



Registration test decision

Application name	Koa People
Name of applicant	Robert Beckett, Frank Button, Natasha Duncan, William Gorham, Pamela Hegarty, Michael Mace, Frank Peterson
NNTT file no.	QC2015/007
Federal Court of Australia file no.	QUD592/2015
Date application made	16 July 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 decision: 28 September 2015

Lisa Jowett

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 4 May 2015 and made pursuant to s 99 of the Act.

Reasons for decision

Introduction

[1] The Registrar of the Federal Court of Australia (the Court) gave a copy of the Koa People claimant application (QUD592/2015) to the Native Title Registrar (the Registrar) on 17 July 2015, pursuant to s 63 of the Act¹. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A: see subsection 190A(1).

[2] Sections 190A(1A), (6), (6A) and (6B) set out the decisions available to the Registrar under s 190A. Subsection 190A(1A) provides for exemption from the registration test for certain amended applications and s 190A(6A) provides that the Registrar must accept a claim (in an amended application) when it meets certain conditions. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (in relation to the merits of the claim) and s 190C (in relation to procedural and other matters). Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B and 190C.

[3] This document sets out my reasons, as the delegate of the Registrar, for my decision to accept the claim for registration pursuant to s 190A of the Act. Given that the claimant application was first made on 16 July 2015 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to the claim made in this application. It is my view that the claim satisfies all of the conditions in ss 190B and 190C and pursuant to ss 190A(6) and (6B), the claim in the application must be accepted for registration.

Application overview and background

[4] The Koa People claimant application was made in response to a non-claimant application (QUD82/2015) filed on 4 March 2015. This non-claimant application is seeking a determination that native title does not exist in relation to a 284 sq km lot approximately 80km north west of Winton. The Koa People's claimant application entirely overlaps the area covered by the non-claimant application.

[5] The area covered by the Koa People's application lies to the south east of Mt Isa in central Queensland.

¹ All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cth) which I shall call 'the Act', as in force on the day this decision is made, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

Information considered when making the decision

[6] Section 190A(3) sets out the information to which the Registrar must have regard in considering a claim under s 190A and provides that the Registrar 'may have regard to such other information as he or she considers appropriate'.

Subsection 190A(3)(a): Application and other documents provided by the applicant

[7] As required by s 190A(3)(a), I have had regard to information in the application and its accompanying documents. I have also considered additional material provided to the Registrar on 21 August 2015.

Subsection 190A(3)(b): Searches conducted by the Registrar of State/Commonwealth interest registers

[8] I note that there is no information before me of the kind identified in s 190A(3)(b).

Subsection 190A(3)(c): Information supplied by Commonwealth/State

[9] The State of Queensland (the state government) has not provided any submissions in relation to the application of the registration test.

Section 190A(3): other information to which Registrar considers it appropriate to have regard

[10] I have also considered information contained in an overlap analysis and geospatial assessment by the Tribunal's Geospatial Services dated 27 July 2015 (the geospatial report).

Procedural fairness steps

[11] I have considered the additional material provided by the applicant on 21 August 2015. On 7 September 2015, I wrote to the state government advising that I would be relying on this information in my application of the registration test and that should they wish to make any submissions, they should do so by 17 September 2015. The state government made no comments or submissions in relation to the additional material. This concluded the procedural fairness processes.

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

Description of the area covered by the application

[12] Schedule B refers to Attachment B which contains a metes and bounds description entitled “Koa People External Boundary Description”, prepared by Queensland South Native Title Services (QSNTS) on 7 May 2015. The description refers to Representative Aboriginal Torres Strait Islanders Body (RATSIB) areas; the Diamantina River Watershed; land parcels and roads; and coordinate points and specifically excludes from the area covered by the application *Kennedy v State of Queensland* [2002] FCA 747 as determined by the Federal Court on 13 June 2002. Schedule B provides a list of further general exclusions.

Map

[13] Schedule C refers to Attachment C which is a map entitled “KOA PEOPLE – Native Title Determination Application”, prepared by QSNTS, dated 27 April 2015 and includes:

- the application area depicted by a bold blue outline with stippled fill;
- drainage basins shown and labelled;
- topographic background image;
- RATSIB areas shown and labelled;
- scalebar, northpoint, coordinate grid and location diagram; and
- notes relating to the source, currency and datum of data used to prepare the map.

Consideration

[14] The information in relation to the external boundaries of the area covered by the application allows me to identify the location and extent of those boundaries. For the purposes of meeting the requirements of this section the general exclusion statements at Schedule B are, in my view, sufficient to offer an objective mechanism to identify areas that would fall within the categories described, and be excluded from the application.

[15] The geospatial report makes the assessment that the description and the map are consistent with each other such that the area covered by the application is readily identifiable. I agree with that assessment. I am therefore satisfied that the external boundary of the claim area is identifiable and, along with the general exclusions, that it can be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

[16] 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.

[17] Schedule A of the application does not name the persons in the native title claim group but contains a description of the persons in that group. It is therefore necessary to consider whether the application satisfies the requirements of s 190B(3)(b). I note the comments of Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112; (2003) 203 ALR 385; [2003] FCA 1384 (*Doepel*) that the focus of s 190B(3)(b) is:

- whether the application enables the reliable identification of persons in the native title claim group—at [51]; and is
- not on ‘the correctness of the description . . . but upon its adequacy so that the members [sic] of any particular person in the identified native title claim group can be ascertained’—at [37].

[18] Carr J in *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93 [1999] FCA 1591 (*Western Australia v Native Title Registrar*) was of the view that ‘it may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently’—at [67].

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

The Koa People are the descendants of the following ancestors:

1. MaryAnn Watson
2. Zoe Button nee Watson aka Zoe Clements/Zoe Murdoch
3. George Mitchell
4. Topsy Mitchell aka Katie of Cork Station aka Katie O’Chin
5. Nancy Chambers nee Watson
6. Jack Chermside
7. Charley Chermside aka Charley Riley
8. Jacob Chermside
9. Lois Tighe/Tye
10. Maria Miller nee Creed aka Maria Jeffries
11. Timothy Creed
12. Valentine Mingo
13. Minnie Winton
14. Jack Watson
15. Tommy Watson
16. George Watson

[20] In my view, the description of the group is capable of being readily understood and is sufficiently clear such that it can be ascertained whether any particular person is in the native title claim group. Based on the information provided at Schedule A and confirmed in the information provided at Attachment F/M, I understand that a person will be a member of the native title claim

group based on descent through the ancestral lines identified. It may be that some factual inquiry is required to ascertain how members of the claim group are descended from the named apical ancestors, but that would not mean that the group had not been sufficiently described.

[21] 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.

[22] Section 190B(4) requires the Registrar to be satisfied that the description of the claimed native title rights and interests contained in the application is sufficient to allow the rights and interests to be readily identified—*Doepel* at [92]. In *Doepel*, Mansfield J refers to the Registrar's consideration:

The Registrar referred to s. 223(1) and to the decision in *Ward*. He recognised that some claimed rights and interests may not be native title rights and interests as defined. He identified the test of identifiability as being whether the claimed native title rights and interests are understandable and have meaning. There is no criticism of him in that regard—at [99].

[23] On this basis, for a description to be sufficient to allow the claimed native title rights and interests to be readily identified, it must describe what is claimed in a clear and easily understood manner. Schedule E of the application contains the description of native title rights and interests claimed in relation to the area covered by the application, as required by s 62(2)(d):

The Koa People claim the following rights and interests:

- (a) where claimable, including where section 47, 47A or 47B of the *Native Title Act 1993* (Cth) applies to an area, the right to possess, occupy, use and enjoy the land and waters covered by the application to the exclusion of all others.
- (b) access, be present on, move about on and travel over the application area;
- (c) camp on the application area and, for that purpose, erect temporary shelters on the application area;
- (d) take (including by hunting and gathering) and use traditional natural resources from the application area for personal, domestic and non-commercial communal purposes;
- (e) to assemble and conduct religious and spiritual activities and ceremonies on the application area;
- (f) maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places and areas, by lawful means, from physical harm;
- (g) teach on the application area the physical and spiritual attributes of the application area;
- (h) light fires on the area for domestic purposes including cooking, but not for the purpose of hunting or clearing vegetation;
- (i) be buried on the application area in accordance with traditional law and custom;

- (j) hunt, fish, travel in or on, and gather from, the water for personal, domestic and non-commercial communal purposes; and
- (k) take and use the water for personal, domestic and non-commercial communal purposes.

[24] I am of the view that the native title rights and interests claimed can be ‘properly understood ... [and there is] ... no inherent or explicit contradiction’ in the description that prevents me from reaching the level of satisfaction required by s 190B(4)—*Doepel* at [123]. I am therefore satisfied that the description contained in the application is sufficient to allow the native title rights and interests to be readily identified.

[25] 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

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

[27] For the application to meet this merit condition, I must be satisfied that a sufficient factual basis is provided to support the assertion that the claimed native title rights and interests exist and to support the particularised assertions in paragraphs (a) to (c) of s 190B(5). In *Doepel* (and this was approved by the Full Court in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [82] to [85]), Mansfield J stated that:

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].

[28] The decisions of Dowsett J in *Gudjala People # 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*) also give specific content to each of the elements of the test at ss 190B(5)(a) to (c). The Full Court in *Gudjala FC*, did not criticise generally the approach that Dowsett J took in relation to these

elements in *Gudjala 2007*, including his assessment of what was required within the factual basis to support each of the assertions at s 190B(5). His approach in *Gudjala 2009* was consistent with the approach he took in *Gudjala 2007*.

[29] Arising from these decisions are clear principles that guide the Registrar when assessing the sufficiency of a claim's factual basis. In summary, they are:

- the applicant is not required 'to provide anything more than a general description of the factual basis'—*Gudjala FC* at [92].
- the nature of the material provided need not be of the type that would prove the asserted facts—*Gudjala FC* at [92].
- the Registrar is not to consider or deliberate upon the accuracy of the information/facts asserted—*Doepel* at [47].

[30] In my view, the test in s 190A involves an administrative decision—it is not a trial or hearing of a determination of native title pursuant to s 225, and therefore it is not appropriate to apply the standards of proof that would be required at such a trial or hearing. It is not the task of the delegate to make findings about whether or not the claimed native title rights and interests exist. It is not the role of the delegate to reach definitive conclusions about complex anthropological issues pertaining to the native title claim group's relationship with its country; that is a judicial enquiry.

Reasons for s 190B(5)(a)

[31] This subsection requires that I be satisfied that the factual basis is sufficient to support the assertion that the native title claim group has, and its predecessors had, an association with the area of the application. It is not necessary for the factual basis to support an assertion that all members of the native title claim group have an association with the area all of the time. However, it is necessary that the material before the Registrar shows cumulatively an association between the whole group and the whole area of the claim—*Gudjala (2007)* at [51] and [52]. Further, Dowsett J also observed:

Similarly, there must be evidence as to such an association between the predecessors of the whole group and the area over the period since sovereignty—at [52].

[32] The Koa People's claim covers an area of some 30,000 square kilometers, comprising 'the headwaters of the Diamantina River in what is now Northwest Queensland'—Attachment F/M at [13]. It includes the main centers of Winton and Middleton located in its south-eastern and western reaches respectively. The area covers pastoral stations, many of which are referred to in the factual material basis—Kynuna, Vindex, Castle Hill and Elderslie Stations.

[33] Attachment F/M asserts that the Koa People have been continuously associated with the area covered by the application since pre-sovereignty through occupation and connection to its land and waters—at [3]. The Koa People's association is said to be through their continuing acknowledgement and observance of their traditional laws and customs as 'a body of Aboriginal

people who occupied and used the resources’ of the area covered by the application—at [8]. This previous association now currently takes the form of regular visitation to the area for ‘collection of ochre for ceremony and the conducting [of] Aboriginal cultural heritage protection work pursuant to their laws and customs, particularly the right (and obligation) to protect the sacred sites of the Koa People’—at [18].

Association of the predecessors of the native title claim group with the application area

[34] Attachment F/M provides information in relation to the association of the native title claim group’s predecessors with the claim area. It is asserted that sustained European settlement in the region may not have occurred until the 1870s, though by 1863 parts of the claim area were already settled by ‘pioneer pastoralists’ and had been explored by William Landsborough and surveyor George Phillips in 1866—at [7]. Historical records of early European contact are said to show occupation and use of resources and trade in relation to the land and waters of the application area, for example:

- Aboriginal occupation, use of the resources and trade was documented by the pastoralist Robert Christison in 1863 and R.M. Watson in 1873—in areas around Winton, Elderslie Station, Conns Hole (in the claim area at the junction of Wokingham Creek and the Diamantina River)—at [9] to [12]; and
- indicating the existence of a landholding group in the region of the Application Area—at [14].

[35] Ethnographers and lexographers later recorded more specifically:

- Koa vocabularies in the region of the Application Area as early as 1886 through to the early 20th century locating the Koa language and its speakers at the head of the Diamantina River; Diamantina River, Middleton Creek, Western River, near Kynuna and the Opalton region—at [15] and [16]; and
- many of these early recordings make reference to Koa People, variously identified as Goamalku, Goamulgo, Goa, Coah, Coa, Guwa and Kuwa—at [9], [17].

[36] The additional material also sites early ethnographic material which described the Koa People’s association with certain areas, matching the description of the area covered by the application:

- ‘go-a’ [Koa] as a ‘Tribe occupying country from the head of Diamantina to Thompson River and Farrar’s Creek, from Evesham to old Brighton Downs’²—at [2];
- placing Koa people and speakers of the Koa language in the Upper Diamantina region—at [3] and [17];
- the tribal area of the Koa as encompassing the ‘Headwaters of the Diamantina north to Kynuna, and Hamilton Creek divide; west to Middleton Creek; east to Winton and Sesbania; south almost to Cork; much of their country is a wooded dissected plateau’³—at [8]; and

² Citing Walter E. Roth, *Ethnological Studies among the North-West-Central Queensland Aborigines* (1897) at [190]

³ This is said to be based on information obtained by way of interviews with several members of the Koa People throughout the 1930s at Cherbourg, Woorabinda, Palm Island and Yarrabah—Norman B Tindale, ‘Fieldnotes’. (Fieldnotes from the Harvard-Adelaide Universities Anthropological Expedition 1938)—footnote 20.

- 'Goa people of the upper Diamantina River' and placed the tribe in the vicinity of Winton⁴—at [10].

[37] The Koa native title claim group is said to be made up of the descendents of persons recognized as being the ancestors for the Koa people, these being the apical ancestors listed at Schedule A. Attachment F/M asserts that these ancestors are firmly associated with the area covered by the application from around the time of practical sovereignty in the 1860s and several decades after—at [19]. Attachment F/M lists each of the named ancestors along with their approximate birth date, areas of association and their descendents (much of which was identified by Tindale)—at [21]. In summary, it is said that:

- **MaryAnn Watson** (born c.1862)—is a full blood woman of Hamilton Downs, northwest of Winton, the mother of **Zoe Watson** (born c.1877 at Kynuna), from Cork Station, **George Mitchell** (born before c.1891); **Topsy Mitchell** aka Katie of Cork Station aka Katie O'Chin (born before c.1904) and **Nancy Chambers** nee Watson (born 1883 at Elderslie Station) west of Winton;
- **Jack Chermiside** (born c.1870)—is from Vindex Station in the claim area; father of **Charley Chermiside** aka Charley Riley (resided at Vindex Station in about 1895) and **Jacob Chermiside**. (born 1895),
- **Lois Tighe/Tye** (born c.1864)—is the mother of [**Ancestor**] from the Winton area born in 1879 at Brighton Downs Station (on the Diamantina River just south of the claim area) ;
- **Maria Miller** nee Creed aka Maria Jeffries (born c.1900) and her half-brother **Timothy Creed**;
- **Valentine Mingo** (born c.1890)—was resident of Kynuna in c.1908 and sister of George Mitchell;
- **Minnie Winton**—was a member of the Koa tribe from Winton;
- **Tommy Watson** (born c.1890), **Jack Watson** and **George Watson**—are identified as the sons of Maria (born c.1875, recorded as a 'full-blood' member of the 'Gwamalku =Koa').

[38] Attachment F/M also refers to early regional accounts showing that the Koa People occupied the land:

... and extracted a range of food and other resources from their country essential to their sustenance and to the conduct of daily and traditional life. For example, Christison recorded that the 'Goamulku' (Koa) traded pituri (the cured leaf and stem of the Pituri, or *duboisia hopwoodii*, plant found in parts of northwest Queensland) for quartz flakes with the neighbouring 'Dallabarra' group... [and]...their ancestors used to trade gidgee wood spears and boomerangs with other tribes in the area—at [46] to [47].

[39] The affidavits of two members of the native title claim group attached to the application provide personal information that illustrate the facts outlined in Attachment F/M. Robert Beckett affirms that he is a Koa man through both of his parents, descendents of named ancestors Zoe Button and Topsy Mitchell—at [3] to [6]. [**Claimant**] affirms that he is a Koa tribal man through his mother whose mother [**Ancestor**] was the daughter of named ancestor Lois Tye/Tighe—at [3]. He understands:

⁴ Citing Caroline Tennant-Kelly, 'Tribes on Cherburg Settlement, Queensland' in *Oceania* 5 (1934-5) at p.473 and p.462.

- that to be a Koa person and have traditional rights in Koa country, you must be descended from a Koa ancestor’—at [4]; and
- ‘our traditional country was out at Winton’ and he has learnt his traditional rights in Koa country through his mother and feels a strong spiritual and cultural connection to Koa lands and waters—at [4] to [6].

Current association of the native title claim group with the application area

[40] Attachment F/M asserts that members of the native title claim group gain rights and interests in the area covered by the application through their descent from their Koa ancestors, and are accepted as Koa by other members of the group because of this recognised descent—at [20]. The current association of members of the native title claim group with the area covered by the application derives from:

- being born and raised on missions such as Woorabinda, Cherbourg, Yarrabah and Palm Island, where they learned about and maintained their connection to the claim area—at [24];
- regularly visiting the claim area for a number of traditional purposes, sometimes travelling considerable distances, speaking to and confirming continued spiritual, cultural and physical ties to the claim area—at [25];
- the rights and interests that arise from descent from their forebears and maintained by continued physical and/or spiritual connection with, and knowledge of, the claim area—at [23];
- maintaining their right to access and travel over the claim area through regular occupation, including working in the pastoral industry on Koa country for generations—at [40].

[41] Mr Beckett attests to his knowledge of his traditional country:

- the traditional country of the Koa People is the area of the Upper Diamantina River catchment and the Winton region—at [14];
- he regularly travels through Koa country – because it is his traditional country and he has the right to travel there; he collects ochre to use for ceremonial and funeral purposes, for trade and other traditional business—at [17] to [23].

[42] **[Claimant]** attests to learning some of his knowledge from a senior member of the native title claim group, a descendant of Koa ancestor Lois Tighe/Tye. This cousin worked as a drover as a young man throughout the claim area in the 1950s along with other Koa People, working on Kynuna, Nuken, Dagworth and Castle Hill stations. In the 1960s, as an adult, he drove sheep and cattle on Mt Landsborough, Elderslie, Bladensburg and Vindex stations. In this way he maintained knowledge of 'special places' on Koa country such as traditional stone artefact scatters, scarred trees, painting places and bora rings. While working on the pastoral stations and travelling throughout Koa country he was able to hunt and gather traditional bush foods such as possum, porcupine, yellowbelly (fish) and witchetty grubs. He recalls using bush medicines such as coolibah leaves and river mud to cure illness, as taught to him by his mother—[40] to [42].

[43] **[Claimant]** grew up and also worked in and around the claim area:

- he knew all the Koa families when he grew up at Cherbourg and through his cousin he was told of Koa law and custom and where Koa traditional country was (around Winton)—at [13] to [19]
- he is involved in cultural heritage work on Koa country because he has obligations to protect Koa sacred sites and cultural heritage and these are taken seriously to avoid negative repercussions—at [22] and [25];
- as the eldest Koa man in his family, he is able to speak about country and to pass down knowledge about Koa law and custom—at [28]; and
- he meets with other senior elders of neighbouring native title groups to discuss native title claim boundary issues —at [40] to [42]

[44] Attachment F/M provides information said to support that the native title claim group continues to have an association with the claim area in a number of different ways, the details of which are:

- some work as a Park Rangers at Bladensburg National Park and as members of cultural heritage protection survey teams for projects;
- ochre is collected for trade and for use in traditional ceremonies, funerals and dance - detailed knowledge of it locations are held, said to be revealed ancestral spirits that occupy the lands and waters of Koa country—at [44] to [45]; and
- people continue to visit the site within the claim area of a massacre that occurred in the early days of European settlement—at [53].

Consideration

[45] There is, in my view, a factual basis that goes to showing the history of association that members of the claim group have, and that their predecessors had, with the area covered by the application—see *Gudjala 2007* at [51]. It is supported by the information at Attachment F/M and further substantiated by the information attested to by **[Claimant]** and Mr Beckett in their affidavits. I am satisfied that the information before me supports the existence of a link between the current claim group and its predecessors. The information (as outlined above) supports the claim group’s connection to the land and waters of the application area and that this connection has its origins in the preceding generations’ association with the area. This is sufficient for me to be satisfied that the Koa People native title claim group has, and its predecessors had, an association with the area.

Reasons for s 190B(5)(b)

[46] In the context of the registration test (and explicitly the task at s 190B(5)(b)), there must be factual material capable of supporting the assertion that there are ‘traditional’ laws and customs acknowledged and observed by the native title claim group, and that they give rise to the claimed native title rights and interests—*Gudjala 2007* at [62] and [63]. Justice Dowsett again considered the requirements of s 190B(5) when he addressed the adequacy of the factual basis underlying an applicant’s claim in *Gudjala 2009*. He makes statements about the assessment of the adequacy of a general description of the factual basis of the claim, which in summary mean that:

- assertions should not merely restate the claim; and
- there must be at least an outline of the facts of the case—at [29].

[47] In *Gudjala 2007*, Dowsett J considered that the factual basis materials for this assertion must demonstrate⁵:

- that the laws and customs currently observed by the claim group have their source in a pre-sovereignty society and have been observed since that time by a continuing society—at [63];
- the identification of a society of people living according to a system of identifiable laws and customs, having a normative content, which existed at the time of sovereignty—at [65] and see also at [66]; and
- the link between the claim group described in the application and the area covered by the application, ‘identifying some link between the apical ancestors and any society existing at sovereignty’—at [66].

The relevant society

[48] The application and additional material describe the Koa People’s society and the normative system from which it derives its traditional laws and customs. Some of this information is drawn from the anthropology around Aboriginal tribal systems before and at sovereignty and their continuing existence in the contemporary societies of native title claim groups. For example, through reference to Norman Tindale and his ‘designating ‘Koa’ as a ‘tribe’, the additional material asserts that ‘Tindale clearly intended to describe the group of people who occupied the Upper Diamantina region as possessing a high degree of complexity in its social organisation and political arrangements, beyond that of a clan group or ‘horde’—at [9].

[49] The material goes on to provide Tindale’s description of the ‘tribe’:

...as being at the limit of political organization in Australia’ and the largest grouping ‘in which a man can readily share in the full life of the community, imparting his thoughts to others whom he meets with a feeling that he is among his own kind’. The members of the tribe ‘share a common bond of kinship and claim a common territory, even though the sharing in it may be the subject of restrictions on the taking of certain foods and the exploitation of some other resources may be limited without prior arrangement or permissible only by reason of the possession of specific kinship ties’⁶—at [9].

[50] Attachment F/M asserts that:

- Koa People share a common system of laws and customs, beliefs and practices, with neighbouring groups within the broader region and under that system only the Koa People enjoy rights and interests in relation to the area covered by the application—at [23];

⁵ This was not criticised by the Full Court in *Gudjala FC* (at [71], [72] and [96]).

⁶ Citing Norman B Tindale, *Aboriginal Tribes of Australia - Their Terrain, Environmental Controls, Distribution, Limits and Proper Names*. Berkeley: U of California Press, 1974 (175). Tindale further noted in relation to Koa tribe and their domain that ‘There are dialect differences east and west’ and ‘They did not practice either circumcision or subincision as rites of initiation’—footnote 22.

- descent from a forebear is the essential mechanism for acquiring membership of the native title claim group and is the basis for transmission of the group's native title rights and interests—at [27];
- the lands and waters of the Koa People are occupied by both creative and ancestral spirits and their rights and interests originate from those spirits as their forebears—at [28];
- knowledge of these spiritual forces and the customary rules that must be adhered to is passed down from senior Koa People to younger generations—at [28]; and
- customary rules mandate social behaviour—at [29] to [30].

[51] The additional material states that 'the society of the Koa People is a tribal society known by the name of its language and belonging to the territory of that language'—at [5]. Acknowledgement and observance of Koa traditional laws and customs continue to be based on a 'belief in powerful creative beings originating in a mythological era that placed humans, topographic features, species, language and culture on the earth thereby establishing the inalienable connection to the country'—at [15]. Further:

The laws and customs acknowledged and observed by the present-day Koa group are, with some adaptation, the same rules as set down by the creative beings, and include:

- a) Inheritance of native title rights and interests in country on the basis of descent from a recognised Koa ancestor;
- b) A system of inalienable communal rights in land, waters and resources;
- c) A permission system for accessing country and its resources;
- d) Rules mandating exogamous marriage between two moieties;
- e) Totemic affiliations. However, a four class section system is no longer strictly adhered to;
- f) Food taboos based on a person's totemic affiliation;
- g) Rules in relation to ceremonies, including funeral rites, and rites of passage to levels of social status. However, initiations are no longer carried out on country;
- h) Punishments for transgressions of normative rules; such punishments meted out by both spiritual forces and fellow claim group members. While punishments in present day Koa society are less severe (ie, do not extend to physical harm or death and are more likely to involve admonishment by an elder or social ostracism), the threat of spiritual punishment remains an ever-present danger;
- i) Continued practice of trade in traditional resources. However, traditional trade routes have adapted to modernity;
- j) Rules regarding the protection of the land and maintenance of spiritual sites, requiring people to respect both the land and the ancestral spirits that inhabit the land
- k) Rules restricting certain cultural practices and access to particular areas to either men or women;
- l) The practice of the holding of tribal and inter-tribal meetings for the purpose of resolving disputes and decision-making;
- m) Teaching of laws, spirituality, culture and medicine, usually by experienced and knowledgeable elders—at [16].

[52] illustrates these principles in his affidavit:

- he was taught by his 'Nanna' about marriage lines—'that you can't marry a person from your own dreaming', that this 'is a regional law for all of the tribes' and it 'regulates marriages to ensure that you don't marry the wrong way'. He was also taught this by his father and uncles. He is married to a Koa woman according to Aboriginal law—at [9] and [10]; and

- his use of ochre in traditional ceremonies is extensively described—he has a right to take it for dance and ceremony, it is revealed to him because it belongs to the Koa people, he speaks to the spirits, he knows how to use it—at [21] to [29].

Speaking for and making decisions about country

[53] Attachment F/M asserts that Koa People maintain their right to be consulted about matters relating to Koa country, and that only they can speak for Koa country. Members of the native title claim group are said to gain the authority to speak for country through the possession of geographic and cultural knowledge transmitted to them by their ancestors – referred to as ‘speaking for country’ – at [32] to [35].

Protecting and caring for country

[54] Attachment F/M asserts that cultural heritage protection work within the area covered by the application is undertaken by members of the native title claim group. It is said that failure to uphold the ‘obligation under traditional law and custom to look after sacred places can result in severe consequences, including sickness or death within Koa families’ – at [52]. This concept also includes looking after the well-being of the land [which] also entails showing respect for the spiritual ancestors of the land’ – at [53]. Mr Beckett affirms in his affidavit that he has taught and shown his sons and grandsons to announce themselves to the spirits and country: ‘Country is what holds everything including our law and custom’ – at [24].

[55] **[Claimant]** also attests to the importance of such responsibilities:

....as Koa tribal people have an obligation to protect our sacred sites and our cultural heritage. If we don't protect our sites then we'd lose everything. It would be a big shame. It is important for Koa people like myself to be involved in any developments on Koa country. It comes down to us as Koa People to look after our sacred places because spiritually and culturally it will get back to us if we don't look after those places. People in our family will get sick and possibly die if we did the wrong thing. We have an obligation under Koa law and custom to protect and preserve our sites. We take this obligation seriously – at [25].

Consideration

[56] The information in the application and the additional material largely pertains to the traditional laws and customs acknowledged and observed by the contemporary claim group. However, this material includes some information on Aboriginal society as it existed in general at the time of sovereignty in and around the vicinity of the claim area. The material would appear to direct me to the basis on which Koa traditional laws and customs are rooted in or derived from the pre-sovereignty Koa society. In my view it is reasonable to draw an inference from the material that a Koa society existed prior to and at the time British sovereignty was asserted in the current claim area.

[57] The ethnographic research and historical records cited in the material provide a sufficient factual basis for an inference that there has been continuous existence of the laws and customs of

the Koa society from before sovereignty and at least since sustained European settlement (purported to be from around the 1860s). The material also asserts and the affidavits illustrate how the claim group has handed down its laws and customs from generation to generation, in the sense defined in *Yorta Yorta*. There appears to be a continuing acknowledgement and observance of traditional laws and customs that give rise to the claimed native title by the Koa people, the practice of which has been passed down to them by preceding generations. There is sufficient information that demonstrates and illustrates aspects of Koa traditional law and custom, in respect of the claim area: information pertaining to family and ancestors, rules about marriage and social relationships, rules in relation to land and belonging to the area, accessing and protecting country and the passing on of traditional and cultural knowledge.

[58] The affidavits and factual material contain sufficient information to provide a link between the named apical ancestors and the area covered by the application and identifies those predecessors of the native title claim group who, around the time of European settlement, acknowledged and observed the laws and customs of Koa society. The birth dates of the apical ancestors (predominantly in the latter part of the 19th century) show they were born within the period which saw the beginning of sustained European settlement of the region – between the 1860s and the 1890s⁷. This is sufficient, along with what is said about their association with the area of the Koa application, for an ‘inference of continuity’ that the society in which they existed was the same as that which prevailed before and at sovereignty. In this sense I refer to *Gudjala 2009*:

. . . Sufficient may be known of circumstances before, or shortly after, first European contact (assuming that event occurred after the date of assertion of British sovereignty) to permit an inference that the claim group is a modern manifestation of a pre-sovereignty society, and that its laws and customs have been derived from that earlier society. Such an inference may be available notwithstanding the absence of any recorded history of the society and the way in which it has continued since the earlier “snapshot” of the society—at [31].

. . . the necessary link between the pre-European contact society and its laws and customs, and the claim group and its laws and customs, may be inferred primarily from continuity, without necessarily resorting to a close examination of the societies and their laws and customs. The evidence of actual events will demonstrate continuity. Even if the history commences shortly after first European contact, it may be reasonable to assume that such a stable society was unlikely to have arisen in the period between contact and the commencement of historical records—at [32].

[59] In my view, the application and additional material provides a sufficient factual basis for the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group and that these give rise to the native title rights and interests it claims.

⁷ asserted in Attached F/M at [4] to [10].

Reasons for s 190B(5)(c)

[60] This subsection requires that I be satisfied that there is sufficient factual basis to support the assertion that the native title claim group continues to hold native title in accordance with its traditional laws and customs.

[61] Attachment F provides information to support that continuity of traditional law and custom has been possible because the members of the claim group and their predecessors have continued to live, work and travel through the area covered by the application. It is said that they have continued to observe and acknowledge their traditional laws and customs and adhere to the processes that regulate their association with and responsibilities to their country (the area of the application). Disruptions to the claim group's continuity of association with the area of Koa country, caused essentially for reasons of dispossession created by European settlement, is claimed to have been mitigated by:

- Koa people maintaining contact with their country through work on the various pastoral stations located within and adjacent to the current claim area; people travelled, worked and resided in the towns and camps proximate to and within the current claim area— Attachment F/M at [40] to [43];
- laws and customs relating to country, important sites and ceremonies, stories, hunting and gathering, fishing and bush tucker were passed down by significant people to the younger generations and continue to be passed on today—R Beckett at [9] and [14]; and
- maintaining connection to Koa families and people in accordance with Koa traditional laws and customs even when living at the missions of Cherbourg, Woorabinda, Palm Island— **[Claimant]** at [13] to [17].

[62] Attachment F/M asserts that the members of the native title claim group hold rights, responsibilities and interests in relation the area covered by the application under their traditional laws and customs that have been passed down to them by preceding generations. It is in this way that traditional laws and customs are said to have been continuously practiced by the Koa People—at [26]. Koa People are said to continue to assert that their lands and waters are occupied by both creative and ancestral spirits and that their rights and interests originate from those spirits as their forebears. A respect for these spiritual forces imbues a sense of responsibility for the land and to the creative and ancestral spirits of the Koa People today. At a practical level this recognition and strengthening continues to take the form of such things as avoidance of places, a prohibition on the removal of objects from country, the need to speak with and placate the spirits of the country when necessary and the obligation to protect sacred places and ancestral sites from physical harm— Attachment F/M at [26] to [31].

[63] Mr Beckett also affirms in his affidavit that 'Koa People have maintained our continuity as a community through our close connections amongst family groups, following and teaching our laws and customs, and through our connection to country, which includes our strong spiritual connection to the country of our ancestors who still occupy that land'— at [15].

[64] The material before me supports the assertion that the laws and customs of the Koa people have been passed from generation to generation and continue to be acknowledged and observed today among the current generations of the claim group. For example, at Attachment F/M:

- the claim group's generational association with the pastoral stations has allowed a transmission of rights, responsibilities and 'knowledge of country' – at [37].
- Koa people continue to facilitate transmission of knowledge and customs to younger generations – at [28].
- working and residing on or proximate to their traditional lands enabled Koa people to visit sites and areas of significance, thereby maintaining a close relationship to their country – at [44].

[65] Despite their removals to missions and towns, the material before me asserts, in my view, that Koa people maintained their spiritual connection and physical access to and knowledge of their country. This has been enabled by the intergenerational transmission of traditional laws and customs through their stories and the exercise of rights and responsibilities in relation to the area covered by the application.

[66] There is sufficient information before me to support the assertion that the native title claim group continues to hold native title in accordance with its traditional laws and customs.

Conclusion

[67] 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.

[68] Under s 190B(6) I must be satisfied that at least one of the native title rights and interests claimed by the native title group can be established, prima facie. I refer to the comments made by Mansfield J in *Doepel* about the nature of the test at s 190B(6):

- it is a prima facie test and 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis' – *Doepel* at [135].
- it involves some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed' – *Doepel* at [126], [127] and [132].

[69] I have examined the factual basis for the assertion that the claimed native title rights and interests exist against each individual right and interest claimed in the application to determine whether prima facie, they:

- exist under traditional law and custom in relation to any of the land or waters under claim;

- are native title rights and interests in relation to land or waters (see chapeau to s 223(1)); and
- are rights and interests that have not been extinguished over the whole of the application area.

[70] I note that, in my view, as set out above at s 190B(5), the application provides a sufficient factual basis to support the assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claimed native title rights and interests.

Consideration

where claimable, including where section 47, 47A or 47B of the Native Title Act 1993 (Cth) applies to an area, the right to possess, occupy, use and enjoy the land and waters covered by the application to the exclusion of all others.

Not established

[71] The majority decision of the High Court in *Western Australia v Ward* (2002) 213 CLR 1; (2002) 191 ALR 1; [2002] HCA 28 (*Ward HC*) considered that '[t]he expression "possession, occupation, use and enjoyment ... to the exclusion of all others" is a composite expression directed to describing a particular measure of control over access to land'. Further, that expression (as an aggregate) conveys 'the assertion of rights of control over the land' which necessarily flow 'from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country'—at [89] and [93]. *Ward HC* is authority that, subject to the satisfaction of other requirements, a claim to exclusive possession, occupation, use and enjoyment of lands and waters can be established, *prima facie*.

[72] In *Griffiths v Northern Territory of Australia* [2007] FCAFC 178 (*Griffiths FC*) the Full Court explored the relevant requirements to proving that such exclusive rights are vested in a native title claim group, stating:

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

[73] The Full Court stressed 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] (*emphasis added*).

[74] Attachment F/M includes statements relating to 'speaking for and making decisions about country':

- Koa people maintain their right to be consulted on matters relating to their country and that 'only they can speak for country';
- that this authority is gained through knowledge and transmission from their predecessors;

- that ‘continued observance of traditional laws and customs relating to decision-making gives rise to the right to speak for and make decisions about the Application Area’ – at [32] to [35]; and
- Koa people maintain the right to exclude others from ‘the Application Area’, and in their position within a ‘broader network of regional laws, customs and social interaction’ it is a right mutually recognised and adhered to by other neighbouring and related groups maintaining their own ‘territorial domains’ – at [38].

[75] Mr Beckett attests to his right as a Koa person ‘to take ochre from the land’, and that those who are not members of the Koa People do not have such a right – at [22]. However, neither Mr Beckett nor **[Claimant]** attest to matters that translates to making exclusive decisions about the application area or controlling its access by persons who are not members of the native title claim group. There is no material before me that sets out or demonstrates how the group had such a right in relation to the area at the time of sovereignty or continues to acknowledge and observe traditional laws and customs as they relate to the right to exclusive possession.

[76] In my view, the right to exclusive possession cannot be established, prima facie, as it is not sufficiently evidenced how this claimed right exists under the traditional laws and customs of the native title claim group.

(b) access, be present on, move about on and travel over the application area;

Established

[77] This right is evidenced in the material before me, suggesting it exists under the traditional laws and customs of the native title claim group. Both affidavits attest to the native title claim group’s previous and continuing access to the area covered by the application.

- Koa people continue to visit the area covered by the application regularly for traditional purposes, confirming their continued spiritual, cultural and physical ties to the area – at [22]
- ‘...inherited the right to reside on, access and travel throughout Koa country from their predecessors’. These are rights ‘legitimised in the transmission of knowledge, laws and customs associated with the responsibility to care for and use Koa country’ – at [37].

(d) take (including by hunting and gathering) and use traditional natural resources from the application area for personal, domestic and non-commercial communal purposes;

Established

[78] This right is evidenced in the material before me, suggesting the right exists under the traditional laws and customs of the native title claim group. The right to take and use the traditional natural resources of Koa country is referred to in Attachment F/M:

- a claimant who, while working on and travelling throughout Koa country throughout his life, was able to hunt and gather traditional bush foods such as possum, porcupine, yellowbelly (fish) and witchetty grubs and use bush medicines such as coolibah leaves and river mud to cure illness, as taught to him by his mother – at [48];

- Koa People continue to maintain their right to use the land, waters and other resources of Koa country is in accordance with traditional law and custom— at [49].

[79] Mr Beckett attests extensively to his taking and using of ochre for traditional purposes and his ability to do so being governed by his acknowledgement and observance of Koa traditional laws and customs.

(g) teach on the application area the physical and spiritual attributes of the application area;

Established

[80] This right is evidenced in the material before me, suggesting the right exists under the traditional laws and customs of the native title claim group. All the information in the affidavits and that which is asserted in Attachment F/M is premised upon the teaching and learning of the physical and spiritual attributes of Koa country by members of the native title claim group and its predecessors. As detailed above, Koa people have maintained their spiritual connection, access to and knowledge of their country through the intergenerational transmission of their traditional laws and customs.

(c) camp on the application area and, for that purpose, erect temporary shelters on the application area;

(e) to assemble and conduct religious and spiritual activities and ceremonies on the application area;

(f) maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places and areas, by lawful means, from physical harm;

(h) light fires on the area for domestic purposes including cooking, but not for the purpose of hunting or clearing vegetation;

(j) hunt, fish, travel in or on, and gather from, the water for personal, domestic and non-commercial communal purposes;

(k) take and use the water for personal, domestic and non-commercial communal purposes

(i) be buried on the application area in accordance with traditional law and custom;

Not established

[81] In my view, there is not sufficient information in the material before me in relation to any of these claimed rights as they exist under Koa traditional law and custom. Whilst information in Attachment F/M refers to the existence of responsibilities for and obligations to country held by the members of the claim group, it is not clear on the face of the material how this translates to these particular rights. Similarly the affidavit material does not illustrate or demonstrate how the group has or continues to acknowledge and observe traditional laws and customs as they relate to such rights.

[82] Therefore, these rights cannot be established, prima facie, as it is not sufficiently evidenced how they exist under the traditional laws and customs of the native title claim group.

Conclusion

[83] I have considered the rights claimed in the application against existing law in relation to whether or not they are capable of being recognised and whether the application provides sufficient information to establish, prima facie, their existence. I am satisfied, having considered

the information before me, that some of the rights claimed in this application can be established, prima facie. Therefore the rights to be registered on the Register of Native Title Claims are as follows:

The Koa People claim the following rights and interests:

- (b) access, be present on, move about on and travel over the application area;
- (d) take (including by hunting and gathering) and use traditional natural resources from the application area for personal, domestic and non-commercial communal purposes;
- (g) teach on the application area the physical and spiritual attributes of the application area;

[84] In the circumstances where I have found that a particular claimed right cannot be established, prima facie, I refer the applicant to the provisions of s 190(3A) of the Act. The provisions are available to the applicant if there is further information which would support a decision under that section to include a right on the Register.

[85] 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.

[86] Under s 190B(7), I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application. In *Doepel*, Mansfield J considered the nature of the Registrar's task at s 190B(7) which was approved by the Full Court in *Gudjala FC*:

Section 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. The focus is, however, a confined one. It is not the same focus as that of the Court when it comes to hear and determine the application for determination of native title rights and interests. The focus is upon the relationship of at least one member of the native title claim group with some part of the claim area. It can be seen, as with s 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration—at [18].

[87] Robert Beckett was brought up by his grandmother at Woorabinda (at [7]) and although he and others like him grew up away from their traditional country, he has maintained a continuous connection which includes 'a strong spiritual connection to the country of [his] ancestors who still occupy the land'—at [15]. He attests to his father having later taught him about Koa laws and

customs and Koa country, places and stories which he continues to pass on to his sons and grandsons—at [6] and [24]. He has the right to travel through his traditional country to collect ochre for ceremonial purposes and it is because he is ‘spiritually connected to Koa country that [he] is able to find it’ —at [17] to [22].

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

[89] 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 s61A (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.

[90] 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)

[91] 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 report dated 27 July 2015 and a search that I have made of the Tribunal's geospatial databases on the day of my decision confirms that there are no approved determinations of native title over the area covered by the application.

Section 61A(2)

[92] Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply. Schedule B at paragraphs 1 and 2 provide the relevant general exclusion statements that the application excludes any area where a previous exclusive possession act was done in relation to the area covered by the application.

Section 61A(3)

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

Conclusion

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

Subsection 190B(9)

No extinguishment etc. of claimed native title

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

- (a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
- (b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
- (c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss 47, 47A or 47B.

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

Section 190B(9)(a)

[96] Schedule Q contains the statement that 'the native title claim group does not claim ownership of minerals, petroleum or gas where they are wholly owned by the Crown'.

Section 190B(9)(b)

[97] Schedule P contains the statement that the application does not include a claim to an offshore place.

Section 190B(9)(c)

[98] Schedule B at paragraph 6 states that the application excludes land or waters where the native title rights and interests claimed have been otherwise extinguished.

Conclusion

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

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.

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

[101] Section 190C(2) 'directs attention to the contents of the application and supporting affidavits' and 'seeks to ensure that the application contains 'all details' required by s 61'. In reaching my decision for the condition in s 190C(2), I understand that this condition is procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss 61 and 62. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s 190C(2)—*Doepel* at [16] and also at [35] to [39]. In other words, does the application contain the prescribed details and other information?

[102] 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)

[103] One of the requirements of my consideration of the application under s 190C(2) is 'to consider whether the application sets out the native title claim group in the terms required by s 61'—*Doepel* at [36]. Specifically:

If the description of the native title claim group were to indicate that not all the persons in the native title claim 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 Registrar should not accept the claim for registration—*Doepel* at [36].

[104] The details relevant to my consideration at this condition are set out in the application at Part A, 1 and 2 and at Schedules A and R. There is nothing on the face of the application that suggests that the application is not brought on behalf of all members of the native title claim group and I am satisfied that the application meets the requirements of this condition.

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

Name and address for service: s 61(3)

[106] Part B of the application states on page 16 the name and address for service of the persons who are the applicant.

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

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

[108] Schedule A provides a description of the persons who comprise the native title claim group.

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

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

[110] The application is accompanied by affidavits from each of the 7 persons who comprise the applicant. The affidavits are signed by each deponent and witnessed and make all the statements required of this section.

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

Details required by s 62(1)(b)

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

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

[113] Schedule B provides a list of general exclusion statements for those areas not covered by the application and refers to Attachment B for the description of the external boundaries of the area covered by the application which is a metes and bounds description of those geographical external boundaries

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

[114] Schedule C refers to Attachment C being a map showing the external boundaries of the area covered by the application.

Searches: s 62(2)(c)

[115] Schedule D provides the statement that no searches have been carried out.

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

[116] Schedule E provides a description of the native title rights and interests claimed in relation to the area covered by the application.

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

[117] Schedule F refers to Attachment F/M which provides information in support of the factual basis for the claim made in the application.

Activities: s 62(2)(f)

[118] Schedule G refers to Attachment F/M which provides information in support of the factual basis for the claim made in the application, which includes activities undertaken by the native title claim group.

Other applications: s 62(2)(g)

[119] Schedule H provides the statement that the applicant is aware only of a non-claimant application filed (QUD82/2015) in relation to a part of the area covered by the application.

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

[120] Schedule HA provides the statement that the applicant is not aware of any such notices made in relation to the whole or part of the area covered by the application.

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

[121] Schedule I provides the statement that the applicant is not aware of any such notices made in relation to the whole or part of the area covered by the application.

Conclusion

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

Subsection 190C(3)

No common claimants in previous overlapping applications

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

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

[123] The requirement that the Registrar be satisfied in the terms set out in s 190C(3) is only triggered if there is a previously registered claim in relation to the area covered by the application before me, as described in ss 190C(3)(a), (b) and (c)—*Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*) at [9]. Section 190C(3) relates to ensuring there are no common native title claim group members between the application currently being considered for registration ('the current application') and any overlapping 'previous application' that is a registered application when the current application was made in the Court.

[124] The geospatial report identified that as at 27 July 2015 no native title determination applications fall within the external boundaries of the current application. This is confirmed by my search of the geospatial datasets on the day I made my decision.

[125] As the Koa People application is not overlapped by any previous application (as defined by the conditions of s 190C(3)), the requirement that I consider the issue of common claim group membership does not arise.

[126] 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.

[127] Schedule R of the application refers to Attachment R which comprises a certification made by Queensland South Native Title Services (QSNTS). As the application purports to be certified by the representative body for the area, the relevant consideration for me is at s 190C(4)(a).

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

[128] Section 190C(4)(a) imposes upon the Registrar conditions which, according to Mansfield J, are straightforward—*Doepel* at [72]. All that the task requires is that I be ‘satisfied about the fact of certification by an appropriate representative body’ which necessarily entails:

- identifying the relevant native title representative body (or bodies) and being satisfied of its power under Part 11 to issue the certification; and
- being satisfied that the certification meets the requirements of s 203BE—*Doepel* at [80] and [81].

[129] Pursuant to s 203BE(4), a written certification by a representative body must:

- include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs of s 203BE(2)(a) and (b) have been met;
- briefly set out the body’s reasons for being of that opinion; and
- where applicable, briefly set out what the representative body has done to meet the requirements of s 203BE(3) in relation to any overlapping applications.

[130] Pursuant to s 203BE(2), a ‘representative body must not certify ... an application for a determination of native title unless it is of the opinion that’:

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

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

Identification of the representative body

[131] The geospatial report confirms that QSNTS is the only representative body for the whole of the area covered by the application. QSNTS is funded to perform all the functions of a representative body in southern and western Queensland pursuant to s 203FE. It is therefore the only body that could certify the application under s 203BE.

[132] The certificate is dated 16 July 2015 and signed by the Chief Executive Officer of QSNTS. The certificate states that he has been delegated the function given to QSNTS under the Act to certify the application in accordance with s 203BE and s 203FEA.

Does the certificate meet the requirements of 203BE

[133] For the purposes of s 203BE(4)(a), the certification contains statements in relation to the requirements of paragraphs 203BE(2)(a) and (b), that is:

- (a) all the persons in the native title claim group have authorised the applicant to make the application and to deal with the matters arising in relation to it and this authorisation has been undertaken in accordance with a decision making process which has been adopted and agreed to by the native title claim group; and
- (b) all reasonable efforts have been made to ensure the application describes or otherwise identifies all the persons in the native title claim group.

[134] For the purposes of s 203BE(4)(b), the certification briefly sets out the reasons for QSNTS being of that opinion, namely:

- information sessions in relation to the application were held in Brisbane and Rockhampton on 3 July 2015;
- the meeting to authorise an applicant for and on behalf of the Koa People was convened on 4 July 2015, held simultaneously in Brisbane and Rockhampton, linked by video conferencing facilities;
- QSNTS published notices for the meeting in two print media publications in addition to copies of those notices being mailed to members of the native title claim group;
- telephone contact was made with members to advise of the authorisation meetings;
- the meetings were well attended and decisions were made by the Koa People in accordance with an agreed process.

[135] The certificate does not specifically set out the efforts made by the representative body to ensure that the application describes or otherwise identifies all the persons in the native title claim group. However, in my view, the statement that goes to this issue is made in the certificate and is supported by the statement in the certificate that the Chief Executive Officer is satisfied that all necessary steps and processes have been followed in accordance with the requirements of the Act' at— paragraph 4(f).

[136] In my view, the statements made in the certificate, as summarised above, briefly set out the reasons for QSNTS being of the opinion that the requirements of s 203BE(2)(a) and (b) have been met.

[137] For the purposes of s 203BE(4)(c), the representative body must also briefly set out how it has met the requirements of s 203BE(3). That subsection provides for a representative body's obligations to make all reasonable efforts to reach agreements between any overlapping claimant groups and to minimise the number of overlapping applications. In my view, as there are no other applications that cover the area of the Koa People claimant application, (confirmed by the geospatial report) there is no requirement for the certificate to address this provision.

[138] For the reasons set out above I am satisfied that the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, thereby complying with s 190C(4)(a).

[End of reasons]

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Koa People
NNTT file no.	QC2015/007
Federal Court of Australia file no.	QUD592/2015

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

Section 186(1): Mandatory information

Application filed/lodged with:

Federal Court of Australia

Date application filed/lodged:

16 July 2015

Date application entered on Register:

28 September 2015

Applicant:

As per Schedule

Applicant's address for service:

As per Schedule

Area covered by application:

As per Schedule. Note: please add paragraph spaces between points 2 and 3, 3 and 4.

Persons claiming to hold native title:

As per Schedule

Registered native title rights and interests:

The Koa People claim the following rights and interests:

- (b) access, be present on, move about on and travel over the application area;
- (d) take (including by hunting and gathering) and use traditional natural resources from the application area for personal, domestic and non-commercial communal purposes;
- (g) teach on the application area the physical and spiritual attributes of the application area;

28 September 2015

[End of document]