am always travelling between Collinsville where many of my family live and are buried, and Townsville. The last time was about three weeks ago when I travelled to Collinsville to participate in a meeting. I cannot stay away from Birriah country for too long. It always pulls me back because it is where my spirit belongs – at [15].

[298] Further statements made by Mr McLennan, in my view, indicate that this physical connection with the application area is of a traditional nature. For example, Mr McLennan talks about the way in which he spent time on the application area as a child being taught practices and appropriate behaviours regarding the use of his country and its resources by his elders, in accordance with traditional patterns of teaching pursuant to Birriah laws and customs. For example, Mr McLennan states that:

> Throughout my life and right up to the present, I have exercised my rights as a Birriah person to take natural resources from Birriah country. This started when I was about one and a half to two years old. That was when I was able to start eating the bush tucker that is found in Birriah country. My Granny Lorna would take me travelling with her. On these trips, she taught me what I could eat, how to get it, prepare it and cook it. I would have to follow her. She always went first and would show me how to use my *dilli* (eyes) to read the tracks of different animals, as well as how to hunt them. We also went fishing in the creeks, rivers and waterholes on Birriah country. When we were in the bush, she also showed me bush medicines and taught me how to use them. Apart from Granny Lorna, other old Birriah women like Alice Tears, Mary Barker and Charlie Budby's wife, Aunty Ina, also taught me a lot about the bush tucker and medicine in Birriah country when I was a child. The old Birriah men I named earlier in this statement also took me out on their horses when I was a child to go fishing and hunting – at [16].

[299] Mr McLennan then further states that:

> The teaching I received from these old Birriah men and women was mostly by sign language as it is important to be quiet when you are hunting. Otherwise the animals get startled. They would point and show me different signs or tracks. It was easiest to track on sand or gravel but I was taught to observe things even on hard, rocky country such as looking at the twigs and leaves on the ground. They taught me to interpret these sorts of things to work out which animal had gone through, how fresh its trail was, which way it was going and how fast. I was taught by them to use my *dilli* and *wale* (ears) or I was given a good hiding. Respecting your elders is part of Birriah law. Listening to them respectfully and not being cheeky is important. Break that law and you will get a hiding. The old Birriah men and women I named earlier in this statement taught me to see and hear things in

> Birriah country that we use to get food and medicine. The things they taught me and the places they showed me, I have never forgotten. They have stayed in my mind and come back to me when I am on Birriah country. I just need to wait and there will be a sign from the country that I will either see or hear. People who are not Birriah cannot see or hear these things because they were not born and bred there – at [17].

[300] In my view, the statements above reveal a number of aspects of the traditional laws and customs of the native title claim group that are discussed above in my reasons at ss 190B(5)(b) and 190B(5)(c). As I have stated above, Mr McLennan refers to the way in which he was taught about his country pursuant to traditional methods of teaching, but in my view, these statements also address the position and authority of elders within the Birriah native title claim group, and the rules and practices that surround respect for elders pursuant to the group's traditional laws and customs. Further, I consider that the statements indicate the importance of Birriah language as an aspect of the group's traditional laws and customs, namely that claim group members have been taught knowledge of their country by their elders using Birri words and terms whilst out on that country.

[301] I consider, therefore, that this information contained within the application supports a physical connection of Mr McLennan with the application area that is traditional in its nature. Consequently, I am satisfied that at least one member of the native title claim group currently has, or previously had, a traditional physical connection with some part of the application area.

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

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

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

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

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

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

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

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

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

Section 61A(1)

[304] Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title. The geospatial assessment provides that there are no determinations of native title that fall within the boundary of the application area.

Section 61A(2)

[305] 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. Section 23B defines a 'previous exclusive possession act'. That definition states that such an act consists of the grant or vesting of any of a number of interests set out in subsection (c) of the provision.

[306] Schedule B of the application sets out those areas falling within the boundary of the application area that are excluded from the application. Paragraph [1] of Schedule B provides that the area covered by the application excludes any land or waters that is or has been covered by those same interests set out in s 23B(c). Consequently, it is my understanding that the application area does not include any area subject to a previous exclusive possession act.

Section 61A(3)

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

Conclusion

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

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

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

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

Section 190B(9)(a)

[310] Schedule Q of the application states that the 'Native Title Claim Group makes no claim to ownership of minerals, petroleum or gas wholly owned by the Crown'.

Section 190B(9)(b)

[311] Schedule P of the application states that there 'are no claims made by the Native Title Claim Group to exclusive possession of all or part of an offshore place'.

Section 190B(9)(c)

[312] There is nothing within the application and accompanying material that indicates that the native title rights and interests claimed have been otherwise extinguished. Paragraph [6] of Schedule B further provides that '[t]he area covered by the application excludes land or waters where the native title rights and interests claimed have been otherwise extinguished'.

Conclusion

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

[*End of reasons*]