

Registration test decision

Application name	Kurtijar People
Name of applicant	Joseph Rainbow, Fred Edwards, Irene Pascoe, Shirley McPherson (applicant)
Application made	18 June 2015
Application amended	20 October 2015
Federal Court No.	QUD483/2015

My decision under s 190A of the *Native Title Act 1993* (Cth)¹ is that the claim in the Kurtijar application satisfies all of the conditions in ss 190B and 190C of the Act. It follows that the claim must be accepted for registration² and entered on the Register of Native Title Claims.³

Date of decision: 15 April 2016

Susan Walsh, Practice Manager⁴

¹ All legislative sections are from the *Native Title Act 1993* (Cth) (the Act), unless I state otherwise.

² See s 190A(6) of the Act.

³ See s 190(1) of the Act.

⁴ Delegate of the Native Title Registrar under a written delegation dated 20 November 2015 pursuant to s 99 of the Act.

Introduction

[1] The application is made on behalf of the Kurtijar People native title claim group in relation to an area of land and waters in the southwest Gulf of Carpentaria region of Queensland, east and north of the town of Normanton. The Deputy Registrar of the Federal Court gave a copy of the amended application and accompanying affidavits filed in the Court to the Native Title Registrar (Registrar) on 20 October 2015. This has triggered the duty to consider the claim in the amended application against the registration test conditions set out in ss 190B and 190C.⁵ If the claim satisfies all of the conditions, then the Registrar must accept the claim for registration.⁶ If the claim does not satisfy all of the conditions, the Registrar must not accept the claim for registration.⁷ My decision is that the claim satisfies all of the registration test conditions and my reasons against each condition now follow.

Conditions about the merits of the claim: s 190B(1)

Decision on identification of area subject to native title: s 190B(2)

[2] The claim meets the requirements of s 190B(2) as I am satisfied that the written description and the map of the external boundary and the written description of internally excluded areas are sufficient to identify with reasonable certainty the particular land or waters covered by the application. My reasons now follow.

What is needed to meet s 190B(2)?

[3] To meet s 190B(2), the Registrar ‘must be satisfied that the information and map contained in the application ... 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.’ The two questions for this condition are whether the information and map provides certainty about: (a) the external boundary of the area of land or waters over which native title rights and interests are claimed; and (b) any areas within that external boundary over which native title rights and interests are not claimed.⁸

Does the information provided about the external boundary meet this condition?

[4] Attachment B of the application provides a written description of the external boundary prepared by the Tribunal’s Geospatial Services, using metes and bounds which reference waterways, adjoining cadastral, native title determination and native title application boundaries. Coordinate points are also used, referencing Geocentric Datum of Australian 1994 and shown to

⁵ See s 190A(1).

⁶ See s 190A(6). I note that s 190A(6A) does not apply as the claim in the application made on 18 June 2015 has not previously been accepted for registration nor entered on the Register of Native Title Claims.

⁷ See s 190A(6B).

⁸ See Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112; (2003) 203 ALR 385; [2003] FCA 1384 (*Northern Territory v Doepel*) at [122].

six decimal points. Attachment C of the application is a colour map that depicts the external boundaries with a bold blue outline. The map shows the commencement point referred to in the written description, a topographic background, scalebar, north point, coordinate grid and locality diagram.

[5] I find that the written description and the map are comprehensive, detailed and consistent. Armed with this information, the external boundaries of the area can be located on the earth's surface with a reasonable degree of certainty. Accordingly, the information satisfies the requirements of s 190B(2) insofar as the external boundary is concerned.

Does the information about excluded areas within the external boundary meet this condition?

[6] Schedule B of the application contains a written description of internally excluded areas by reference to the provisions of s 23B so that all areas within the external boundary covered by a 'previous exclusive possession act' are not covered by the claim, save where such extinguishment is to be disregarded as a result of the operation of the Act. The final part of Schedule B excludes areas where native title rights and interests have otherwise been extinguished.

[7] I find that the written description of the internally excluded areas is reasonably clear. It will be possible to work out any internally excluded areas affected by a previous exclusive possession act or other extinguishment, once a search of historical and current tenure for the application area is completed.⁹

Decision on identification of native title claim groups: s 190B(3)

[8] The claim meets the requirements of s 190B(3) as I am satisfied that the application contains a sufficiently clear description of the persons in the native title claim group, so that it can be ascertained whether any particular person is in that group, as required by subsection (b). My reasons now follow.

What is needed to meet s 190B(3)?

[9] To meet s 190B(3), 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.' The only question for this condition is 'whether the application enables the reliable identification

⁹ This approach is supported by the decisions in *Daniel for the Ngaluma People & Monadee for the Injibandi People v Western Australia* [1999] FCA 686 (Nicholson J) and *Strickland v Native Title Registrar* (1999) 168 ALR 242; [1999] FCA 1530 at [51] to [52] (French J, as the Honourable Chief Justice then was).

of persons in the native title claim group.¹⁰ Whether the claim is on behalf of the correct native title claim group is not relevant.¹¹

Does the description of the persons in the native title claim group meet this condition?

[10] Schedule A of the application does not name all of the persons in the claim group in the manner identified by subsection (a). The question is therefore whether the description of the native title claim group in Schedule A satisfies subsection (b). Schedule A of the application states that the native title claim group on whose behalf the claim is made is the Kurtijar people. Schedule A states that the Kurtijar People are all the descendants of the apical ancestors named in Schedule A and who identify and are identified by other Kurtijar People according to Kurtijar traditional law and custom. Schedule A states that the term ‘Descendants’ includes persons who have been adopted by the Kurtijar People. Schedule A names 12 sets of apical ancestors. In some cases a single person is named, in others, two are named and in one case, three males are named together. Schedule A defines the term ‘descendants’ as including ‘those individuals who have been adopted by the Kurtijar People’.

[11] I interpret the description to mean that a person may be ascertained as a member of the claim group if they can show biological or adoptive descent from one or more of the Kurtijar ancestors and if their identification as Kurtijar is recognised by the native title claim group as a result of the operation of traditional law and custom. The applicant has provided genealogies¹² for each of the apical ancestors. This illustrates the anthropological work undertaken since 2010 to identify descendants of the apical ancestors born within living memory, in the 1930s and 1940s. The applicant’s additional information also illustrates that identifying a person as Kurtijar involves processes of mediation within the group and is governed by the operation of the group’s traditional laws and customs.¹³

[12] The description is sufficiently clear so that it can be ascertained whether any particular person is in the native title claim group. The two elements within the written description of descent and identification provide a ‘substantial factual element’ and a clear basis for a ‘factual inquiry’, such that a person’s status is capable of being ascertained with a sufficient degree of clarity.

Decision on identification of claimed native title: s 190B(4)

¹⁰ *Northern Territory v Doepel* at [51] and also at [37].

¹¹ *Northern Territory v Doepel* at [37] and the decision of Dowsett J in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*), that this condition ‘requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification’ – at [33].

¹² See affidavit by [Anthropologist 1] dated 30 April 2013, to which are annexed genealogies for the 11 apical ancestors, provided as additional information by the applicant on 22 June 2015.

¹³ See the explanatory notes by [Anthropologist 1] within the Kurtijar Genealogies and the discussion of this in paras 40 to 43 of [Anthropologist 1] report dated 26 May 2015.

[13] The claim meets the requirements of s 190B(4) as I am satisfied that the description in the application is sufficient for me to clearly understand and identify the rights as native title rights and interests, as defined in s 223(1). My reasons now follow.

What is needed to meet s 190B(4)?

[14] To meet s 190B(4), the Registrar 'must be satisfied that the description contained in the application as required by paragraph 62(2)(d) is sufficient to allow the claimed native title rights and interests to be readily identified'. The question for this condition is whether the claimed rights are described clearly, comprehensively and in a way that is meaningful and understandable, having regard to the definition of the term 'native title rights and interests' in s 223 of the Act.¹⁴

Does the description of the native title rights and interests meet this condition?

[15] Attachment E of the application states that the native title rights and interests claimed are the non-exclusive rights listed in Attachment E. These rights include the right to occupy, to use the area, to access and travel over it, to hunt and gather there, the right to use natural resources and the right to take a number of listed resources, including water, fish, plants and ochre. Rights relating to the conduct of economic pursuits and ceremonial life on the application area and looking after its significant places are also claimed.

[16] This description is carefully drafted and clearly explains the identified native title rights and interests. The description is sufficient for me to clearly understand and identify the itemised rights as 'native title rights and interests'. I do have an issue with some of the rights being able to be prima facie established, but that is considered against the condition of s 190B(6) below.

Decision on factual basis for claimed native title: s 190B(5)

[17] The claim meets the requirements of s 190B(5) as I am satisfied that the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support the assertion and the three particular assertions in s 190B(5). My reasons now follow.

What is needed to meet s 190B(5)?

[18] To meet s 190B(5), 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.' Section 190B(5) then states that the factual basis must support three particular assertions:

- (a) an association by the claim group and their predecessors with the area;
- (b) the existence of traditional laws and customs acknowledged and observed by the native title claim group giving rise to the claimed native title; and

¹⁴ *Northern Territory v Doepel* at [99] and [123].

- (c) the claim group continuing to hold the native title under those traditional laws and customs.¹⁵

[19] Answering the questions posed by s 190B(5) does not involve a hearing by the Registrar of the Kurtijar People's claim to hold native title in relation to the area covered by the application. At the end of the day, whether or not the Kurtijar People hold native title is for the Federal Court to hear and determine.

[20] That the Registrar's consideration of the claim against this condition is limited, is supported by the case law. After generally considering the provisions of ss 190B and 190C, Mansfield J held in *Northern Territory v Doepel* that:

It is trite to observe that the nature of the Tribunal's task is defined by those provisions. Its task is clearly not one of finding in all respects the real facts on the balance of probabilities, or on some other basis. Its role is not to supplant the role of the Court when adjudicating upon the application for determination of native title, or generally to undertake a preliminary hearing of the application.¹⁶

[21] Mansfield J went on to find that the task for the condition of s 190B(5) is 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'.¹⁷ Mansfield J also said that it is not for the Registrar to 'test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts'.¹⁸

[22] A Full Court of the Federal Court in a later case agreed with Mansfield J about the limits of s 190B(5), holding that what is not required to satisfy this condition is 'evidence that proves directly or by inference the facts necessary to establish the claim'.¹⁹ Nonetheless, the Full Court found that the factual basis 'must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality.'²⁰

[23] If there is a sufficient factual basis for each particular assertion of s 190B(5), then there will also be a sufficient factual basis to support the general assertion at the head of s 190B(5) that the

¹⁵ See the particular assertions set out in subsections (a), (b) and (c).

¹⁶ *Northern Territory v Doepel* at [16].

¹⁷ *Northern Territory v Doepel* at [17].

¹⁸ *Northern Territory v Doepel* at [17].

¹⁹ *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317; [2008] FCAFC 157; (*Gudjala 2008*), per French J (as the Honourable Chief Justice then was) & Moore and Lindgren JJ at [83] and [92].

²⁰ *Gudjala 2008* at [92].

claimed native title rights and interests exist.²¹ I therefore consider below the sufficiency of the factual basis against each of the three particular assertions of ss 190B(5)(a), (b) and (c).

Decision on s 190B(5)(a)

[24] I am satisfied that the factual basis is sufficient to support the assertion of s 190B(5)(a). My reasons now follow.

What is needed to provide a sufficient factual basis for s 190B(5)(a)?

[25] To meet s 190B(5)(a), the factual basis must support the assertion that ‘the native title claim group have, and the predecessors of those persons had, an association with the area’. Generally on what is needed for the ‘association’ assertion:

- (a) 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 at all times;²²
- (b) it is necessary that the material is sufficient to support that the group as a whole presently has an association with the area and to also support an association with the area by the predecessors of the whole group over the period since sovereignty, or at least since European settlement;²³ and
- (c) the materials must support that the association both presently and by the group’s predecessors relates to the area as a whole.²⁴

Is there a sufficient factual basis for the assertion of s 190B(5)(a)?

[26] The applicant explains the assertion that the application area is within the bounds of the traditional country of the Kurtijar people, being one of the Aboriginal tribes commented upon by early settlers and ethnographers in this region in the latter decades of the 19th century and first half of the 20th century. This explanation is found in a report by [Anthropologist 1] titled ‘Kurtijar People—Anthropological Overview’ dated 26 May 2015 (overview report).

[27] The overview report uses the spelling ‘Kurtjar’ and I have assumed that this is merely a variant spelling of the claim group’s name. There are a number of other variant spellings for the claim group, identified in paragraph 9 of the overview report.

[28] The following is a summary of the information in the overview report about the early historical and ethnographic references to the Kurtijar People:

²¹ *Northern Territory v Doepel* at [131]–[132] and *Gudjala 2007* at [43].

²² *Gudjala 2007* at [52].

²³ *Gudjala (2007)* at [51] and [52].

²⁴ See *Martin* at [23]–[26], affirmed by Siopis J in *Corunna v Native Title Registrar* [2013] FCA 372 (24 April 2013) at [35]–[39] and [42]–[44].

- (a) An article published in the *Queenslander* newspaper in 1897 identified that the Normanton tribe called the Oook-a-jin and the three tribes to the north as far as the Gilbert River lived peaceably together. The three tribes to the north were called the O-o-ee-kulla, Goon-gharra (which is a variant for Kurtjar) and the Air-rib (see para 10 of the overview report).
- (b) The ethnographer R. H. Matthews described 'a community of tribes spread over the country of the Norman and Yapper Rivers, Spear Creek, Carron Creek, Walker's Creek, the Lower Gilbert, Byerley's Creek, Pelican Creek, Staaten River, Nassau River, and the lower portions of the Einasleigh and Lynd'. Matthews named eight tribes, including the Ariba and Goongarra (a variant for Kurtjar) and saw them as an 'aggregate of tribes' which formed a 'nation' (para 11).
- (c) Lauriston Sharp was the first anthropologist with academic training to conduct longer-term focused fieldwork in the region in the 1930s. In 1939, he categorized 'tribes' in the area on the basis of 'common features of totemic organisation' dividing Aboriginal people 'into a number of groupings.' His Division VII was situated within an approximate area from the Staaten River in the north to the Leichardt River in the south, with a boundary drawn inland some distance from the coast and this included the 'Kunggara [a variant for Kurtjar] ... Walangama ... Kutanda and Kurandi [and] Kukatja' (para 12).
- (d) The ethnologist Norman Tindale described Kurtjar people and country, using the variants 'Kungere' in 1940 and 'Kunggara/Kurtjar' in 1974. In 1940 he wrote that Kungere territory was 'from Karumba north to Delta Downs; inland to Midlothian and Lotus Vale, with another group which he labeled Wangare 'south of mouth of Staaten River to about Gilbert River'. Tindale quoted Sharp, as well as Curr and Roth as sources for this, noting that information about the Wangare was scant. By 1974, Tindale had revised his description of the Kunggara/Kurtjar territory to 'Staaten River south of Smithburne River and Delta Downs; inland to Stirling and Lotus Vale.' Tindale noted that many Kunggara [i.e. Kurtjar] people had settled on Delta Downs station by this time. Tindale's discussion in 1974 of tribal boundaries around Normanton identified that 'there may be some areas in the Normanton vicinity still subject to errors in determining tribal boundaries' due to the disruptions caused by 'white occupation' which 'came early and for a while was very active during the mining booms, after which there was a long recession.' Tindale is reported as saying that 'many tribal groups were disturbed and movements took place, many forced by the attentions of the native police' (para 13).

- (e) A number of linguists, including Arthur Capell, considered the Kurtjar people. Capel described 'Gunggara ... from Karumba north to Delta Downs [and inland] to Midlothian and Lotus Vale' (para 14). Another linguist, Paul Black, came to Normanton following the linguistic work of the 1960s and 1970s to study the Aboriginal languages of the area and spent more than 12 months there, working with some Kurtjar people, notably [Name removed] (para 15).
- (f) Black's references to the Kurtjar people and country are spread across a number of research reports and publications, including a document in 1978 titled 'The Kurtjar in Recent Years'. In this document, Black commented that the Kurtjar were the 'autonomous and self-supporting inhabitants of an area stretching from the Gulk [i.e. Gulf] of Carpentaria coast from south of the Smithburn River northward nearly as far as the Staaten.' Black wrote that that the area for the Kurtjar stretched inland 'at least as far as the homesteads of Delta and Macaroni Stations.' Black wrote also that his contemporary informants 'maintain that it extended somewhat further, but some data leads me to think that the now virtually extinct Rib or 'Ariba' people could have occupied the more eastern regions of what is now considered Kurtjar territory.' Black wrote that the 'Rib apparently spoke the same language as the Kurtjar, however, and could perhaps have been essentially a division of the same tribe'. Black is finally reported to have commented in 1978 that '[e]ven as late as the 1920s the Kurtjar gathered the remnants of other tribes for such purposes as the initiation of young men' (para 16).
- (g) There is another document in 1980 titled 'About Kurtjar Land' which Black prepared with the Kurtjar informant [Name removed]. This was signed by a number of other Kurtjar people and discusses the impact of colonisation on the Kurtjar people, including how the 'white men would drive us away from the places they wanted ... so that their cattle could have water.' The authors of this document wrote of the killing of one of their people at a soak called Rdeekirran or Skull Hole. The father of one man who was shot at Lntheer played dead and was able to get away later and to tell what happened there.
- (h) The Black/[Name removed] document also describes the impact of colonisation on 'neighbouring groups to the north and east, noting that the label Kurtjar may today encompass people descended from other groups'. One group with which the Kurtjar 'joined up' was the 'Kwanthar people in the Galbraith Station area in order to hide from the white men in this more northern tribe's land along the Staaten River, and some of our people are buried up there ... because it wasn't safe to take them back to our own burial grounds.' This document also discusses how '[s]ome of the people to the east – Areba of Stirling Station area and the Kumulmar (or

Walangama) of Croydon area – also came to live among us when we came to be working on the cattle stations in later years.’

- (i) The Black/[Name removed] document reported that the ‘people of these tribes that grew up among us often married in with us and learned to speak our language, and we’ve come to accept them as part of our tribe ... some of the Kumulmar people came to join us because the police picked them up as children in Croydon and shipped them off to stations in our area’ (para 17).
- (j) Black prepared several maps of Kurtjar country with the assistance of Robert Layton and using five key Kurtjar informants, including the son of the Kurtjar man who survived the Lntheer massacre (para 18). One of Black’s maps titled ‘Kurtjar Country, from Black and [Name removed] 1996’ is reproduced as Map 5 on page 12 of the report. The map shows numbered sites which correspond to a list of language names. Four of the identified sites are the sites of Kurtjar dreaming stories and others show sites where massacres by the white men or native police are remembered to have occurred (para 18).
- (k) The anthropologist Paul Memmott worked at Normanton in the early 2000s with neighbouring groups to the south of the Kurtjar, namely, the Kukatj and Gkuthaan people and referred to the Kurtjar as having occupied the lands and waters of the Staaten River in the north to the Smithburne River in the south (para 19).
- (l) The final contribution to the ethnographic materials concerning the Kurtjar people is the document ‘Memories of Normanton: An Aboriginal Perspective’ (1992), prepared by the Kurtjar man [Name removed] with contributions from other prominent Kurtjar people (the [Name removed] document). The [Name removed] document included a map outlining Kurtjar territory depicting sacred story, bora and burial grounds and was apparently taken from the early mapping which had been undertaken Paul Black (para 20).
- (m) The [Name removed] document identified the Kurtjar as coastal peoples heavily dependent on fishing and generally confined to the higher inland areas during the wet season. Their territory is described as starting on the coastline with the Gulf with the Smithburn River being their southern boundary and the Staaten River being their approximate northern boundary. In relation to their inland eastern boundary, the [Name removed] document states that is ‘at least as far as the homesteads of Delta and Macaroni stations’ (para 20). The [Name removed] document also noted that ‘the Areba people could have occupied the more eastern regions – of what is now considered Kurtjar territory (1992:1)’ (para 20).

[29] In light of the information recounted in the overview report, I find that there is a sufficient factual basis to support an association by the Kurtjar people, both at sovereignty and since, with the coastal country north of Normanton. This is part of the southwest Gulf of Carpentaria in Queensland. This is an area that includes the Delta Downs pastoral lease area, which was purchased by Kurtjar people in 1982. Although the application area does not encompass the Delta Downs pastoral lease area, it does adjoin the eastern and northern bounds of that pastoral lease. To the north of Delta Downs, the application covers the coastal country from around the mouth of Macaroni Creek (a tributary of the Gilbert River) north to the mouth of the Staaten River. To the east of Delta Downs, the application covers an area of inland country that is approximately 160km distant from the western boundary at its most distant point.

[30] It is clear that the association of the Kurtjar People does not stop at the eastern and northern bounds of the Delta Downs pastoral lease. There is evidence in the statements within Attachment F1 and also in the overview report that the association extends east and north to places such as Miranda Downs, Stirling, Dorunda, Pandanus Creek, Velox Lagoon, Wyaaba Creek, Vanrook and Davidson's Well. These places all lie within the application area.

[31] The overview report refers to some mixed views in the ethnographic sources about the southern, northern and eastern reaches of Kurtjar country:

- (a) Tindale (1940) identified the Norman River and Normanton as the southern boundary of Kurtjar territory. This matches the southern boundary of the area covered by the application and also corresponds to the southern boundary of the Delta Downs pastoral lease. However, Tindale (1974) and Black (1977, 1978) identify the southern boundary further to the north around the Smithburne River.
- (b) Tindale (1940) puts the northern boundary at the Gilbert River. Tindale (1974) and Black (1977, 1978) puts it further north, at the Staaten River (para 22 of the overview report).

[32] The overview report concludes that the historical and ethnographic records support that the southern and northern bounds of the Kurtjar extend south to Normanton and the Norman River and north to the Staaten River respectively. This is the basis of this conclusion in the overview report:

- (a) The historical and ethnographic research supports that the Kurtjar people were a distinctive group in this part of the Gulf of Carpentaria and that they have continued as such from the time of sovereignty until the present (para 21).
- (b) There is strong evidence of a connection by Kurtjar people with the area around Delta Downs station and this has been consistently mapped as Kurtjar country

over the years (para 22). (The Delta Downs southern boundary is around Normanton, as is the southern boundary of the application area.)

- (c) There is a strong association with Delta Downs Station and various outstation camps around the main homestead area and it is clearly a significant focal point for Kurtjar people, who purchased the lease in 1982 and have been operating a pastoral business there since that time (para 24).
- (d) Some Kurtjar people assert that the Delta Downs northern boundary is also the northern bounds of Kurtjar country (para 24). The overview report states that 'it is possible that younger people ... who have grown up since Kurtjar people purchased the lease for Delta Downs in 1982 maintain a stronger association ... [with] Delta Downs station ... than their seniors (para 24).
- (e) The author of the report concludes that a majority of contemporary Kurtjar people identify Kurtjar country as extending beyond the northern Delta Downs boundary north to the Staaten River, which is also the northern boundary of the application area. To support this, the author reproduces statements from Kurtjar persons (para 23) that the Staaten River is the northern edge of their country, despite the northern boundary of the Delta Downs station only extending as far north as the mouth of Macaroni Creek. That the northern boundary goes further than the northern Delta Downs boundary to the Staaten River is the position taken by the majority of Kurtjar people (para 24).

[33] The application is accompanied by statements from a number of Kurtjar people who provide evidence that the northern boundary is beyond the Delta Downs boundary up to the Staaten River:²⁵

- (a) [Name removed] states at para 14 that he has been to Dorunda and went throughout that country as he had friends there. He was shown burial sites through that area and told about their boundary at the Staaten River. He was shown areas where people would come across and try to steal women. He states that he has always been told and understood that the northern boundary of Kurtjar country is the Staaten River.
- (b) [Name removed] states at para 17 that the neighbours of the Kurtjar beyond the Staaten were the mob from Kowanyama and they traded with the Kurtjar about 10 to 20 kilometres inland on the Staaten River near Galbraith outstation. He also states that the Kurtjar would trade with the mob from the Chillagoe side further to

²⁵ These are the statements in Attachment F1 of the application by [names removed].

the west along the Staaten, near Pandanus Creek in what is now called Staaten national park (para 18).

- (c) Other Kurtjar people, such as [names removed], also provide evidence in their accompanying statements that the country between the Delta Downs northern boundary and the Staaten is Kurtjar country.

[34] The question of the eastern boundary of the Kurtjar and the inland extent of their territory is addressed at paras 25 to 27 of the overview report:

- (a) Earlier sections of the report identified that the Kurtjar were one of a number of groups associated with the region before sovereignty. The groups associated with inland areas to the east were known as the 'Rib', 'Rib and Walangama', 'Ariba' or 'Areba' people (see Maps 3 and 5) and 'Kunjen' (Map 5).
- (b) In 'About Kurtjar Land' by the linguist Paul Black and the Kurtjar informant [Name removed] in 1980, they say that 'the people of these tribes that grew up among us often married in with us and learned to speak our language, and we've come to accept them as part of our tribe' (a quote from para 17 of the overview report).
- (c) The author of the overview report states that there is some support for a process of licit succession grounded in traditional laws and customs that operated in the region whereby the eastern neighbours of the Kurtjar, being Areba and Kunjen territories, have been absorbed into the normative system of which the Kurtjar belonged at sovereignty when these territories became vacant as a result of the disruption occasioned following colonisation of the region.

Summary in relation to the 'association' assertion of s 190B(5)(a)

[35] I find that the factual basis is sufficient to support an assertion that the persons in the native title claim group have, and the predecessors of those persons had, an association with the area covered by the application.

[36] There is detailed and specific information provided on this topic in [Anthropologist 1] report. Additionally, Attachments F1 of the application contains supporting statements by nine members of the Kurtjar native title claim group. These persons describe a long and unbroken history of association dating back to the time of their ancestors in the late 19th and early 20th century.

[37] The information I have reviewed is specific and detailed as to the identity of the predecessors and their descendants; the nature of the association; the holding of detailed knowledge about its special places and associated stories; and the practice of law and custom

within the area. It follows that I am satisfied that the information is of a sufficient quality to support the assertion that the predecessors of the native title claim group had an association with the area and this has been relatively constant over the time since European settlement.

[38] The information talks specifically and in detail about how that association has manifested over the generations since settlement within the asserted bounds of Kurtjar country because of descent from known Kurtjar predecessors and the inter-generational passing on of knowledge about Kurtjar law and custom.

[39] I refer to the evidence that current members of the claim group are descended from known Kurtjar ancestors who were born at or shortly after European settlement and had an association with a broader reach of Kurtjar country, including the application area. The evidence is to the effect that current members of the claim group have an enduring association with Kurtjar country because of the inter-generational passing on of laws and customs pertaining to their country and ways of interacting with it. Comprehensive statements have been made by Kurtjar people and they speak about a life-long association with their Kurtjar identity, heritage and country and how that has been passed to current claim group members in a line that stretches back to the times of their ancestors alive around the time of settlement of the area.

[40] There is detailed and specific information about a broad reach of places within and proximate to the claim area and about particular persons within the claim group, both past and present, who were and are associated with these places. The information provided has a sufficiently wide geographic compass so that I am satisfied that the association relates to the application area as a whole.

[41] The factual basis is sufficient to demonstrate that there is a history of association by the native title claim group and by their predecessors with the area over the time since European settlement. The factual basis materials also support an assertion that the claim group presently have an association with the area and that this has its origins in the association by their predecessors with the area. The totality of the information leads me to find that the factual basis is sufficient to support the assertion that the native title claim group has, and the predecessors of those persons had, an association with the area.

Decision on s 190B(5)(b)

[42] I am satisfied that the factual basis is sufficient to support the assertion of s 190B(5)(b). My reasons now follow.

What is needed to provide a sufficient factual basis for s 190B(5)(b)?

[43] To meet s 190B(5)(b), the factual basis must support the 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'. The wording of s 190B(5)(b) is almost

identical to paragraph (a) of the definition of ‘native title rights and interests’ within s 223(1) of the Act. Dowsett J approached this in *Gudjala 2007* by considering s 190B(5)(b) in light of the case law regarding s 223(1)(a), particularly the leading decision of the High Court of Australia in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta*).²⁶

[44] According to the High Court’s decision in *Yorta Yorta*, a law or custom is ‘traditional’ where:

- (a) it ‘is one which has been passed from generation to generation of a society, usually by word of mouth and common practice’ – at [46];
- (b) the origins of the content of the law or custom concerned can be found in the normative rules of a society²⁷ which existed before the assertion of sovereignty by the Crown – at [46];
- (c) the normative system has had a ‘continuous existence and vitality since sovereignty’ – at [47];
- (d) the relevant society’s descendants have acknowledged the laws and observed the customs since sovereignty and without substantial interruption – at [87].

[45] Dowsett J found that a sufficient factual basis must therefore demonstrate that the laws and customs relied on by the claim group ‘have their source in a pre-sovereignty society and have been observed since that time by a continuing society’. Dowsett J held that a ‘starting point must be identification of an indigenous society at the time of sovereignty or, for present purposes, in 1850-1860’. His Honour concluded that a sufficient factual basis must also establish the link between the native title claim group described in the application and the area covered by the application, which involves ‘identifying some link between the apical ancestors and any society identified at sovereignty’.²⁸

Is the factual basis sufficient to support the assertion of s 190B(5)(b)?

[46] The overview report identifies the Kurtjar as a distinctive group from around the time of effective sovereignty in the region until the present. The ethnographic sources referred to above

²⁶ *Gudjala 2007* at [26] and [62] to [66].

²⁷ The term ‘society’ in this context is ‘understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs’ – *Yorta Yorta* at [49].

²⁸ See *Gudjala 2007* at [63] and [66] respectively. Although the Full Court found error in Dowsett J’s evaluation of the factual basis materials, the Full Court did not disagree with his Honour’s assessment of what a sufficient factual basis for this assertion must address—see *Gudjala 2008* at [71]–[72]. The Full Court also agreed with Dowsett J that one question a sufficient factual basis must address is whether ‘there was, in 1850–1860, an indigenous society in the area, observing identifiable laws and customs’ – *Gudjala 2008* at [96]. (1850–1860 is the time of European settlement of the Gudjala application area.)

show that in the years following settlement of the region, early settlers and ethnographers observed a group known as the Kurtjar.

[47] The overview report considers the following evidence on the question of the eastern inland extent of Kurtjar country (para 25):

- (a) The reproduction of Black and [Name removed] 1996 map (Map 5 on page 12) situates Kurtjar dreaming (or totemic) sites close to the western coast, around Delta Downs and the Gilbert River and Staaten River mouths. This then puts the Kurtjar territory eastern boundary much closer to the coast than the eastern boundary of the application area. Map 5 shows that 'Rib and Walangama' territory and 'Kunjen' territory lies to the east of the depicted Kurtjar territory.
- (b) The author notes that it is unclear from the record the extent to which the inland extent of Kurtjar country was a focus of Black's research. [Anthropologist 1] writes that it is 'commonly the case in Aboriginal Australia that resource-rich coastal areas and river frontages are closely mapped, with commonly demarcations between groups, while the hinterland region can have boundaries which are, to quote from Professor Sutton's discussion of such matters, 'heavily blurred' (1995: 51).'
- (c) There is also evidence found in a documents titled 'The Kurtjar in Recent Years (1978) authored by the linguist Paul Black that the 'now virtually extinct 'Rib' or 'Ariba' people could have occupied the more eastern regions of what is now considered Kurtjar territory'. Black wrote in 1978 that that the Rib 'apparently spoke the same language as the Kurtjar... and could perhaps have been essentially a division of the same tribe'. Black is also quoted to have written, '[e]ven as late as the 1920s the Kurtjar gathered with remnants of other tribes for such purposes as the initiation of young men' (para 16 of the overview report).
- (d) Black authored another document in 1980 with his Kurtjar informant, [Name removed], which talks about the terrible impacts of colonization both on the Kurtjar and on the neighbouring groups to the north and the east. In this document, [Name removed] explains how some of the people to the east, the Areba and the Kumulmar (or Walangama) came to live among the Kurtjar when the Kurtjar came to be working on the cattle stations in later years. [Name removed] and Black wrote: 'The people of these tribes grew up among us and often married in with us and learned to speak our language, and we've come to accept them as part of our tribe' (para 17).

- (e) [Anthropologist 1] surmises that these pieces of evidence about Rib or Ariba people 'previously occupying the eastern regions of what is now considered Kurtjar territory suggest that some form of licit succession according to Aboriginal law and custom may have taken place' (para 25).
- (f) [Anthropologist 1] refers to statements from contemporary Kurtjar people that these eastern regions are part of their hunting country, quoting a Kurtjar source at para 25 of the report.
- (g) Earlier ethnographic sources such as R.H. Mathews (1899) and Lauriston Sharp (1939) observed that the Kurtjar and related tribes in the southeastern Gulf shared similar customs. Mathews called this a 'community of tribes' and an 'aggregate of tribes' and expressed the view that they were a 'nation' (para 11 of the overview report).

[48] The report is clear that the inland extent of Kurtjar country may require further investigation. However, the factual basis materials I have reviewed are sufficient to support an assertion that there was a pre-sovereignty society in the region that included the application area and the Kurtjar were part of that normative system. The information is to the effect that the Kurtjar had a strong association with the coastal regions to the north of Normanton and that they lived peaceably with other groups within this broader regional society, with whom they shared language and rituals, including their eastern neighbours, the Rib and Ariba to the east. The eastern boundaries beyond the resource rich coastal lands and waters are 'blurred', as is common in many parts of Aboriginal Australia. There is also information to support that the impacts of colonisation resulted in the territory to the east becoming vacant such that the Kurtjar may have succeeded to this country under the pre-sovereignty regional system of traditional laws and customs.

[49] The report describes the relevant land holding system of the pre-sovereignty society at paras 28 to 39. This states that '[i]t seems likely that Kurtjar people maintained a system of local estate organisation at the time of sovereignty' as was observed by Lauriston Sharp in the 1930s. Importantly, the report notes that Sharp recorded that the Kurtjar shared a similar form of social organisation with other groups, including the Rib or Ariba to their east, with features of a section/moiety system, totemic responsibilities and patrilineal clans or local groups who controlled territories and their natural products (para 29).

[50] Contemporary claimants provide evidence that they assert rights and interests across a range of areas within Kurtjar country as generic language group connections, rather than more specific local area or 'estate' connections (para 33 of the overview report). There is also evidence that claimants know about particular families being connected to sub-areas within Kurtjar country; although Kurtjar people also respect more generic language group connections with the

area as a whole (para 34). The author opines that a review of the archival and preliminary fieldwork, supports an assertion that rights and interests in land were generated at the wider Kurtjar language group level, rather than at the estate or local group level, although the lower level estate group did generate ownership and use rights to particular areas within Kurtjar country (para 35).

[51] The author of the overview report states that the evidence supports that Kurtjar people formed part of a broader regional society with other language groups or 'tribes' who together acknowledged similar laws and customs. The author opines that this likely included the same four named section recorded by Lauriston Sharp; the same system of spiritual or totemic entities inhering in the landscape; adaptations and transformations from an estate group model towards cognatic descent links to country; and a history of intermarriage resulting in potential memberships of different language or tribal groups (para 36).

[52] The author of the overview report refers to Tindale's report of an Ariba or Rib man describing a common system of non-circumcision in the Gulf region, which covered country to the east of Normanton (Ariba or Rib) and along the coast north of Normanton (Kunggara [i.e. Kurtjar) (para 36).

[53] The author expresses the preliminary view that these commonalities in law and custom amongst the groups in this region of the Gulf country provide support for the existence of a broader regional society with shared laws and customs including those relating to succession where a neighbouring group ceases to exist (para 37). The author relates a striking example of the operation of succession in the northern reaches of Kurtjar country, when the Kwanthara clan or group died out there after colonisation. The document, authored by the Kurtjar man, [Name removed] and the linguist Paul Black in 1980, describes how the Kurtjar joined up with some Kwanthara in the Galbraith station area along the Staaten River to hide from the white man and later burial there of Kurtjar people. There are also Robert Layton's 1977 field notes describing this apparent succession: 'Sites on Staaten Lagoons were Kwanthara, but given Kurtjar names. When Kwanthara died out, Kurtjar took sites over, but left sites north of the river for Koko Bera (1977: 40)' (para 37).

[54] There is other evidence relied on in the overview report to support that succession is a feature of the laws and customs of the regional society operating in the Gulf country at sovereignty:

- (a) [Name removed] who is a knowledgeable Ganggalida person with connections to the Kurtjar group through her father tell that the country between the Gilbert and the Staaten Rivers runs together and the Kurtjar would have been very close knit and mixed together with other groups to the north of the Staaten (para 38).

- (b) The Kurtjar man, [Name removed], commented in relation to Kurtjar people and country at sovereignty that there were 'breakaway' Kurtjar groups further to the east and beyond Kurtjar coastal country, through Miranda, Stirling and Vanrook. These groups had broken away from the main tribe, and that is how a lot of Kurtjar ended up on those stations (para 38).
- (c) [Name removed] suggested that these breakaway groups formed because of conflict amongst Kurtjar people, leading to smaller groups of people moving into areas bordering Kurtjar country and taking over those areas through processes of change and succession. When interviewed in April 2015, [Name removed] reportedly said that 'people may have had another tribe but Kurtjar people adopted them in, reared them up'. According to [Anthropologist 1] this also appears to indicate processes of succession were a feature of the pre-sovereignty normative system (para 38).

[55] I note that it is not appropriate that I impose too high a burden when assessing these matters, having regard to the limited nature of the enquiry when assessing the factual basis condition of s 190B(5).²⁹

[56] With these constraints in mind, I find that the factual basis provides specific and detailed information to explain the identity of the relevant pre-sovereignty normative system, which operated in the region. This information includes an analysis of some of the available evidence which may support that there were pre-sovereignty laws that allow for succession, including observations in the ethnography for the region that:

- (a) Kurtjar breakaway groups interacted with their eastern neighbours and territories in the period before sovereignty.
- (b) the eastern and northern groups suffered terribly from the impacts of colonisation and all but died out.
- (c) the boundaries between the resource rich coastal and the sparser inland territories were blurred.
- (d) the Kurtjar and their neighbours to the east and north shared common customs and interacted in a communal way such that they could have formed a nation of tribes.

[57] In my view, all of this provides a sufficient factual basis for the assertion that succession has operated in the area covered by the application under pre-sovereignty laws and customs, such

²⁹ I refer also to a recent decision by Barker J that 'it must be borne in mind that the provisions of the NTA dealing with registration are not, nor could they be, concerned with the proof that native title exists' — *Stock v Native Title Registrar* [2013] FCA 1290 (29 November 2013) at [64] and also at [65]–[66].

that there is an argument that the Kurtjar have succeeded to the vacant territories of the Ariba or Rib in the east and of the Kwanthar in the north.

[58] I am satisfied that the factual basis is sufficient for the assertion of s 190B(5)(b). It contains an explanation and sets out the necessary facts in a sufficiently detailed way so that I can understand both the identity of the relevant pre-sovereignty society, the area over which it existed and the links between the society, the current members of the claim group, their apical ancestors and the application area. The information provides a sufficient factual basis for the assertion that there exist traditional laws and customs derived from a pre-sovereignty society identified in the early records as the Kurtjar tribal group and that the claim group and their apical ancestors can demonstrate their links to this group over time.

Decision on assertion of s 190B(5)(c)?

[59] I am satisfied that the factual basis is sufficient to support the assertion of s 190B(5)(c). My reasons now follow.

What is needed for the assertion of s 190B(5)(c)?

[60] To meet s 190B(5)(c), the factual basis must support the assertion 'that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.'

[61] The factual basis must address that the claim group has continued to hold the claimed native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way. This is the second element to the meaning of the word 'traditional' when used in the s 223(1)(a) definition of 'native title rights and interests' discussed at [47] and [87] of *Yorta Yorta*.

[62] The case law on this assertion indicates the following kinds of information are required:

- (a) That there was a society that existed at sovereignty observing traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed on to the current claim group;
- (b) That there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least to European settlement.³⁰

Is the factual basis sufficient to support the assertion of s 190B(5)(c)?

[63] There is ample evidence of the continuity in the observance of traditional laws and customs in the period since sovereignty. The application is accompanied by statements from nine Kurtjar persons. Each person speaks in detail about a lifelong association with and connection to Kurtjar country, their Kurtjar heritage and the inter-generational transmission of law and custom in a line

³⁰ See *Gudjala (2007)* at [82] and *Gudjala FC* at [96].

that stretches back to the time of their apical ancestors, who in turn were alive or born shortly after settlement. There is detailed and specific information in these statements showing the acknowledgement and observance of laws and customs about:

- (a) Hunting and fishing;³¹
- (b) Dreaming and totems;³²
- (c) Restrictions imposed by gender, age and ritual experience;³³
- (d) The presence of and ritual restrictions imposed by the presence of sites of significance on the land and waters;³⁴

[64] There is a wealth of information in these statements which describe the transmission in a direct line from the ancestors to current claimants of traditional knowledge about Kurtijar country, including its stories, sacred sites and how to hunt and fish there. The statements speak in a detailed way about the acknowledgement and observance of law and custom relating to hunting, fishing, gathering of food, observing spiritual protocols when accessing country, totems and an inter-generational transmission of rules and customs about these things.

[65] I am therefore satisfied that the factual basis is sufficient to support the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Decision on prima facie case: s 190B(6)

[66] The claim meets the requirements of s 190B(6) as I consider that, prima facie, at least some of the native title rights and interests can be established. My reasons now follow.

What is needed to meet this condition?

[67] To meet s 190B(6), there must be some substance to the material before the Registrar to show on a prima facie basis that some of the claimed native title rights and interests can be established. The following case law guides the Registrar in relation to this condition:

- (a) it requires some measure of the material available in support of the claim;³⁵

³¹ See, for example, [Name removed] statement dated 25/9/12 at paras 7 to 9.

³² See, for example, [Name removed] statement dated 25/09/12 at para 12.

³³ See, for example, [Name removed] statement dated 25/09/12 at para 8.

³⁴ See, for example, [Name removed] statement dated 20/11/12 at paras 14 and 16 to 18; [Name removed] dated 25/09/12 at para 7; [Name removed] dated 26/09/12 at paras 13–14 and [Name removed] dated 20/11/12 at paras 8–9.

³⁵ *Northern Territory v Doepel* at [126].

- (b) although s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed, this does not itself require some weighing of that factual assertion as that is the task required by s 190B(6);³⁶
- (c) the condition of s 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed.³⁷
- (d) Mansfield J found that the use of the words ‘prima facie’ in s 190B(6) means 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’.

Which of the claimed rights and interests can be prima facie established?

[68] I consider that there is evidence sufficient to establish on a prima facie basis the following claimed rights:

1. The Applicant asserts that the Kurtijar People have the following non-exclusive native title rights and interests in accordance with their traditional laws and customs:
 - (a) The right to use the application area;
 - (b) The right to access and traverse the application area in accordance with and for the purposes allowed under their traditional laws and customs;
 - (c) The right to hunt and / or gather living and plant resources on the application area;
 - (d) The right to fish in the application area;
 - (f) The right to live on the land, to camp and to erect shelter and other structures on the application area;
 - (g) The right to light fires on the application area;
 - (h) The right to conduct burials on the application area;
 - (i) The right to use natural resources in their entirety, other than minerals and petroleum;
 - (j) The right to:
 - (i) take water;
 - (ii) take fish;
 - (iii) take plants in their entirety and animals;
 - (iv) take ochre, clay and salt;
 - (v) take sand, gravel and rock;
 - (vi) take shells; and
 - (vii) take glass, resin and wood.
 - (k) The right to manufacture or produce traditional items from natural resources found on or in the application area;
 - (l) The right to carry out economic pursuits on the application area including the barter and / or exchange of natural resources, all parts of natural resources and the products of those resources;
 - (n) The right to enjoy amenity of the application area;
 - (s) The right to maintain, protect and preserve the physical state of sites and areas within the application area;

³⁶ *Northern Territory v Doepel* at [127].

³⁷ *Northern Territory v Doepel* at [132].

- (u) The right to maintain, protect and conserve the natural values and resources of the application area; in the alternative an interest in the maintenance, protection and preservation of the natural values and resources of the application area;
- (v) The right to protect and look after cultural artefacts from, on and within the application area, including rock art;
- (w) The right to conduct and take part in ceremonial activities on the application area;
- (x) The right to maintain proper and appropriate custodianship of the application area and the special and sacred sites within and on it, including through ceremonies, to ensure the continued vitality of traditional law and culture; and
- (z) The right to be accompanied on to the area by those persons who, though not native title holders, are:
 - a. spouses or partners of native title holders;
 - b. people who are members of the immediate family of a spouse or partner of a native title holder;
 - c. people reasonable required by the native title holders under traditional law and custom for the performance of ceremonies or cultural activities in the application area;
 - d. people who have specialised knowledge based on their training, study or experience who are requested by native title holders to observe or record traditional activities or otherwise to investigate matters of cultural significance on the application area.

[69] I refer to the following evidence from the statements found in Attachment F1 of the application:

*[Name removed]*³⁸

[70] [Name removed] was born in 1939 and he grew up on Delta, Macaroni and Vanrook stations. His father [Name removed] is a Kurtijar man who was born in 1904 on Delta. His mother, the apical ancestor [Name removed], was born in 1910 on Glenore station. He was told by his elders that Kurtijar country goes to the south side of the Staaten River (this represents the northern boundary of the application area). He has lived his life working around Kurtijar country, including Macaroni, Stirling, Vanrook and Delta (these places, except for Delta, are all within the application area). [Name removed] describes how the old people used to camp, fish and hunt on these stations and they would show him and others where the best fishing country was. He tells of some station managers to the east of Delta excluding Kurtijar people, but not the Miranda Downs' manager who would always allow them on to go fishing (Miranda Downs is located relatively centrally within the application area). The old people told [Name removed] the dreaming stories for his country when they would sit around camp fires as children.

*[Name removed]*³⁹

[71] [Name removed] was born in 1943 on Myra Vale station on Kurtijar country. He is a member of the Kurtijar people through his descent from [Name removed], [Name removed] and [Name removed], who are named as Kurtijar ancestors. [Name removed] learned to hunt and fish

³⁸ See [Name removed] statement dated 26 September 2012.

³⁹ See [Name removed] statement dated 24 September 2012.

with a spear from the older people. He collected wild yam berries and magpie geese eggs. He learned the custom of not going to some sacred grounds. He went through the law as an adolescent.

[Name removed]⁴⁰

[72] [Name removed] was born in 1945 on the reserve at Normanton just outside the southern external boundary. Her mother [Name removed] was born on Delta Downs in 1912 and her father [Name removed], a Kurtijar man, was born in 1913 at Croydon, which is to the east of the application area. [Name removed] learned to speak Kurtijar and lived out on country. Her mother and Aunties taught her to hunt, to fish for turtles, to gather the white apple in the wet and bush turnip. They would eat the apple from the tree but cook the turnip over the coals.

[73] [Name removed] learned to boil the bark from certain trees on their country to treat sores and other ailments. They would make beds and shelters using bush materials. There were berries to collect and they used a vine from a tree on their country to make baskets to carry food and to collect geese eggs, a task undertaken by the men, who also hunted game with spears and woomera. [Name removed] was told stories in language by her grandmother, as there was shame in her mother and Aunties telling her these stories. The men observed similar customs around stories told about men's business.

[74] [Name removed] teaches these things to her grandchildren and great-grandchildren when they go out on country to camp. [Name removed] was taught a dreaming story for her country and places on country where spirits lived in the waterholes and to observe the custom of leaving something there on a leaf or bark for the spirits.

[Name removed]⁴¹

[75] [Name removed] was born in 1947 on Myra Vale station. His father was born there too in 1925. His grandfather [Name removed] was born at Delta in 1899 and died in 1974. His grandmother [Name removed] was also born on country at Fish Hole. [Name removed] taught [Name removed] about his country, including language and the location of sacred places on Delta and Double Lagoon. [Name removed] has Kurtijar heritage on his mother's side too and he is a descendant of the apical ancestor George Gilbert through this line. [Name removed] grew up on Myra Vale Station. He has learned about Kurtijar corroboree practices, fishing, hunting crocodile and other game and cooking food using a dug out hole called a *cuppmurray*. He learned customs about how to eat food, which he describes at paragraph 22 of his affidavit. There were marriage rules and he followed those rules by marrying a woman of the same skin.

[76] [Name removed] learned the boundaries of his country extended north to the Staaten and east to the country around Dorunda and Wyaaba Creek. Boundaries were marked in the old days

⁴⁰ See [Name removed] statement dated 21 November 2012.

⁴¹ See [Name removed] affidavit dated 2015.

on Ironwood and Coolabah trees to show bora and poison grounds. His grandfather told him about these markings and explained that they were there to warn other tribes not to go onto these sites. [Name removed] describes in detail the many plants and animals used by his people in traditional ways for food, healing and as water, when running water is scarce. [Name removed] and two other men are the law men for their group and he passes his knowledge, including the songs he has learned from the Elders that went before him.

*[Name removed]*⁴²

[77] [Name removed]⁴³ was born in 1950 in Normanton. She has lived on Kurtijar country all of her life. Her mother was born on Delta at a camp called Fish Hole, at a camp further down near the coast at a place called Macinerny Island. [Name removed]'s maternal grandmother told her that Kurtijar country went from the Norman River in the south, north to the Staaten River.

[78] [Name removed]'s grandparents are Kurtijar and she is a descendant of [Names removed], who were the parents of her grandmother, [Name removed]. She knows the special places on Kurtijar country and her elders taught her these places. [Name removed] describes these places in great detail in her affidavit. She tells some of the dreaming stories associated with these places. She learned many things about Kurtijar country from her elders, including collecting edible seeds, berries and yam roots, medicinal bark, vine and leaf treatments. [Name removed] learned Kurtijar language which she speaks with [Name removed] and has tried to teach her children.

*[Name removed]*⁴⁴

[79] [Name removed] was born in 1954 on the Normanton Reserve. He is a descendant from the apical ancestor Kangaroo on his mother's side and from [Name removed] on his father's side. His mother was born on Macaroni Island (in the north of the application area). His father was taken away from Macaroni Station to Kowanyama and he went to school there. He is buried there. As a young child, [Name removed] was taken and placed in the care of his grandparents, [Names removed]. ([Name removed] is a prominent Kurtijar elder and informant for the linguist Paul Black in the 1970–80s, discussed in the overview report).

[80] [Name removed] taught [Name removed] to hunt wallaby, turtle and to fish for bream, barramundi and shark. He was taught only to catch what he could eat and share with his family. He learned to make a spear and boomerang. [Name removed] went to work on Miranda Downs (located relatively centrally within the application area) with [Name removed] when he was about 15 years old. [Name removed] worked on various stations for about 10 years and went to Delta as a machinery operator in 1982.

⁴² See [Name removed] statement dated 20 November 2012.

⁴³ See [Name removed] statement dated 20 November 2012.

⁴⁴ See [Name removed] affidavit dated 26 May 2015.

[81] [Name removed] became strongly connected to his country whilst working on Delta. There were Kurtijar elders there who taught him about his country and its laws and customs. They knew important places and showed these to him. [Name removed] describes these places and markings in some detail in his affidavit. [Name removed] was given a language name and he must not eat the animal represented by that name. He learned about the boundaries of Kurtijar country from his Elders and it stretches from the Norman River north to the Staaten. Velock's waterhole and Pelican Creek are at the eastern edges of Kurtijar country (both these places are in the eastern reaches of the application area). He learned about boundaries as a child growing up and was told that they are marked by trees and rivers. There is a massacre site at Davidson's Well on Kurtijar country, in the north-western reaches of the application area.

*[Name removed]*⁴⁵

[82] [Name removed] was born in 1960 has lived and worked around Kurtijar country all of his life. He has spent a lot of time on country with his Dad and other older Kurtijar men. [Name removed] learned how to hunt and fish and he has camped on his country. The old men taught him the Kurtijar names for fish, animals, bush medicine and sacred sites.

[83] [Name removed] was taught about places to which his family were connected, including on Macaroni Island (in the north of the application area between the Staaten River and Macaroni Creek, where his grandmother and the child of apical ancestor Kangaroo was born. His mother would not let him look as they passed a poison ground near the northern side of the Norman River, where Kurtijar men were initiated and which represents the southern boundary of Kurtijar country. [Name removed] has a totem, the red tail black cockatoo, which was passed to him by his grandfather [Name removed]. [Name removed] took his kids on country when they were growing up and has established a home on country at Myra Vale outstation.

[84] [Name removed]'s elders would take him to sacred Kurtijar sites on Delta country, but also on the country to the east of Delta and within the area covered by the application, such as:

- (a) on Miranda and Vanrook stations, located centrally in the application area;
- (b) Dorunda station close to the northern boundary of the application area;
- (c) Pandanus Creek in the north-eastern reaches of the application area;
- (d) Wyaaba Creek in the north-east of the application area.

*[Name removed]*⁴⁶

[85] [Name removed] was born in 1967 and grew up in Normanton. His was the first generation not born and raised on cattle stations. He visited Delta Downs and Myra Vale most weekends

⁴⁵ See [Name removed] statement dated 25 September 2012.

⁴⁶ See [Name removed] statement dated 20 November 2012.

with his parents he taught him to hunt and fish and to dig up mangrove oysters. He learned the location of a sacred site on Myra Vale and the associated dreaming story. He remembers that people wanted to dig for water there during a drought in the 1950s and how some old Kurtijar men stood up to them with spears to protect the dreaming that lived there.

*[Name removed]*⁴⁷

[86] [Name removed] was born in 1983 and has lived in Normanton for most of his life. His mother is [Name removed] and she is the eldest daughter of [Names removed] who were born on Delta in the 1930s. These people are all Kurtijar. His family have a homestead on Myra Vale where they spend weekends and holidays. Myra Vale is on Delta, just outside the western bounds of the application area. The old people showed [Name removed] all the water points on Kurtijar country and he learned the language names for these places. His mother showed him a dreaming sacred site on Myra Vale and told him the story for that place. The old people showed him other sacred story sites and initiation grounds.

[87] [Name removed] was taught his totem, which is his dreaming and must be protected. There are camping grounds on country which his elders have taken him to. He learned to hunt and fish from his old people and he takes children out on country to do this. They camp out there. He learned the Kurtijar names of animals. [Names removed] told [Name removed] about the boundaries of Kurtijar country which go as far north as the Staaten River and east to Carron Creek, Wyaaba Creek and Pelican Creek.

[88] In light of this direct evidence from members of the claim group, I find that the claimed non-exclusive rights listed in my reasons at [68] are all prima facie established. This evidence speaks to the continuity in the observance of traditional laws and customs of a pre-sovereignty society to underpin such rights. There is significant information about the claim group's previous and continuing access under law and custom with the traditional country of their ancestors. There is evidence that these things have been passed down from the group's predecessors who were born on country in the early settlement period, where they have remained since those times. Detailed and specific information is provided about the continuity of laws and customs over the generations since settlement relating to knowledge of country, its places and stories, how to use its resources and where to find its sacred dreaming places.

Which of the claimed rights cannot be prima facie established?

[89] There are a number of rights and interests described in Attachment E which I find are not prima facie established. This is because they appear to seek a measure of control that is inconsistent with the statement at the outset of Attachment E that the claimed rights are non-exclusive. Rights which fall into this category are:

- (a) the right to occupy the application area

⁴⁷ See [Name removed] affidavit dated 13 May 2015 and statement dated 25 September 2012.

- (o) the right to protect the land and waters and the resources including natural resources, of the land and waters by taking steps to prevent acts which are not carried out in the exercise of statutory rights or any common law rights in which acts might cause damage, spoliation or destruction of the land and waters or the animals, plants or fish on or in the land and waters.
- (p) an interest in the management and / or use of the application area and the natural resources in the application area;
- (q) the right to make decisions about the use and enjoyment of the land and waters and its natural resources and the subsistence and other traditional resources thereof by people other than those exercising a right conferred by or arising under a law under the State of Queensland or the Commonwealth in relation to the use of the land and waters;
- (r) the right to protect the application area from physical damage;
- (t) the right to maintain, protect and preserve sites and areas within the application area that are of significance to the native title holders from inappropriate behaviour.

[90] The Full Federal Court in *Attorney General of the Northern Territory v Ward* [2003] FCAFC 283 removed the term 'occupy' from a proposed description of 'non-exclusive' rights because it tended to imply the notion of 'control' and was therefore not consistent with the finding of the High Court in *Western Australia v Ward* [2002] HCA 28 that:

The 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. To break the expression into its constituent elements is apt to mislead. In particular, to speak of "possession" of the land, as distinct from possession to the exclusion of all others, invites attention to the common law content of the concept of possession and whatever notions of control over access might be thought to be attached to it, rather than to the relevant task, which is to identify how rights and interests possessed under traditional law and custom can properly find expression in common law terms — at [89].

[91] Wilcox, North and Weinberg JJ held in *Attorney General of the Northern Territory v Ward* that:

As was pointed out by [the High Court at [89] of *WA v Ward*] the expression 'possession, occupation, use and enjoyment', used in s 225(e) of the Act, 'is a composite expression directed to describing a particular measure of control over access to land'. The words of the proposed determination, 'occupy, use and enjoy' are not identical to, but are reminiscent of, this composite expression. They might be understood as conveying the notion discussed by their Honours, including control of access. This would be inappropriate in this case. The right of absolute control of access must have been extinguished by the grant of the pastoral leases. There might be a surviving right to make decisions, pursuant to Aboriginal laws and custom, about the use and enjoyment of the land by Aboriginal people. That right would not be affected by the grant of a pastoral lease. However, that matter is specifically addressed by sub-para (e) of para 5. We think the word 'occupy' should be omitted from the opening words of para 5 — at [17].

[92] With this case law in mind, I have decided that a right to occupy cannot be prima facie established. I am also of the view that the rights at (o) to (r) and (t) are not able to be prima facie established because they seek to control access to and use of the area in a manner that is not

consistent with the existence of other rights and interests in the area, whereby exclusive native title has been extinguished.

No evidence about traditional laws and customs said to give rise to the claimed right

[93] I can find no information which addresses the traditional laws and customs said to give rise to the following right:

(y) The right to use minerals not wholly owned by the Crown.

Rights that do not fall within the definition of 'native title rights and interests'

[94] I consider that the following right is not a right and interest in relation to land or waters and therefore outside the statutory definition of 'native title' in s 223(1) of the Act, following the unchallenged first instance decision by Olney J in *Yarmirr v Northern Territory* (1998) 82 FCR 533 at [118]:

(m) a right to receive a part of any living, mineral or other natural resources taken by others on or from the application area.

Decision on traditional physical connection: s 190B(7)

[95] The claim meets the requirements of s 190B(7) as I am satisfied that there are members of the native title claim group who currently have or previously had a traditional physical connection with any part of the land or waters covered by the application. My reasons now follow.

What is needed to meet s 190B(7)?

[96] The case law on this condition provides the following guidance:

- (a) 'It does require the Registrar to be satisfied of a particular fact or particular facts' and 'some evidentiary material to be presented to the Registrar'.
- (b) However the focus is confined and 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'.⁴⁸

Is there evidence to show a traditional physical connection with some parts of the area?

[97] I am satisfied that the nine persons who have provided statements to support their connection with the application area are all members of the native title claim group. These persons describe their descent from Kurtijar persons in an unbroken line that leads back to the apical ancestors.

⁴⁸ *Northern Territory v Doepel* at [17].

[98] I am also satisfied that these persons currently have a traditional physical connection with at least some part of the land or waters covered by the application. These persons have all provided evidence of a lifelong association and connection with Kurtijar country. I refer to my reasons at paragraphs 70 to 87 for the details of this evidence. They speak about their knowledge of and interaction with the Kurtijar country of their ancestors, which appears to have both a physical and spiritual dimension. This knowledge appears to have passed to them in a continuous line from the apical ancestors identified in Schedule A of the application, all of whom were who were themselves connected to Kurtijar country in traditional ways.

[99] The overview report indicates that the eastern inland bounds of Kurtijar country may require further investigation. Nonetheless, the report does set out information to support that the native title claim group have succeeded to vacant areas to the east because of the operation of succession laws under a pre-sovereignty normative system that operated throughout this part of the Gulf of Carpentaria country. I refer to the evidence from the overview report discussed by me above at paragraph 47 of these reasons.

[100] One of the principal Kurtijar informants to support the operation of a form of licit succession was the Kurtijar elder, [Name removed], whose grandson [Name removed] has provided a statement. [Name removed] discusses a traditional physical connection that extends east into the application area, as do others such as [Names removed]. There is also evidence of a connection by some members with the north-western reaches of the application area around Macaroni Island, which lies south of the Staaten River.⁴⁹

Decision on no failure to comply with s 61A: s 190B(8)

[101] The claim meets the requirements of s 190B(8). I am satisfied that the application and accompanying documents do not disclose and I am 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. My reasons now follow.

What is needed to meet s 190B(8)?

[102] This section provides that applications must not be made:

- (a) over areas already covered by an approved determination of native title;
- (b) over areas where a previous exclusive possession act attributable to the Commonwealth or a State or Territory was done;
- (c) which claim exclusive possession, occupation, use and enjoyment in relation to areas where a previous non-exclusive possession act was done and is attributable to the Commonwealth or a State or Territory.

⁴⁹ See the evidence summarised at paragraph 33 of these reasons and see also the statements from [names removed] whose ancestors were born there.

Does the application meet these three requirements?

[103] I am satisfied that there is no prohibition against the claim because of this condition:

- (a) a search has revealed that there are no approved native title determinations over the application area, thus meeting s 61A(1);
- (b) schedule B expressly excludes any such areas covered by a previous exclusive possession act, thus meeting s 61A(2);
- (c) Attachment E expressly states that there is no claim to a right of exclusive possession occupation use and enjoyment where there has been no extinguishment of such a right by a previous non-exclusive possession act, thus meeting s 61A(3).

Decision on no extinguishment etc. of claimed native title: s 190B(9)

[104] The claim meets the requirements of s 190B(9). I am satisfied that the application and accompanying documents do not disclose and I am not otherwise aware, that:

- (a) to the extent that the native title rights and interests claimed consist of or include ownership of minerals, petroleum or gas—the Crown in right of the Commonwealth, a State or Territory wholly owns the minerals, petroleum or gas;
- (b) to the extent that the native title rights and interests claimed relate to waters in an offshore place—those rights and interests purport to exclude all other rights and interests in relation the whole or part of the offshore place;
- (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

[105] The claim meets this condition because:

- (a) Schedule Q of the application states that there is no claim to ownership of minerals, petroleum or gas wholly owned by the Crown;
- (b) the application area does not extend to any offshore places;
- (c) there is no information before me to indicate that the native title rights and interests claimed have been otherwise extinguished

Conditions about procedural and other matters: s 190C(1)

Decision on prescribed information and accompanying affidavit: s 190C(2)

[106] The claim meets the condition of s 190C(2) as I am satisfied that the application contains the details and other information and is accompanied by the documents prescribed by ss 61 and 62. My reasons now follow.

Applications that may be made: s 61(1)

[107] Section 61(1) provides that a native title determination application must be made by ‘a person or persons authorised by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group’.

[108] I must check to see that there is information about the native title claim group and the authority of the applicant. I am not empowered to go behind this information unless there is something on the face of the application 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’—see *Northern Territory v Doepel* at [36]. There is nothing on the face of the application to indicate that the claim is not made on behalf of all the persons in the native title claim group.

Applicant’s name and address for service: s 61(3)

[109] This information is provided on the first and final pages of the Form 1 application.

Applications authorised by persons: s 61(4)

[110] This section provides that a ‘native title determination application that persons in a native title claim group authorise the applicant to make must: (a) name the persons; or (b) otherwise describe the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons’. Schedule A contains a description of the persons in the native title claim group. Dowsett J held that the task here is merely to assess that the persons are named or a description provided and whether those details are sufficient is the task of the corresponding merit condition in s 190B(3).⁵⁰

Affidavits in prescribed form: s62(1)(a)

[111] There are affidavits from the four persons who comprise the applicant. I find that the affidavits have all been signed in the presence of a witness and contain the five statements required by this section. Therefore, I am satisfied under s 190C(2) that the application is accompanied by the required affidavit.

Information about the boundaries of the area covered by the application and any areas within those boundaries not covered and map showing the boundaries: s 62(2)(a) & (b)

[112] The required details are in Schedule B, Attachment B and a map showing the boundaries is in Attachment C.

Searches of any non-native title rights and interests carried out: s 62(2)(c)

[113] Schedule D states that there are no searches.

Description of native title rights and interests claimed in relation to particular land or waters: s 62(2)(d)

⁵⁰ See *Gudjala 2007* at [31] and [32].

[114] Attachment E contains a description of the claimed native title rights and interests. See my reasons above at s 190B(4) which analyses the adequacy of the description and finds it be sufficient to allow the rights claimed to be readily identified. It follows that the description does not consist of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

Activities: s 62(2)(f)

[115] These details are in Schedule G.

General description of factual basis for assertion that native title exists: s 62(2)(e)

[116] This description is provided in Attachment F. See my reasons above for the condition of s 190B(5). Attachment F suffices as a general description of the factual basis for the assertion that the claimed native title exists and for the particular assertions provided in subsections (i) to (iii) of s 62(2)(e).

Other applications: s 62(2)(g)

[117] Schedule H states that the applicant is not aware of any overlapping applications.

Future act notices: ss 62(2)(ga) and (h)

[118] Schedule HA states that there are no notices under s 24MD, of which the applicant is aware. Attachment I provides details of known s 29 notices.

Decision on no common claimants in previous overlapping applications: s 190C(3)

[119] The claim meets the requirements of s 190C(3). My reasons now follow.

[120] To meet s 190C(3), the Registrar 'must be satisfied that no person included in the native title claim group for the application (the *current application*⁵¹) was a member of a native title claim group for any previous application'. To be a 'previous application':

- (a) the application must overlap the current application in whole or part;
- (b) there must be an entry for the claim in the previous application on the Register of Native Title Claims when the current application was made; and
- (c) the entry must have been made or not removed as a result of the previous application being considered for registration under s 190A.

[121] A search⁵² reveals that there are no previously registered claimant native title applications that overlap the area of the application, such that there is no requirement for me to consider the issue of common members.

⁵¹ Emphasis in original.

⁵² See Geospatial overlaps analysis dated 24 June 2015.

Decision on identity of claimed native title holders: the authorisation condition of s 190C(4)

[122] The claim meets the requirements of s 190C(4) as I am satisfied that the applicant is a member of the native title claim group and is authorised by that group to make the application and to deal with matters arising in relation to it

What is required to meet s 190C(4)?

[123] To meet s 190C(4), one of two things must be in place:

- (a) the Registrar must be satisfied that the application has been certified by the representative Aboriginal/Torres Strait Islander body or bodies for the area covered by the application;⁵³ or
- (b) the Registrar must consider the information contained in the application and form the opinion that he is satisfied that 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.⁵⁴

[124] I have considered the condition of s 190C(4) in the way dictated by subsection (b) as the representative body for the area has not certified the application. Before doing so, I note that the application contains information in Attachment R and in the accompanying affidavits by the applicant, which amounts to the statement and brief settling out of the grounds on which the Registrar should consider that it has been met. The two questions to consider under subsection 190C(4)(b) are:

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

Is the applicant a member of the native title claim group?

[125] I am satisfied on the basis of their statements to this effect in their accompanying affidavits⁵⁵ that each of Shirley McPherson, Irene Pascoe, Joseph Rainbow and Frederick Edwards are member of the native title claim group.

Is the applicant authorised by the native title claim group?

[126] Section 251B states what it means for a person or persons to be authorised by all the persons in the native title claim group to make a claimant native title determination application.⁵⁶ It

⁵³ See ss 190C(4)(a).

⁵⁴ See ss 190C(4)(b) and (5). Subsection (5) prescribes the information required in the event that the application is not certified by the representative body.)

⁵⁵ These are the affidavits that the persons comprising the applicant have made, copies of which are found in Attachment F2 of the application.

⁵⁶ See the notes to ss 61(1) and 190C(4).

provides that all the persons in a native title claim group authorise another person or persons, to make and deal with a native title determination application:

- (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 deal with matters arising in relation to it, in accordance with that process;
- (b) where there is no traditionally mandated decision-making process, the persons in the native title claim group authorise the person or persons to make and deal with the application, in accordance with a process of decision-making agreed to and adopted, by the persons in the native title claim group.

[127] The Courts do not interpret the stipulation that ‘all’ the persons in the native title claim group must authorise an applicant literally.⁵⁷ Nonetheless, there must be information to demonstrate that authorisation has flowed as a result of a decision or decisions in which the native title claim group as a whole has been afforded a reasonable opportunity to participate (absent a traditionally mandated decision-making process which provides otherwise) using one of the two decision-making processes identified in s 251B.

[128] The following legal principles govern my consideration of whether the applicant is authorised by all the other persons in the native title claim group:

- (a) unanimous decision-making is not mandated, unless this is the case under the group’s traditional laws and customs which must be followed;
- (b) in those cases where there is no traditionally mandated decision-making process that must be , s. 251B does not mandate any one particular decision-making process, only that it be agreed to and adopted by the persons in the native title claim group;
- (c) agreement to a particular process may be proved by the conduct of the parties even in the absence of proof of a formal agreement;
- (d) authorisation by a majority of those who comprise the native title claim group following an agreed and adopted process is possible;
- (e) ‘agreed to and adopted by’ imports the giving to all of those in the native title claim group, whose whereabouts are known and have capacity to authorise, every reasonable opportunity to participate in the adoption of a particular process and the making of decisions pursuant to that process.⁵⁸

⁵⁷ *Lawson on behalf of the ‘Pooncarie’ Barkandji People v Minister for Land and Water Conservation for the State of New South Wales (NSW)* [2002] FCA 1517 (9 December 2002) (*Lawson*), [25].

⁵⁸ *Fesl v Delegate of the Native Title Registrar* [2008] FCA 1469 (*Fesl*) at [26] and [71]–[72] (Logan J) distilled these principles from earlier case law on the requirements of s 251B. See also *Lawson v Minister for Land and Water Conservation (NSW)* [2002] FCA 1517 (*Lawson*) at [25], Stone J; *Wharton on behalf of the Kooma People v State of*

[129] The applicant asserts that:

- (a) their authority arises as a result of the giving of public and personal notice to all of the known members of the native title claim group of an authorisation meeting in Normanton on 20 November 2014;
- (b) a sufficiently representative number of claim group members attended the meeting and decided to authorise the applicant to make the application and to deal with matters arising in relation to it;
- (c) the Kurtijar native title claim group do not have traditional laws and customs which mandate how decisions of this kind must be made. They have agreed to and adopted a decision-making process, which allows these decisions at their properly notified and well-attended meetings, if a majority of those present vote for that decision.⁵⁹

[130] In February 2016, a number of claim group members provided information to the Registrar contesting the applicant's authority. These persons assert that the application should have included within its external boundary the Kurtijar people's important western wetlands around Delta Downs, Myra Vale, Midlothian, Maggievale and Karumba Downs. These persons assert that the applicant did not properly consult with the Kurtijar people about this claim and do not have the authority of the group to make a claim that does not cover these important areas.⁶⁰

[131] The applicant has responded to these concerns in a number of documents received by the Registrar on 15 March 2016.⁶¹ The applicant has provided substantive information that supports me finding that there was proper consultation with the Kurtijar native title claim group for two years, culminating with the authorisation meeting on 20 November 2014. I am satisfied that the consultation was extensive, comprehensive and carefully provided. It is clear that the members of the native title claim group were informed that there would be a staged approach to their native title claims. It is clear that the applicant and their advisers informed the group that their first claim would not cover the Delta Downs and related holdings over their western coastal and wetlands. It is clear that the applicant and their advisers explained to the claim group that the

Queensland [2003] FCA 790 (*Wharton*) at [34], Emmett J; *Noble v Mundraby* [2005] FCAFC 212 at [18] and *Noble v Murgha* [2005] FCAFC 211 at [34], North, Weinberg and Greenwood JJ; and *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31 at [1265], Lindgren J.

⁵⁹ See Part A, 2 of the Form 1 application and paragraph 5 of each of the applicant's affidavits in Attachment F2 of the application.

⁶⁰ See copies of a letter from [Name removed] to the applicant's legal representative, Howden Sagers Lawyers, dated 8 February 2016 and a joint letter from 22 Kurtijar persons to the Registrar, which he received via email on 12 and 15 February 2016.

⁶¹ See Howden Sagers' written submissions (HS submissions) and affidavits by [Legal representative] (14 March and 14 May 2016), [Name removed], Joseph Rainbow, [Name removed] and [Name removed] (all dated 11 March 2016).

Kurtijar people would not commence native title proceedings until they held the tenures over these areas in a way that would allow them to rely on ss 47 and 47A of the Act. This means that extinguishment of exclusive native title by previous grants must be disregarded, thereby allowing the Kurtijar People to achieve exclusive native title rights and interests over these areas.

[132] The following evidence shows that the applicant and their advisers took careful and considered steps to explain that the application would not relate to the entirety of Kurtijar country:

- (a) The public and personal notice distributed before the final authorisation meeting in November 2014 provided a clear map of the proposed external boundary and would have alerted Kurtijar people to the fact that the western edge of it abutted the eastern Delta Downs pastoral holding boundary and therefore did not include that area;⁶²
- (b) There was extensive and widespread publication of this notice in a regional newspaper, on notice boards in prominent and regularly attended regional centres for the claim group members and via posting to the known addresses for the claim group members, based on a mailing list maintained by the Carpentaria Land Council;⁶³
- (c) The members of the claim group had attended a number of meetings in the two years leading up to the authorisation meeting which explain the decision to proceed with a claim that did not include the Delta Downs lands:
 - i. they authorised a country-wide claim in November 2012 on the understanding that exclusive native title over the Delta Downs pastoral lands held by the Morr Morr Pastoral Company (an entity affiliated with the Kurtijar people);
 - ii. the applicant and their advisers convened another meeting in June 2013 to explain that the Morr Morr pastoral company did not satisfy s 47 of the Act and needed to be transferred to a trust entity so that the Kurtijar people could achieve exclusive native title over these land;
 - iii. the Kurtijar people attended a further meeting in September 2013 to discuss the Delta Downs issue in more detail and resolved to transfer Delta Downs

⁶² See [Name removed] affidavit, exhibit 2, dated 9 March 2015 in Attachment R1 of the application.

⁶³ See para 30 of the HS submissions for a summary of these efforts, including the documentary evidence showing that they took place.

to a trust to allow the Kurtijar to lodge a separate exclusive native title claim once that has been accomplished;

- iv. the Kurtijar people met again and revoked the authority given in November 2012 for a country-wide claim. They agreed that Delta Downs would be the subject of a claim only when there was a trust in place to permit exclusive native title over these lands.⁶⁴

[133] There is also evidence that persons who have provided adverse information to the Registrar that they were not consulted about a decision to make a claim that did not include the Delta Downs lands in fact received personal notice of the proposed claim before the authorisation meeting.⁶⁵ [Legal representative] states that the Carpentaria Land Council faxed a copy of the meeting notice to [Name removed] on 31 October 2014.⁶⁶

[134] The applicant's response to the complaints by [Name removed] and others that the applicant did not consult the group in a sufficiently comprehensive way about the decision to authorise a claim that did not include the Delta Downs lands is not borne out by the evidence I have reviewed. It seems that the group decision took place after an extensive period of consultations and meetings, as to which the persons in the claim group were widely informed and given a reasonable opportunity to come along and express their views.

[135] I am satisfied that the applicant is authorised to make this application. The evidence I have reviewed shows that the native title claim group do not have traditional laws and customs, which mandate a particular decision-making process. The evidence shows that the applicant is authorised using a 'majority vote' agreed and adopted decision-making process at the meeting in Normanton on 20 November 2014, after extending a reasonable opportunity to known members of the native title claim group to participate in the authorisation process.

[136] I am satisfied that the participants in the authorisation process agreed and adopted the relevant process and then used that process to authorise the applicant to make this native title determination application and to deal with matters arising in relation to it.

[End of reasons]

⁶⁴ See para 39 for details of these meetings and the documentary evidence, including from [Legal representative and claim group members, [names removed].

⁶⁵ See the mailing list exhibited to [Name removed] affidavit dated 9 March 2015 in Attachment R1 of the application, which contains the names and addresses of a number of persons who say that they were not properly consulted.

⁶⁶ See [Legal representative] affidavit dated 14 March 2016.