National Native Title Tribunal

Registration test decision

Application name	Darumbal People
Name of applicant	Alan Douglas Hatfield, Warren John Malone, Rodney William Mann, Vanessa Ross, Amanda Meredith, Pauline Cora
NNTT file no.	QC2012/008
Federal Court of Australia file no.	QUD6131/1998
Date application made	27 June 1997
Date application last amended	24 November 2015

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

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

Date of decision: 10 March 2016

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Radhika Prasad

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 20 November 2015 and made pursuant to s 99 of the Act.

Reasons for decision

Introduction

[1] This document sets out my reasons, as the delegate of the Native Title Registrar (Registrar), for the decision to accept the amended native title determination application made on behalf of the Darumbal People for registration pursuant to s 190A of the Act.

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

Application overview

[3] The Darumbal People application (QUD6131/1998) was made on 27 June 1997. This application was considered by a delegate of the Native Title Registrar (the Registrar) and accepted for registration under s 190A(6) of the Act on 27 June December 2001.

[4] The Darumbal People #2 application (QUD6001/1999) was made on 22 January 1999 and accepted for registration on 9 July 2001.

[5] The Federal Court (the Court) granted leave to combine the above two applications on 26 July 2012 with the combined application to continue under file number QUD6131/1998. The combined application was accepted for registration under s 190A(6) on 23 November 2012.

[6] On 27 March 2013, Collier J ordered that the combined application be separated into two parts, namely 'Darumbal Part A' and 'Darumbal Part B'. Darumbal Part B consists of that portion of the combined application that is overlapped by the then proposed Barada Kabalbara Yetimarala (BKY) native title determination application. Darumbal Part A consists of the balance of the area not the subject of Darumbal Part B. Collier J also ordered that Darumbal Part A and Part B were to be heard separately.

[7] On 17 November 2015, Collier J granted leave to amend the combined application.

[8] On 24 November 2015, the amended application was filed with the Court. The amendments to the application include the following:

- Schedule A has been changed to provide greater clarity in the claim group description but does not alter the composition of the claim group;
- Schedule H has been amended to reflect the overlap with the BKY (QUD439/2013) native title determination application;
- Schedule S has been changed to reflect the most current amendments;
- Schedule T has been amended to indicate that the application was separated into two parts;
- Attachments B and C have been amended to revise the description and map of the external boundary of the application area;

- Attachment E has been altered to revise the rights and interests claimed and Attachment F has been amended to provide the factual basis for the native title rights and interests being claimed; and
- Attachment M has been amended to provide updated information relating to the traditional physical connection of members of the claim group.

[9] On 24 November 2015, the Registrar of the Court gave a copy of this application to the Registrar pursuant to s 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

Requirements of s 190A

[10] My consideration of the application is governed by s 190A of the Act. Section 190A(6) requires the Registrar to consider whether a claim for native title satisfies the conditions in ss 190B and 190C, known as the registration test. The test is triggered when a new claim is referred to the Registrar under s 63 or in some instances when a claim in an amended application is referred under s 64(4). The test will not be triggered when an amended application satisfies the conditions of ss 190A(1A) or (6A). For the following reasons, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to this claim:

- subsection 190A(1A) does not apply as the application was not amended because an order was made under s 87A by the Court; and
- subsection 190A(6A) does not apply because the effect of the amendments to the native title determination application, which includes a change to the factual basis, falls outside the exceptions to undertaking a full registration test set out in subparagraphs 190A(6A)(d)(i) to (v).

[11] I must therefore apply the registration test to this amended application. In accordance with s 190A(6), I must accept the claim for registration if it satisfies all of the conditions in ss 190B and 190C of the Act. If those conditions are not satisfied then, under s 190A(6B), I must not accept the claim for registration.

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

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

Information considered when making the decision

[14] Subsection 190A(3) directs me to have regard to certain information when testing an application for registration. I understand this provision to stipulate that the application and information in any other document provided by the applicant is the primary source of

information for the decision I make. Accordingly, I have taken into account the following material in coming to my decision:

- the information contained in the application and accompanying documents;
- the information contained in the documents accompanying the earlier amended application filed on 26 July 2012;
- the additional information provided by the applicant on 22 and 23 October 2012 in relation to the earlier amended application;
- the Geospatial Assessment and Overlap Analysis (GeoTrack: 2015/2320) prepared by the Tribunal's Geospatial Services on 1 December 2015 (the geospatial assessment); and
- the results of my own searches using the Tribunal's registers and mapping database.

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

Procedural fairness steps

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

- On 26 November 2015, the case manager for this matter sent a letter to the State of Queensland (the State) enclosing a copy of the Extract from Schedule of Native Title Applications which shows details of the application as amended. That letter informed the State that any submission in relation to the registration of this claim should be provided by 18 December 2015. The State has not provided any submissions.
- The case manager, also on 26 November 2015, wrote to inform the applicant that any additional information should be provided by 18 December 2015. No additional information has been provided.

Procedural and other conditions: s 190C

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

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

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

[18] In coming to this conclusion, I understand that the condition in s 190C(2) is procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss 61 and 62. This condition does not require me to go beyond the information in the application itself nor undertake any merit or qualitative assessment of the material for the purposes of s 190C(2) — see observations of Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112; [2003] FCA 1384 (*Doepel*) at [37] and [39]; see also [16], [35] and [36]. Accordingly, the application must contain the prescribed details and other information in order to satisfy the requirements of s 190C(2).

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

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

Native title claim group: s 61(1)

[21] Schedule A of the application provides a description of the native title claim group, an extract of which can be seen in my reasons below at s 190B(3). The application indicates that the persons comprising the applicant are included in the native title claim group — see s 62(1)(a) affidavits of the persons comprising the applicant at [1]. There is nothing on the face of the application that causes me to conclude that the requirements of this provision, under s 190C(2), have not been met.

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

Name and address for service: s 61(3)

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

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

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

[25] I consider that Schedule A of the application contains a description of the persons in the native title claim group that appears to meet the requirements of the Act.

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

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

[27] The application is accompanied by affidavits sworn by each of the persons who comprise the applicant. The affidavits contain the statements required by s 62(1)(a)(i) to (v), including stating the basis on which the applicant is authorised as mentioned in subsection (iv) — at [5] – [7].

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

Details required by s 62(1)(b)

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

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

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

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

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

Searches: s 62(2)(c)

[32] Schedule D provides that no searches have been carried out in relation to the application area, as currently amended, to determine the existence of non-native title rights and interests.

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

[33] A description of the native title rights and interests claimed by the native title claim group in relation to the land and waters of the application area appears at Attachment E. The description does not consist only of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

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

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

Activities: s 62(2)(f)

[35] Schedule G contains a list of the activities currently undertaken by members of the claim group on the land and waters of the application area.

Other applications: s 62(2)(g)

[36] Schedule H contains details of the BKY application that partly covers the application area.

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

[37] Schedule I provides that there are no notices issued under s 29 that relate to the whole or part of the application area of which the applicant is aware.

Conclusion

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

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

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

[39] In my view, the requirement that the Registrar be satisfied that there are no common claimants arise where there is a previous application which comes within the terms of subsections (a) to (c) — *State of Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

[40] I note that in assessing this requirement, I am able to address information which does not form part of the application — *Doepel* at [16].

[41] The geospatial assessment identifies the BKY application to overlap the area covered by the current application. My search of the Register revealed that the BKY application was accepted for registration and added to the Register on 23 August 2013. This application has not been removed from the Register since that date.

[42] The Darumbal People application (QUD6131/1998) and the Darumbal People #2 application (QUD6001/1999), which were made on 27 June 1997 and 22 January 1999 respectively, were ordered by the Court on 26 July 2012 to be combined. This application was accepted for registration and entered on the Register on 23 November 2012.

[43] As the BKY application was not on the Register at the time the current application was made, in my view, the BKY application does not meet the criterion specified under subsection (b) and is therefore not a previous application for the purposes of s 190C(3).

[44] As a result, I do not need to consider whether I am satisfied that no person included in the native title claim group for the current application was a member of the native title claim group for any previous application for the purposes of s 190C(3).

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

Subsection 190C(4)
Authorisation/certification

> Under s 190C(4) the Registrar/delegate must be satisfied that either:
> (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
> (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
>
> Note: The word ***authorise*** is defined in section 251B.
>
> Under s 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

[46] I must be satisfied that the requirements set out in either ss 190C(4)(a) or (b) are met, in order for the condition of s 190C(4) to be satisfied.

[47] Schedule R indicates that a copy of the certificate of the representative Aboriginal body accompanies the application at Attachment R. Accordingly, I must consider whether the requirements of s 190C(4)(a) are met. If these requirements are not met, then I must consider whether the condition at s 190C(4)(b) has been met.

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

[48] Section 190C(4)(a) imposes upon the Registrar conditions which, according to Mansfield J, are straightforward — *Doepel* at [72]. His Honour noted that the Registrar is to be 'satisfied about the fact of certification by an appropriate representative body', but is not to 'go beyond that point' and 'revisit the certification of the representative body' — at [78], [80] and [81]; see also *Wakaman People #2 v Native Title Registrar* [2006] FCA 1198 at [32]. I therefore consider that my task here is to identify the appropriate representative body and be satisfied that the application is certified under s 203BE.

[49] Once satisfied that the requirements of s 190C(4)(a) have been met, I am not required to 'address the condition imposed by s 190C(4)(b)' — *Doepel* at [80].

Identification of the representative body and its power to certify

[50] Attachment R is entitled 'Certification of Authorisation of the Darumbal People's Further Amended Form 1 Native Title Determination Application — QUD6131/1998' (certification). It is dated 11 July 2012 and signed by the Chief Executive Officer of Queensland South Native Title Services Limited (QSNTS).

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

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

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

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

The requirements of s 203BE

[55] As mentioned above, I consider that I am only required to be satisfied of 'the fact of certification' and 'its compliance with the requirements of s 203BE' but I am not permitted 'to consider the correctness of the certification by the representative body' — *Doepel* at [78] and [82].

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

Subsection 203BE(4)(a)

[57] This provision requires a statement from the representative body confirming that they hold the opinion that the conditions at subsections (2)(a) and (2)(b) have been met.

[58] Subsection 203BE(2) sets out that a representative body must not certify an application for a determination of native title unless it is of the opinion that:

- all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it (s 203BE(2)(a)); and
- all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group (s 203BE(2)(b)).

[59] The certification contains the statement required by s 203BE(2)(a) — at [2]. However, the certificate does not contain the statement required by s 203BE(2)(b) and instead states:

> All reasonable efforts have been made to ensure that all persons who hold or may hold native title in relation to the land or waters in the area covered by the native title determination applications have been identified — at [3].

[60] I do not consider that this or any other paragraph in the certificate contains the statement of the kind required by s 203BE(2)(b). I am therefore unable to be satisfied that the certificate meets the requirements of s 203BE.

[61] I therefore need to consider whether the requirements of s 190C(4)(b) have been met.

The applicant's authorisation material

[62] The applicant's authorisation material is contained in the additional information provided by the applicant on 22 and 23 October 2012 in relation to the amended application filed in July 2012, which was provided to the State for comment in relation to the earlier claim. This information includes submissions of QSNTS of 22 October 2012, the affidavit of QSNTS principal legal officer dated 11 July 2012 and the affidavit of QSNTS legal practitioner dated 12 July 2012.

[63] I consider that it is appropriate to have regard to this material while considering the requirements of s 190C(4)(b). Although Mansfield J commented that where 's 190C(4)(b) applies, s 190C(5) imposes requirements which must appear from the application itself', his Honour was of the view that '[t]he interactions of s 190C(4)(b) and s 190C(5) … clearly … involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given' — at [16] and [78]. I also note the comments of French J that:

> s 190C(4)(b) does not confine the Registrar to the statements made in the affidavit or the information provided in the application in reaching the relevant state of satisfaction. Nor is the Registrar so confined by subs 190C(5) — *Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*) at [57].

[64] This approach was followed by Collier J in *Wiri People v Native Title Registrar* [2008] FCA 574. I am therefore of the view that I am permitted to consider this material provided in support of authorising the applicant to make the application and deal with matters in respect of it.

The application must contain the information specified in s 190C(5)

[65] Section 190C(5) contains a threshold test that must be met before the Registrar may be satisfied that the applicant is authorised in the way described in s 190C(4)(b). Section 190C(5) provides that:

> [i]f the application has not been certified as mentioned in [s 190C(4)(a)], the Registrar cannot be satisfied that the condition in [s 190C(4)] has been satisfied unless the application:
>
> (a) includes a statement to the effect that the requirement set out in [s 190C(4)(b)] has been met, and
>
> (b) briefly sets out the grounds on which the Registrar should consider that [the requirement in s 190C(4)(b)] has been met.

[66] The affidavits of the persons comprising the applicant made under s 62 provide that each of those persons are a member of the Darumbal native title claim group through descent of an apical ancestor identified in Schedule A — at [1].

[67] Part A, Item 2 of the application states that:

> The Applicant was authorised by the members of the Native Title Claim Group to make this native title determination application at an authorisation meeting held in Rockhampton on 2 June 2012.

[68] Attachment R contains the following statement:

> All the persons in the native title claim group have authorised the Applicant to make the amendments to this Application as authorised at the Authorisation Meetings and to deal with matters arising in relation to it — at [2].

[69] In my view, the above constitutes statements to the effect that the requirement in s 190C(4)(b) has been met.

[70] As to the grounds on which the Registrar should consider that the requirement in s 190C(4)(b) has been met, I note that the s 62 affidavit of each of the persons comprising the applicant contain similar statements and particularly note the following:

> At Rockhampton on 2 June 2012, members of the Darumbal People native title claim group attended authorisation meetings organised by [QSNTS]. I attended these meetings.
>
> At the second authorisation meeting ("Authorisation Meeting #2") in Rockhampton on 2 June 2012, members of the Darumbal native title claim group in attendance at the meeting confirmed there was no decision-making process under traditional law and custom that the Darumbal People must use for making decisions relating to native title and agreed to and adopted the following decision-making process for making decisions at the meeting:
>
> (a) The decision to be made will be put in the form of a clearly worded written resolution;
>
> (b) The proposed resolution will be read out to the meeting;
>
> (c) The proposed resolution must be moved and seconded by members of the group before it is decided on;
>
> (d) The decision by the group about the proposed resolution will then be made by a show of hands; and then
>
> (e) A decision of the majority of those people in attendance and present for the vote about the proposed resolution will be an authoritative decision of the claim group.
>
> As a result of Authorisation Meeting #2 on 2 June 2012, I and the [other persons comprising the applicant], who are all members of the Darumbal People native title claim group, were authorised by all persons in the native title claim group to make the application and to deal with matters arising in relation to it … — at [5] – [7].

[71] I am satisfied that the above information contains a brief outline of the grounds on which the applicant considers the Registrar should be satisfied that the requirements of s 190C(4)(b) are met. I assess whether the material provided addresses those requirements below.

The application must address the requirements of s 190C(4)(b)

The requirements of s 190C(4)(b)

[72] Justice Mansfield, in *Doepel*, commented that s 190C(4)(b) requires the Registrar to be satisfied that the applicant has been authorised by all members of the native title claim group, which 'clearly … involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given' — at [78].

[73] Justice Collier, in *Wiri People v Native Title Registrar* [2008] FCA 574 (*Wiri People*), noted that s 190C(4) requires the Registrar to be satisfied as to the identity of the claimed native title holders, including the applicant, and that the applicant needs to be authorised by all the other persons in

the native title claim group — at [21], [29] and [35]; see also *Risk v National Native Title Tribunal* [2000] FCA 1589 at [60].

[74] In *Strickland*, French J stated that the authorisation condition at s 190C(4)(b) is not 'to be met by formulaic statements in or in support of applications' — at [57].

[75] Section 251B provides, for the purposes of s 190C(4)(b), two alternative means of authorisation:

- authorisation in accordance with a process required under the traditional laws and customs of the native title claim group — s 251B(a); or
- authorisation in accordance with a process of decision making agreed to and adopted by the persons in the native title claim group — s 251B(b).

[76] I understand that a claim group is not permitted to choose between the two processes described in s 251B. If there is a traditionally mandated process, then that process must be followed to authorise the applicant, otherwise the process utilised for authorisation must be one that has been agreed to and adopted by the native title claim group — *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9)* [2007] FCA 31 at [1229] and [1230]; see also *Evans v Native Title Registrar* [2004] FCA 1070 at [7].

The applicant's authorisation material

[77] The applicant's authorisation material provides the following relevant information about the authorisation meeting.

[78] The affidavit of 11 July 2012 contains information about the authorisation meeting, including that it is comprised of two separate meetings. One of the notified purposes of the first meeting was to authorise an amendment to the claim group description for each of the two claims to take into account research conducted by consultant anthropologists — at [12]. The notified purpose of the second meeting included authorising an applicant for the Darumbal People claims; authorising an amendment to combine the Darumbal People and Darumbal People #2 claims and authorising an amendment to the combined claim to reduce the boundary — at [30]. In light of the purpose of each meeting, I only refer to the information regarding the second meeting as at this meeting it was resolved to combine the Darumbal People and Darumbal People #2 applications and authorise the applicant to make the application and deal with matters arising in relation to it. In this regards, the affidavit contains the following relevant information regarding the second meeting:

- The persons attending were required to register their attendance by entering their name under the apical ancestor from who they descend — at [13] and [31]. A consultant anthropologist oversaw the registration process and verified where necessary.
- The meeting was also attended by QSNTS staff, an independent chairman, and two consultant anthropologists — at [3] – [5].
- Around 80 members of the native title claim group registered their attendance at the first meeting — at [32] and Annexure TW-4. The numbers present at any one time during the meetings varied but there were a substantial number of people were present and took part in discussion and voting on each resolution — at [33].

- An agenda was provided to all persons in attendance — at [34] and Annexure TW-5.
- Legal advice was given, the proposed resolutions were explained, relevant matters were discussed and an opportunity was given to ask and answer questions — at [35]. Each proposed resolution was put to the group for consideration, discussion and the decision was displayed on a PowerPoint slide. The consultant anthropologists also answered any question from the group in relation to the proposed resolutions— at [36].
- Those present confirmed that the people in attendance were all members of the proposed Darumbal claim group — at [38].
- The persons in attendance made a decision in relation to the decision making process to be used during the meeting and a number of resolutions were passed including confirming that those in attendance were sufficiently representative of the newly described claim group, there is no traditional decision-making process that the Darumbal People must use for making decisions in relation to native title, an agreed to adopted decision making process, combining the Darumbal claims, amendments to the claim boundary and authorising the applicant to make the application and to deal with matters arising in relation it— at [39] – [44]. All the resolutions were seconded and passed either unanimously or by majority.

[79] The affidavit of 12 July 2012 contains the following information about the authorisation meeting:

- QSNTS engaged two anthropologists to undertake anthropological research in relation to the continuing Darumbal society and claim group description — at [6].
- The authorisation meeting was broadly notified with public notices placed in the Courier Mail on 12 and 13 May 2012, the Koori Mail on 16 May 2012 and the Rockhampton's The Morning Bulletin on 12 May 2012 — at [8] and Annexure CMG-1. The notice included information about the date, time, venue and purpose of the meeting.
- On 15 May 2012, QSNTS sent a letter to all persons whose details appear on QSNTS' register informing them about the authorisation meeting and enclosing a copy of the public notice — at [10] and Annexure CMG-2. A total of 76 letters were sent.
- Between 2 and 18 May 2012, a QSNTS community relations officer notified key members of the claim group by telephone of the meeting and its purpose — at [10].
- QSNTS website displayed the public notice from 11 May 2012 to 4 June 2012 — at [10].
- Notice of the meeting was provided at an applicant meeting held on 14 April 2012 to enable the persons comprising the then applicant to disseminate information about the authorisation meeting to other claim group members by word of mouth — at [10].
- Notice was also provided to attendees at a pre-authorisation meeting held on 28 April 2012 in Rockhampton for the purpose of enabling members of the current Darumbal People claim group and members of the proposed Darumbal People claim group to consider and discuss the anthropological research and engage in their own dialogue at a family or inter-personal level prior to the authorisation meeting — at [10]. QSNTS staff and a consultant anthropologist also attended the pre-authorisation meeting.

- On 31 March 2012, a meeting was held by QSNTS with the descendants of the earlier listed apical ancestors where the continued use of those ancestors was discussed — at [11].

Consideration

[80] I note that the first limb of s 190C(4)(b) requires all the persons comprising the applicant to be members of the native title claim group.

[81] In each of their affidavits, the persons who jointly comprise the applicant depose that they are members of the native title claim group. I have not been provided with any material that contradicts those statements and information. It follows that I am satisfied that the persons who comprise the applicant are all members of the native title claim group.

[82] In respect of the second limb of s 190C(4)(b), namely that the persons who jointly comprise the applicant are authorised by all the other members of the claim group to make the application and to deal with matters arising in relation to it, the decision making process utilised at the authorisation meeting must be identified — *Doepel* at [78]; *Wiri People* at [21], [29] and [35].

[83] Section 251B identifies two distinct decision making processes, namely a process that is mandated by traditional laws and customs and one that has been agreed to and adopted by the native title claim group. If there is a traditionally mandated process, then that process must be followed to authorise the applicant. The affidavits of the persons comprising the applicant state that the claim group does not have a decision making process that is traditionally mandated and therefore an agreed and adopted process was used during the authorisation meeting. Given this information, I have considered the applicant's material in light of the requirements of s 251B(b).

[84] Although in the context of s 66B, the requirements of s 251B(b) were discussed by Stone J in *Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales* [2002] FCA 1517 (*Lawson*) where her Honour observed that the 'effect of the section is to give the word "all" [in s 190C(4)(b)] a more limited meaning than it might otherwise have' — at [25]. Her Honour held that:

> … the subsection does not require that "all" the members of the relevant claim Group must be involved in making the decision. Still less does it require that the vote be a unanimous vote of every member. Adopting that approach would enable an individual member or members to veto any decision and may make it extremely difficult if not impossible for a claimant group to progress a claim. In my opinion the Act does not require such a technical and pedantic approach. It is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process — at [25].

[85] Justice Stone cited with approval the decision of *Ward v Northern Territory* [2002] FCA 171 (*Ward*), where O'Loughlin J identified deficiencies in the information provided in that matter regarding the authorisation process and listed a number of questions, which in substance, were required to be addressed before his Honour would consider making an order pursuant to s 66B:

> Who convened it and why was it convened? To whom was notice given and why was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was

the voting for and against a particular resolution? Were there any apologies recorded? — *Ward* at [24], cited in *Lawson* at [26].

[86] O'Loughlin J noted that it was not necessary that these questions be answered in any formal way but held that 'the substance of those questions must be addressed' — at [25].

[87] In my view, the substance of those questions has been addressed in the material provided. The information reveals the reasons for the authorisation meeting. It indicates that all reasonable steps were taken to advise members of the native title claim group of the authorisation meeting, which included by public notice in newspapers and QSNTS' website, pre-authorisation meetings, letters, telephone and by word of mouth, and the notices indicate that the claim group members were advised of the date, time, place and purpose of the meeting. The information also shows that the persons who were present at the meeting were given a reasonable opportunity to participate in the decision making process. In my view, the conduct of the meeting is such that those present agreed to use the adopted decision making process, and the actual process is indicative that it was inclusive, allowing those present an opportunity to participate and have their votes count. For instance, the claim group members who were present were able to participate through discussion, ask questions of QSNTS staff and the anthropologists about the proposed resolutions and vote on the resolutions. Attendance records were kept and it was resolved that those present were sufficiently representative of the native title claim group. The information indicates that the resolutions were passed either by majority or unanimously to authorise the persons comprising the applicant to make the application and deal with matters arising in relation to it.

[88] In my view, the process adopted ensured that the persons who jointly comprise the applicant are authorised by all the other members of the claim group to make the application and to deal with matters arising in relation to it. It follows that, I am satisfied that the condition of s 190C(4)(b) is met.

[89] The application **satisfies** the condition of s 190C(4).

Merit conditions: s 190B

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

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

[90] Attachment B is a written description prepared by QSNTS on 7 May 2015 and contains a metes and bounds description of the external boundaries of the application area, referencing lot on plans, Low and High Water Marks, shire and regional council boundaries, ridgelines of the Dee Range, creeks, rivers and geographic coordinates. Schedule B lists general exclusions.

[91] Attachment C is a copy of a map titled 'Darumbal – Native Title Determination Application' prepared by QSNTS on 7 May 2015. The map includes:

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

Consideration

[92] The geospatial assessment identifies an issue with the written description, namely that it does not elucidate the particular point the external boundary falls along the Rockhampton Regional Council boundary. Despite this, the geospatial assessment concludes that the description and map of the application area are consistent and identify the application area with reasonable certainty. I agree with this assessment. In my view, the error is minor in nature which does not create uncertainty around the description of the application area. As the court in *Kanak v National Native Title Tribunal* (1995) 61 FCR 103; [1995] FCA 1624 commented at [73], the Act is remedial in character and should be construed beneficially.

[93] In light of the above information, I am satisfied that the description and the map of the application area, as required by ss 62(2)(a) and (b), are sufficient for it to be said with reasonable certainty that the native title rights and interests are claimed in relation to particular land or waters.

[94] The application **satisfies** the condition of s 190B(2).

Subsection 190B(3)
Identification of the native title claim group

The Registrar must be satisfied that:

(a) the persons in the native title claim group are named in the application, or

(b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

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

> The native title claim group is the Darumbal People. The Darumbal People are those people who:
>
> (a) are descendants of the following deceased persons:
>
> - Brothers John McPherson and Harry Bauman
> - Kate Reid and James Hector
> - Clara McKenzie
> - Jack Naylor (Jnr)
> - Maria McKenzie
> - Clara Wallace
> - Mundabel
> - Mary Jones
> - Maggie (Mitchell)
> - Yorky
> - Kitty Mulway and Pompey of Stanage; and
>
> (b) are recognised by the living Darumbal People according to their traditional laws and customs as Darumbal People.

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

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

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

[98] In *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*), Dowsett J commented that s 190B(3) 'requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification' — at [33]. His Honour expressed the view that where a claim group description contained a number of paragraphs, 'consistent with traditional canons of construction', the paragraphs should be read 'as part of one discrete passage, and in such a way as to secure consistency between them, if such

an approach is reasonably open' — at [34]. His Honour also confirmed that s 190B(3) required the Registrar to address only the content of the application — at [30].

[99] In *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*), Carr J commented that to determine whether the conditions (or rules) specified in the application has a sufficiently clear description of the native title claim group:

> [i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently. It is more likely to result from the effects of the passage of time and the movement of people from one place to another. The Act is clearly remedial in character and should be construed beneficially — at [67].

Consideration

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

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

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

Descent

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

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

[105] The factual basis indicates, in my view, that descent from a named ancestor provides the fundamental basis for membership to the Darumbal People native title claim group — see Attachment F at [76] – [78]. I am of the view that with some factual inquiry it will be possible to identify the persons who fit the description of the native title claim group.

Recognition

[106] As noted above, I am of the view that the description of the native title claim group is to be read as a discrete whole and recognition as a Darumbal person is not meant to be stand alone criteria. Rather, it is a qualifier to membership by descent. I discuss below my reasons for coming to this view, including the relevant case law that have considered recognition as a criterion of itself.

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

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

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

[109] Dowsett J referred to the decision of the *High Court in Members of the Yorta Yorta Aboriginal Community v State of Victoria* (2002) 214 CLR 422; (2202) 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*) where it was found that the existence of a society depended upon mutual recognition within the group. His Honour also referred to the decision in *Sampi v State of Western Australia* [2005] FCA 777 where French J stated that recognition as a member involved an internal perspective of the group. The decision of French J was appealed and the Full Court stated that:

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

[110] Dowsett J noted that '[t]hese cases clearly demonstrate that membership must be based on group acceptance' — at [260].

[111] Having regard to the information contained in the factual basis, it is my view that descent from the named ancestors provides the fundamental basis for membership to the Darumbal people native title claim group — see Attachment F at [76] – [78]. Recognition as a Darumbal person is linked to the connection to Darumbal land. Generally, those who have rights in country must be a biological descendant of an ancestor from the area — at [81]. It follows, in my view, that recognition is inherently linked to the recognition of one's biological descent from a named ancestor. It is through this connection that individuals are recognised by other Darumbal People as being a member of the claim group.

Conclusion

[112] In my view, the description of the native title claim group contained in the application is such that, on a practical level, it can be ascertained whether any particular person is a member of the group. Accordingly, focusing only upon the adequacy of the description of the native title claim group, I am satisfied of its sufficiency for the purpose of s 190B(3)(b).

[113] The application **satisfies** the condition of s 190B(3).

Subsection 190B(4)
Native title rights and interests identifiable

> The Registrar must be satisfied that the description contained in the application as required by s 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.

[114] The task at s 190B(4) is to assess whether the description of the native title rights and interests claimed is sufficient to allow the rights and interests to be readily identified. In my opinion, that description must be understandable and have meaning — *Doepel* at [91], [92], [95], [98] to [101] and [123]. I understand that in order to assess the requirements of this provision, I am confined to the material contained in the application itself — at [16].

[115] I note that the description referred to in s 190B(4), and as required by s 62(2)(d) to be contained in the application, is:

> a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law …

[116] I will consider whether the claimed rights and interests can be prima facie established as native title rights and interests, as defined in s 223, when considering the claim under s 190B(6) of the Act. For the purposes of s 190B(4), I will focus only on whether the rights and interests as claimed are 'readily identifiable'. Whilst undertaking this task, I consider that a description of a native title right and interest that is broadly asserted 'does not mean that the rights broadly described cannot readily be identified within the meaning of s 190B(4)' — *Strickland* at [60]; see also *Strickland FC* at [80] to [87], where the Full Court cited the observations of French J in *Strickland* with approval.

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

> Non-exclusive rights to:
>
> (a) access, be present on, move about on and travel over the area;
>
> (b) camp, and live temporarily on the area as part of camping, and for that purpose build temporary shelters on the area;
>
> (c) hunt, fish and gather on the land and waters of the area for personal, domestic and non-commercial communal activities;
>
> (d) take, use and share Natural Resources from the land and waters of the area for personal, domestic and non-commercial communal purposes;
>
> (e) take and use the Water of the area for personal, domestic and non-commercial communal purposes;
>
> (f) conduct smoking, welcome and cleansing ceremonies and ceremonies associated with the repatriation of remains on the area;

(g) be buried on and bury native title holders within the area;

(h) maintain and protect places of importance and areas of significance to the native title holders under their traditional laws and customs;

(i) teach on the area the physical, cultural, and spiritual attributes of the area;

(j) hold meetings on the area; and

(k) light fires on the area for personal and domestic purposes including cooking, but not for the purpose of hunting or clearing vegetation.

Consideration

[118] For the purposes of s 190B(4), I am satisfied that the rights and interests identified are understandable and have meaning.

[119] I find that the description of the native title rights and interests claimed is sufficient to allow the rights and interests to be readily identified and that therefore the application satisfies the condition of s 190B(4).

[120] The application **satisfies** the condition of s 190B(4).

Subsection 190B(5)
Factual basis for claimed native title

> The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:
> (a) that the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interest, and
> (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

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

The requirements of s 190B(5) generally

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

[123] Although the facts asserted are not required to be proven by the applicant, I consider the factual basis must provide sufficient detail to enable a 'genuine assessment' of whether the particularised assertions outlined in subsections (a), (b) and (c) are supported by the claimant's factual basis material — see *Gudjala FC* at [92].

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

Gudjala People #2 v Native Title Registrar [2009] FCA 1572 (*Gudjala 2009*) at [28] and [29] and *Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal* [2012] FCA 1215 at [43] and [48].

[125] I am therefore of the opinion that the test at s 190B(5) requires adequate specificity of particular and relevant facts within the claimants' factual basis material going to each of the assertions before the Registrar can be satisfied of its sufficiency for the purpose of s 190B(5).

[126] The factual basis material is contained in Attachment F and the affidavits dated 3 November 2010 and 4 November 2010 from members of the native title claim group.

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

Reasons for s 190B(5)(a)

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

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

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

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

[129] The factual basis contains the following relevant information about the native title claim group's association with the application area:

- The application area is situated between Shoalwater Bay forming the northern boundary of the application area and the Boomer Range and Mount Morgan forming the southern boundary. The claim group members were told by their predecessors that 'the traditional country of the Darumbal People extends west to the Boomer-Broadsound Ranges, north to the Marlborough area and south to the mouth of the Fitzroy River' — affidavit of 4 November 2010 at [7].
- Records from the first explorers who sailed near the application area in 1770, note seeing inhabitants and other signs of life such as smoke — Attachment F at [1].
- In around the early 1800s, 1820s and 1840s, explorers reported encounters with, and observations of, the predecessors in and around the application area — at [2] – [3].
- European occupation commenced in the region in 1847, but sustained settlement did not occur until at least 1855 — at [4] – [5].

- Historical accounts between 1854 and 1870 record the predecessors actively resisting European settlement in the application area — at [11]. The predecessors resided in camps throughout the application area, with large camps existing within the central and mid-southern regions — at [12].
- In 1897, 100 speakers of the Darumbalic dialects were recorded as living around the southeastern region — at [13]. The speakers of the Darumbalic dialect were described 'as being organised into traditional local groups focused around a "head centre camp" and that mixed camps presumably of people from different local groupings also existed through the [region]' — at [14].
- Various Aboriginal camps in the southeastern region were seen and reported during the period from the 1850s to the 1890s — see table at 19 – 20.
- Throughout the nineteenth century and into the twentieth century, the predecessors remained in the application area by being involved in pastoral and timber industries conducted on the application area — at [19].
- Of relevance to the association of the apical ancestors identified in Schedule A and their descendants, the factual basis includes the following information:
  - John McPherson was born in 1875 proximate to the southwestern boundary — at [18] and map at 21. He was married to the daughter of ancestors James Hector and Kate Reid — affidavit of 4 November 2010 at [6]. He worked on cattle stations on Darumbal country and his wife would often work close by — at [9]. One of their sons was born in the central region and his children lived and worked around the central, mid-northern and mid-southern regions — at [8]. Their great grandson was born in the southeastern region in 1957 and grew up and went to school there — at [1] and [3] – [4]. He was told by his grandparents, great aunts and uncles, who were told by their elders, that his family belongs to the country around the southeastern region and was told about the extent of traditional Darumbal country — at [7]. Other ancestors in this descent group were born between 1907 and 1914 around the middle, southeastern and mid-western regions — Attachment F table at 22. A descendant of this ancestor says his maternal grandparents and their siblings lived and worked on and around the mid-western and central regions of the application area — at [21]. He grew up hearing about the locations within the application area that some of the Darumbal predecessors were at, including within the mid-western and central regions of the application area. He was told by his mother that his great grandmother used to walk and camp all around the northern region. The families of this descent group were associated with pastoral properties in the central region in the 1890s, the central and mid-northern regions in the 1900s, the central, mid-northern and proximate to the northwestern regions in the 1910s, the central and mid-northern regions in the 1920s, a station I understand to be located in the southeastern region during the 1920s to 1940s, and the central region in the 1950s — table at 24.
  - Clara McKenzie was born proximate to the mid-western boundary around 1875 and 1879 — at [18] and map at 21. Her children were born proximate to or in the mid-western region and lived there for a period before moving to the central region — at [25]. Other ancestors of this descent group were born between 1898 and 1928 either in

the middle region or proximate to the mid-western boundary — table at 22. Clara McKenzie, her husband and her son were present on a station in the central region in 1946 and her son and his wife were living there in the 1950s — at [22]. Her granddaughter says that she and her siblings would stay there in the holidays. According to her granddaughter, Clara would travel on foot within the middle region to visit her son. Clara's son worked at a station within the middle region until the mid-1960s and then worked within the mid-western region until the 1970s — at [24]. In the 1960s and 1970s, some of her descendants were living in the mid-western region and working on stations there. They would fish and swim at the creek there. The families of this descent group were associated with pastoral properties located in the central region during the 1910s to the 1960s and the mid-western region during the 1910s, 1920s, 1930s and the 1970s — table at 24.

- Jack Naylor Jr was born proximate to the mid-western boundary in 1897 — at [18] and map at 21. Other ancestors of this descent group were born between 1910 and 1923 proximate to the mid-western boundary — table at 22. The families of this descent group were associated with pastoral properties located in the central region and within and proximate to the mid-western region — table at 24.
- Maria McKenzie was born around the mid-southern boundary in 1885 — at [18] and map at 21.
- Clara Wallace was born in the mid-western region in 1865 — at [18] and map at 21. Another ancestor from this descent group was born in 1886 in the mid-western region — table at 22. Clara is buried on Darumbal country — affidavit of 3 November 2010 at [4]. Her descendants lived within the mid-western region in the 1910s and after inter-marriages with another descent group around the 1940s and 1950s in the mid-western region, there was increasing visitation between the families living there and those proximate to the mid-western boundary — Attachment F at [27]. These families visited the creeks in the mid-western region for camping, fishing, and swimming from as early as the 1910s through to the late 1950s and early 1960s. Members of the family continued to work at stations within the area. Clara's daughter was born in the middle region and she and her brothers were brought up at a station in that area — at [28]. The families of this descent group were associated with pastoral properties located in the mid-western and northwestern regions during the 1960s and 1970s — table at 24. In addition, Clara's great grandson says that he feels most connected to the northwestern and mid-western regions of the application area — affidavit of 3 November 2010 at [8]. He spent 21 years around the northwestern region and travelled and worked all over the mid-western and central regions — at [8]. He says he belongs to Darumbal country because his ancestors were Darumbal and because of his spiritual connection to country — at [9]. He maintains his connection to country by spending as much time as he can in the bush and passing on his knowledge and respect for country to his children and grandchildren — at [9]. Currently, he goes fishing and hunting in the northwestern region — at [11] – [12].
- Mundabel was born in the mid-southern region between 1849 and 1860 — Attachment F at [18] and map at 21. Mundabel's son was born in the late 1870s at either the southeastern region or the mid-western region of the application area and worked for

a period in the southeastern and mid-southern regions — at [32]. Another ancestor of this descent group was born around the mid-1870s to early 1880s in the mid-western region and another ancestor was born in 1888 in the southeastern region — table at 22.

- Mary Jones was born within the mid-southern region around the 1850s — at [18] and map at 21. She was recorded by an anthropologist as being associated with the southeastern region — at [31]. Her daughter was born in the mid-southern region. Another ancestor of this descent group was born around 1884 in the mid-southern region — table at 22. The families of this descent group were associated with pastoral properties located in and proximate to the northwestern region in the 1880s and 1890s — table at 24.
- Maggie Mitchell was born around the southeastern region — at [18] and map at 21. Another ancestor from this descent group was born in 1891 — table at 22. The families of this descent group were associated with pastoral properties located in the mid-western, central and northwestern regions in the 1960s — table at 24.
- Yorky was born around the southeastern boundary in 1853 — at [18] and map at 21.
- Pompey and Kitty Mulway were born in the mid-northern region in the 1850s — at [18] and map at 21. Other ancestors of this descent group were born around the mid-1870s to early 1880s around the mid-northern and southeastern regions — table at 22.
- One ancestor from the Kate Reid descent group was born around the mid-1870s in the southeastern region — table at 22. Another ancestor was around the mid-1890s or early 1900s in the middle region and worked at stations such as those within the mid-southern region and proximate to the southwestern boundary — [23] and table at 22. Some of the descendants of these apical ancestors worked on the pastoral station in the middle region around the 1940s — at [22]. The families of this descent group were associated with pastoral properties located in and proximate to the mid-western region during the 1910s to the 1960s, in the central region in the 1880s and the 1930s to the 1960s, in the mid-northern region in the 1920s, in and proximate to the northwestern region in the 1920s, 1960s and 1970s, and a station I understand to be located in the southeastern region during the 1880s — table at 24.

- Current family groups are recognised for their long inter-generational association with different pastoral properties in the claim area and stories of their parents, grandparents or even themselves visiting kin at these locations are remembered by other claimants — at [20].
- The claimants who had families forcibly removed from the claim area tell stories of how their parents and grandparents taught them about their association with the claim area and countrymen from the claim area — at [29]. Those who had been forcibly removed would try to visit the claim area or other claim group members from the claim area. For instance, a claimant was told by her mother of the areas they moved to, how they remained in close proximity to other Darumbal People and about the different descent groups — at [30]. The oral history is passed to the current claimants through their elders and their families who stayed on country as well as those who were removed — at [35].

- By the 1950s, urban enclaves of Darumbal families began to develop in the southeastern region and in Brisbane — at [35]. Since the 1950s, the residential base of families in the southeastern region 'has played a key role in maintaining the native title community' — at [36]. 'The greater permanence and residential concentration fostered key traditional beliefs and practices, including those associated with tribal identity and connection to country' — at [37]. The claim group members would visit family, speak in language, hunt, fish, collect bush tucker, and teach their descendants history, language, avoidance behaviour and customary practices relating to respect for elders and appropriate ways in which elders would impart knowledge — at [38] – [39] and [42] – [54]. For instance, the great grandson of Clara Wallace says that his father taught him all about living in the bush, hunting, fishing and gathering food — affidavit of 3 November 2010 at [6]. He has also passed his knowledge of country on to his children and grandchildren.
- The claimants also continue to camp, conduct smoking ceremonies and prepare native plants for medicinal use on the claim area — Attachment F at [68] and [70]. They continue to maintain and protect significant sites, such as burial, ceremonial, story and art sites, and have knowledge of kinship, their totems, the dreamings they are associated with and the associated stories, and believe that the spirits of their ancestors and other spirits, such as the creation spirit, are present amongst them and exist at different places on their traditional country, particularly within the river system — affidavit of 3 November 2010 at [20] – [22] and [25] and affidavit of 4 November at [15] – [17], [19], [21] – [23] and [32].

Consideration

[130] In *Gudjala 2007*, Dowsett J noted the necessity for the Registrar 'to address the relationship which all members claim to have in common in connection with the relevant land' — at [40]. In my view, this criterion should be considered in conjunction with his Honour's statement that the 'alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)' — at [39]. I consider that these principles are relevant in assessing the sufficiency of the claimant's factual basis for the purpose of the assertion at s 190B(5)(a) as they elicit the need for the factual basis material to provide information pertaining to the identity of the native title claim group, the predecessors of the group and the nature of the association with the area covered by the application. In that regard, I consider that the factual basis material clearly identifies the native title claim group and acknowledges the relationship the Darumbal People have with their country. The factual basis reflects the knowledge claim group members have of Darumbal land and waters including the places that their ancestors and the different descent groups were associated with.

[131] There is also, in my view, a factual basis that goes to showing the history of the association that members of the claim group have, and that their predecessors had, with the application area — see *Gudjala 2007* at [51]. The factual basis contains references to the presence of some of the apical ancestors and other predecessors within the application area around the date of sustained European contact, which I understand from the factual basis to have occurred around 1855. For instance, Mundabel and Mary Jones were born in the mid-southern region of the application area between 1849 and 1860 and in the 1850s respectively and Pompey and Kitty Mulway were born in the mid-northern region in the 1850s, from which I infer their parents would have been associated with the area prior to sustained contact. The factual basis provides that some of the other ancestors were born close to the date of sustained European contact in or around the application

area. There are references to the descendants of the apical ancestors, including their children and grandchildren being born or present on the application area at various times for work, visiting kin, camping, fishing, gathering natural resources and travelling. The families of different descent groups have been associated with different parts of the application area at various periods.

[132] The factual basis is also sufficient to support the assertion that the Darumbal People have a spiritual association with the application area and is sufficient to show the history of that association. The claim group members have knowledge of the creation and other mythical spirits, the dreaming stories and country they are associated with, and their totems. They continue to practice traditional customs such as smoking ceremonies on country and believe their country is imbued with spiritual presence. They are taught traditional laws and customs from their immediate predecessors by being shown and told about sacred sites, ceremonies, totems and dreaming stories ensuring that the younger generations continue to have a spiritual association with their country. In my view, this transfer of knowledge and belief system demonstrates the history of the spiritual association the Darumbal People have with the application area.

[133] For the purposes of s 190B(5)(a), I must also be satisfied that there is sufficient factual material to support the assertion of an association between the group and the whole area. The material indicates that the different descents groups have an association with various parts of the application area. The families of the John McPherson descent group were associated with the central, mid-northern, northwestern and southeastern regions. The families of the Clara McKenzie descent group were associated with the central and mid-western regions. The families of the Jack Naylor Jr descent group were associated with the central and mid-western regions. The families of the Clara Wallace descent group were associated the mid-western and northwestern regions. The families of Mary Jones descent group were associated with the northwestern region. The families of Maggie Mitchell descent group were associated with the mid-western, central and northwestern regions. The families of Kate Reid descent group were associated with the mid-western, central, mid-northern, northwestern and southeastern regions. The factual basis indicates that the ancestors and their descendants may also have been associated with other regions in the application area and refers to those locations. The asserted facts also refer to the creation being present on Darumbal country particularly within their river system, which I understand to flow throughout their country, predominantly within the southern region.

[134] From the above information, I consider that the factual basis is sufficient to support the assertion of an association, both physical and spiritual, 'between the whole group and the area' — see *Gudjala 2007* at [52]. In my view, the factual basis material provides sufficient examples and facts of the necessary geographical particularity to support the assertion of an association between the whole group and the whole area.

[135] Given the information before me, I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s 190B(5)(a).

Reasons for s 190B(5)(b)

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

[136] The definition of 'native title rights and interests' in s 223(1) provides, at subsection (a), that those rights and interests must be 'possessed under the traditional laws acknowledged, and traditional customs observed,' by the native title holders. Noting the similar wording between

this provision and the assertion at s 190B(5)(b), I consider that it is appropriate to apply s 190B(5)(b) in light of the case law regarding the definition of 'native title rights and interests' in s 223(1). In that regard, I have taken into consideration the observations of the High Court in *Yorta Yorta* about the meaning of the word 'traditional' — see *Gudjala 2007* at [26] and [62] to [66].

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

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

[138] I note that in *Gudjala 2009,* Dowsett J also discussed some of the factors that may guide the Registrar, or his delegate, in assessing the asserted factual basis, including:

- that the factual basis demonstrate the existence of a pre-sovereignty society and identify the persons who acknowledged and observed the laws and customs of the pre-sovereignty society — at [37] and [52];
- that if descent from named ancestors is the basis of membership to the group, that the factual basis demonstrate some relationship between those ancestral persons and the pre-sovereignty society from which the laws and customs are derived — at [40]; and
- that the factual basis contain an explanation as to how the current laws and customs of the claim group are traditional (that is laws and customs of a pre-sovereignty society relating to rights and interests in land and waters). Further, the mere assertion that current laws and customs of a native title claim group are traditional because they derive from a pre-sovereignty society from which the claim group is said to be descended, is not a sufficient factual basis for the purposes of s 190B(5)(b) — at [29], [54] and [69].

Society

[139] The identification of a pre-sovereignty society or a society that existed prior to European contact of the application area is relevant to my assessment of the assertion at s 190B(5)(b). In particular, I am of the view that identification of such a society is necessary to support the assertion of a connection between that society and the apical ancestors as well as a connection with the current native title claim group. I consider the following asserted facts to be relevant to my consideration of whether the factual basis is sufficient to support the existence of such a society:

- At sovereignty, four groups of Aboriginal people occupied and used the application area, being the Tarumbal, Warrabal, Kuinmurrburra and Ningebal — Attachment F at [6].
- The Tarumbal, Warrabal and Kuinmurrburra spoke dialects of a single language, now known as the Darumbal language, and it is inferred that the language spoken by the Ningebal was also a dialect of the Darumbal language — at [7].
- These groups took their name from the name of their respective language and owned and occupied a defined territory within the claim area — at [8].
- The groups were united in and by their acknowledgement and observance of a common body of laws and customs in relation to the possession, occupation, use and enjoyment of the land and waters of the application area, and social organisation and aspects of social behaviour — at [9]. Under the system of traditional laws and customs, the Darumbal ancestors possessed rights and interests in relation to land and waters of the claim area — at [10].
- Following sovereignty, and by the turn of the nineteenth/twentieth century, the Warrabal, Kuinmurrburra and Ningebal had declined as autonomous social, political and landholding groups. The surviving members of these groups, together with the territory within the claim area associated with those groups, were merged and absorbed into the Tarumbal people and territory. As a consequence, under traditional laws and customs, the Tarumbal People had assumed responsibility for the territory within the claim area that has been owned and occupied by the other groups at sovereignty — at [15] – [16].
- The descendants of these ancestors collectively possess rights and interests in relation to the whole of the land and waters of the claim area under traditional laws and customs and have come to be known by, and to identify with, the name of their shared language, Darumbal — at [17].

Traditional laws and customs

[140] The factual basis contains information about the traditional laws and customs of the Darumbal native title claim group, some of which I refer to below.

[141] The native title claim group continue to acknowledge and observe laws and customs that relate to the possession, occupation, use and enjoyment of land and waters in the application area — at [81]. These laws and customs continue to be based on a belief in the essential creative role of the beings of the mythological era in placing groups and languages in the country and thereby establishing the inalienable connection to the country. They include knowledge of the creation stories and myths, rules in relation to acquiring and holding creation stories and myths, being mindful and respectful of the spirits of the dreaming beings and Darumbal ancestors that reside on country, calling out to ancestral spirits when entering country, respecting the spiritual presence in country, including by not disturbing country, rules against harming or eating totems, seeking permission to enter another person's country, speaking for country, avoidance places, and caring for country — at [81].

[142] One claim group member says that he is aware of the dreaming story his family is associated with, another dreaming story with which it is closely associated, and how the

dreaming beings work together to create rain, storms, lightning and thunder — affidavit of 4 November 2010 at [17]. He received this information from his grandfather's brother and sister and was given more information from his elders as he grew older. He says that they are distinct from neighbouring groups because their identity relates to the dreaming beings and their identity of being the rain makers — at [33]. He speaks of the creation spirit that resides on country, particularly within the river system in Darumbal country, and of other spiritual presence on country — at [19] – [20] and [23]. He speaks of proper burials and how they have repatriated and buried remains in an appropriate place and conducted a smoking ceremony thereafter — at [20] – [26]. He says that they speak to the spirit of their deceased in language and conduct smoking ceremonies to remove their presence from properties — at [24]. He says that they do not speak the names of the deceased — at [21]. He has knowledge of Darumbal significant sites, which include burial places, ceremonial places, story places and art sites — at [34] – [36].

[143] The rights and interests in land are held collectively by the group, although persons can have, and are recognised as having, particular associations with parts of the claim area on the basis of their ancestral connections to that part — Attachment F at [81]. Group membership, identity and the acquisition of descent-based rights and interests in relation to land, is on the basis of filiation with a parent or grandparent who themselves held such rights. A claim group member says that he was told by his elders that his family belongs to the country around the southeastern region of the application area and says he claims his Darumbal identity through his mother, who in turn claimed her identity through her father whose parents were apical ancestor John McPherson and the daughter of apical ancestors James Hector and Kate Reid — affidavit of 4 November 2010 at [5] – [7]. It is through their connection with country that the Darumbal People derive their identity, and through their belief in the country and its stories and their observance of the rules laid down by it they derive rights and interests in country — at [19].

[144] The native title claim group also continues to acknowledge and observe traditional laws and customs in relation to social organisation and aspects of social behaviour, including totemic associations, classificatory kinship systems that regulate roles and responsibilities of relationships such as the passing on of cultural knowledge regarding avoidance and respect between certain categories of kin, regulation of marriage, respect for elders, and regulation of some ceremonial activities and ritual practices such as funeral rites and smoking ceremonies to appease spirits and for cleansing — Attachment F at [82] and 60 – 64. A current claimant says that when he was growing up, his family would have other Aboriginal families staying with them for extended periods as an expression of their cultural obligation to care for their kin — affidavit of 4 November 2010 at [12]. His parents, grandparents and other elders taught him about kin relationships, such as how they were related and connected to certain individuals and families — at [15]. He says that kinship is used to identify other Darumbal People and to determine whether a person has rights in Darumbal country — at [16]. He learnt about Darumbal identity, such as skin and skin names, when he was young which has given him understanding of who he is as an individual, where he fits in the wider Darumbal society, who he should or should not interact with for cultural reasons, what rights and interests he can exercise in Darumbal country and other aspects of Darumbal culture — at [17] – [18]. He speaks of showing respect to kin relationships such as displaying respect at funerals, sharing grief of mourning relatives, the custom of not speaking the name of deceased persons and of performing proper burials and smoking rituals — at [20] – [26].

[145] The claimants use their traditional country to travel across, reside and camp on, for employment, hunt, collect and use resources, visit and care for country, and visit each other within and outside the claim area — Attachment F at [79]. One claimant says that he often travelled across the application area and would fish, hunt and gather natural resources for food and water — affidavit of 4 November 2010 at [31], [39] – [40], [44] – [48].

[146] The laws and customs have been passed down the generations by word of mouth and common practice — Attachment F at [78]. For instance, a Darumbal man says he learnt from his elders how to fish and catch turtle and eels on the riverbank and told not to swim in the river because the creation spirit that lives there may cause harm. He was also told not to waste water and when to hunt for certain bush food — affidavit of 4 November 2010 at [40] – [47].

[147] I note that the information extracted at s 190B(5)(a) is also relevant to my consideration of the assertions at s 190B(5)(b).

Consideration

[148] In order to support the assertion that the relevant laws and customs are 'traditional' in the *Yorta Yorta* sense, I consider that the factual basis must include factual details of:

- the connection between the pre-sovereignty society and the existing claim group; and
- the connection between the laws and customs acknowledged and observed by the pre-sovereignty society and the existing claim group.

[149] I also consider that the factual basis must include assertions that do not merely restate the claim but provide an adequate general description of the factual basis — see *Gudjala 2007* at [62] and [66] and *Gudjala 2009* at [27] and [29].

[150] My understanding of the factual basis material is that the pre-sovereignty society comprised of the Tarumbal, Warrabal, Kuinmurrburra and Ningebal groups who spoke dialects of the single language, now known as the Darumbal language. The groups were united in and by their acknowledgement and observance of a common body of laws and customs in relation to country, social organisation and aspects of social behavior. Each group occupied a defined territory within the application area which was acknowledged by the other groups and, under the system of traditional laws and customs, the ancestors possessed rights and interests in relation to the land and waters. Following sovereignty, under the traditional laws and customs, a decline in the Warrabal, Kuinmurrburra and Ningebal groups led to the surviving members, together with the territory of those groups, being merged and absorbed into the Tarumbal people and territory and the Tarumbal People assuming responsibility for the application area. The descendants of these ancestors collectively possess rights and interests in relation to the whole of the land and waters of the claim area under traditional laws and customs and have come to be known by, and to identify with, the name of their shared language, Darumbal.

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

[152] I am also of the view that there is information contained within the factual basis material from which the current laws and customs can be compared with those that are asserted to have existed at sovereignty. The Darumbal People observe a landholding system in which rights, responsibilities and interests are exercised by the descendants of the apical ancestors. The factual basis demonstrates that the descent groups continue to have knowledge of the country their ancestors were associated with and have knowledge of sacred sites such as burial places, ceremonial places, story places and art sites on country. In my view, there is sufficient information to support the assertion that the present landholding system whereby members of the Darumbal People gain rights to country on the basis of cognatic descent, and the spiritual relationship to country, is one that is founded upon a normative system that is likely to have been present at or before sustained European contact. I consider that there is a sufficient factual basis that the landholding system held by the current claimants is derived from and rooted in customary laws and practices.

[153] The factual basis contains information which speaks to the way the claim group continues to perform traditional practices such as hunting, fishing and gathering natural resources for various purposes as well as following a system of kinship and skin. This in my view is sufficient to support the assertion that the laws and customs currently observed are relatively unchanged from those acknowledged and observed at the time of contact, and that they have been passed down the generations to the claimants today.

[154] The factual basis also contains references to current observance and acknowledgement of laws and customs of a spiritual nature. The claimants have knowledge of creation stories and myths, and the dreaming beings. They have knowledge of rules of conduct in relation to certain places on country such as not swimming in the river due to the presence of the creation spirit and speak of a system where respect is given to the land and its spirits, including the spirits of their predecessors, by acknowledging and speaking to spirits. There are also references to current claimants performing smoking ceremonies to appease spirits and for cleansing.

[155] The factual basis, in my view, is sufficient to support the assertion that the relevant laws and customs, acknowledged and observed by this society, have been passed down through the generations, by word of mouth and common practice, to the current members of the claim group, and have been acknowledged by them without substantial interruption. There are references to the current claimants being taught about and following their system of kinship and skin, hunting and fishing in the application area, conducting proper burials and smoking ceremonies, speaking to the spirits in language and gathering natural resources such as for medicinal purposes, which in my view reveals a continuing practice of teaching laws and customs to the younger generation. This in my opinion is sufficient to support the assertion that these laws and customs will continue to be passed to future generations ensuring a vitality and continuity of the traditional laws and customs. I infer that, given the level of detail in the continued acknowledgement and observance of the group's cultural traditions and that the laws and customs have been passed between a few generations from the apical ancestors to the current claimants, the apical ancestors would have also practiced these modes of teachings. It follows that, in my view, the laws and customs currently observed and acknowledged are 'traditional' in the *Yorta Yorta* sense as they derive from a society that existed at the time of sustained contact.

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

Reasons for s 190B(5)(c)

[157] This condition is concerned with whether the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the native title rights and interests claimed in accordance with their traditional laws and customs.

[158] In *Martin*, French J held that:

> [u]nder s 190B(5)(c) the delegate had to be satisfied that there was a factual basis supporting the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs. This is plainly a reference to the traditional laws and customs which answer the description set out in par (b) of s 190B(5) — at [29].

[159] Accordingly, meeting the requirements of this condition relies on whether there is a sufficient factual basis to support the assertion at s 190B(5)(b) that there exist traditional laws and customs which give rise to the claimed native title rights and interests. In my view, this assertion relates to the continued holding of native title through the continued observance of the traditional laws and customs of the group.

[160] In addressing this aspect of the test, in *Gudjala 2009*, Dowsett J considered that where the claimant's factual basis relied upon the drawing of inferences, that:

> [c]lear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs may justify an inference of continuity' — at [33].

Consideration

[161] There is, in my view, information within the factual basis material that goes to explaining the transmission and continuity of the native title rights and interests held in the application area in accordance with relevant traditional laws and customs.

[162] The factual basis provides that traditional laws and customs have been passed from generation to generation using methods of oral transmission and common practice — Attachment F at [78]. For instance, a descendant of ancestors John McPherson, James Hector and Kate Reid speaks of learning from his elders including his parents, grandparents, aunts and uncles, about Darumbal country, his identity as a Darumbal person, kinship and skin, proper burials and smoking ceremonies, the creation and mythical spirits and the spirits of their ancestors on country, not to swim in the rivers where the creation spirit lives, how to hunt and fish in a traditional manner, and gather natural resources for traditional purposes such as for medicine — see affidavit of 4 November 2010. Current claimants continue to follow and perform traditional practices and teach the younger generation — see for instance affidavit of 3 November 2010 at [18].

[163] In reaching my view in relation to this requirement, I have also considered my reasons in relation to s 190B(5)(b) and in particular that:

- the relevant pre-sovereignty society has been clearly identified and some facts in relation to that society have been set out;
- there is some information pertaining to the acknowledgement and observance of laws and customs by previous generations of Darumbal People in relation to the application area;

- examples of the claim group's current acknowledgement and observance of laws and customs in relation to the application area have been provided.

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

[165] The application **satisfies** the condition of s 190B(5) because the factual basis provided is **sufficient** to support each of the particularised assertions in s 190B(5).

Subsection 190B(6)
Prima facie case

> The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.

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

The requirements of s 190B(6)

[167] The requirements of this section are concerned with whether the native title rights and interests, identified and claimed in this application, can be *prima facie* established. Thus, 'if on its face a claim is arguable**,** whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis' — *Doepel* at [135]. Nonetheless, it does involve some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed' — at [126], [127] and [132].

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

[169] I understand that the requirements of s 190B(6) are to be considered in light of the definition of 'native title rights and interests' at s 223(1) — *Gudjala 2007* at [85]. I must, therefore, consider whether, prima facie, the individual rights and interests claimed:

- exist under traditional laws and customs in relation to any of the land or waters in the application area;
- are native title rights and interests in relation to land or waters; and
- have not been extinguished over the whole of the application area.

[170] I also understand that the claimed native title rights and interests:

> must nonetheless be rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the peoples in question. Further, the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs. For the reasons given earlier, "traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty — *Yorta Yorta* at [86], cited in *Gudjala 2007* at [86].

[171] I am therefore of the view that a claimed native title right and interest can be prima facie established if the factual basis is sufficient to demonstrate that they are possessed pursuant to the traditional laws and customs of the native title claim group.

[172] I note that the 'critical threshold question' for recognition of a native title right or interest under the Act 'is whether it is a right or interest "in relation to" land or waters' — *Western Australia v Ward* [2002] HCA 28 per Kirby J at [577]. I also note that the phrase 'in relation to' is 'of wide import' — *Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [93]. Having examined the native title rights and interests set out in Attachment E of the application, I am of the opinion that they are, prima facie, rights or interests 'in relation to land or waters.'

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

[174] Before I consider the rights and interests claimed, I note that my reasons at s 190B(6) should be considered in conjunction with, and in addition to, my reasons and the material outlined at s 190B(5).

Rights prima facie established

Non-exclusive rights to:

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

(b) camp, and live temporarily on the area as part of camping, and for that purpose build temporary shelters on the area;

[175] The claim group members speak of their regular use of country, visiting family, camping, and travelling over the application area for cultural purposes and for hunting and fishing within it. Some members were born, raised, worked and currently live on or proximate to the application area.

[176] The factual basis indicates that some of the apical ancestors and other predecessors resided on country, accessed country for various traditional purposes, and some worked at the stations within the application area.

[177] It is my view that the factual basis material prima facie establishes that these rights are possessed pursuant to the traditional laws and customs of the native title claim group.

(c) hunt, fish and gather on the land and waters of the area for personal, domestic and non-commercial communal activities;

(d) take, use and share Natural Resources from the land and waters of the area for personal, domestic and non-commercial communal purposes;

[178] The factual basis contains references to members of the claim group and their predecessors hunting and fishing in the Darumbal country and also utilising the natural resources of the land.

[179] Early historical accounts record that the predecessors of the claim group utilised a wide range of natural resources from the area to make such things as canoes, fishing lines, boomerangs, spears and baskets and hunted and collected food such as turtles, oysters, fish, ducks, crabs, fern roots, kangaroo and porpoises — Attachment F at 46 – 59.

[180] The current claimants continue to hunt, fish and gather natural resources such as for medicinal purposes on the application area — affidavit of 3 November 2010 at [12] – [17] and [19]. Some claimants continue to hunt turtle and dugong in a traditional manner by using spears which they make from saplings — affidavit of 4 November 2010 at [45] – [46]

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

(e) take and use the Water of the area for personal, domestic and non-commercial communal purposes;

[182] The factual basis contains references to the predecessors taking and using water for bathing and washing sores, and was likely to have been used during camping — Attachment F at 59. The current claimants speak of water being an importance resource for bathing and drinking and say that their 'Old People' and ancestors used to go to the permanent water supplies within the application area — at 59 – 60.

[183] In my view, this right is prima facie established under Darumbal traditional laws and customs.

(f) conduct smoking, welcome and cleansing ceremonies and ceremonies associated with the repatriation of remains on the area;

(g) be buried on and bury native title holders within the area;

(j) hold meetings on the area;

The asserted facts refer to the predecessors conducting initiation ceremonies, corroborees and congregating for meetings between different tribes — at 60 – 62.

The current claimants speak of the importance of introducing or welcoming other Aboriginal people on to country, acknowledging the spirits on country, and conducting smoking ceremonies to appease the spirits and for cleansing — at 60 – 64. They speak of the importance of being buried on country and how they have repatriated the bones of old people back on country — at 65 – 66. The claimants continue to hold meetings such as in relation to native title — at 73 – 75.

[184] I am of the view that these rights are prima facie established pursuant to the traditional laws and customs of the native title claim group.

(h) maintain and protect places of importance and areas of significance to the native title holders under their traditional laws and customs;

[185] The factual basis indicates that the predecessors maintained significant sites possibly for great lengths of time prior to European settlement — at 66. Current claim group members speak of how they look after sites and artefacts and how they participate in cultural heritage protection work – at 66 – 69.

[186] I consider this right is prima facie established under Darumbal traditional laws and customs.

(i) teach on the area the physical, cultural, and spiritual attributes of the area;

[187] The claimants speak of being taken onto country and being told by their ancestors about their country and culture such as how to care for country, about the natural resources and bush food, and how to use the shadows of trees to tell time — at 69 – 73. Recent programs have been

established so that possession of geographic and cultural knowledge continues to be transmitted to the younger generation by the predecessors.

[188] The factual basis material, in my view, prima facie establishes that this right is possessed pursuant to the traditional laws and customs of the native title claim group.

(k) light fires on the area for personal and domestic purposes including cooking, but not for the purpose of hunting or clearing vegetation.

[189] The asserted facts indicate that the predecessors would light fires for cooking and camping — at 75 – 77. The current claimants continue to light fires for these purposes, such as cooking witchetty grubs on the coals. There are also references to the claim group members performing ceremonies which would also require the use of fire.

I consider that the factual basis material prima facie establishes that this right is possessed pursuant to the traditional laws and customs of the native title claim group.

Conclusion

[190] As I am satisfied that at least one of the native title rights and interests claimed has been prima facie established, the application **satisfies** the condition of s 190B(6).

Subsection 190B(7)
Traditional physical connection

> The Registrar must be satisfied that at least one member of the native title claim group:
> (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or
> (b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:
> (i) the Crown in any capacity, or
> (ii) a statutory authority of the Crown in any capacity, or
> (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

[191] The High Court's decision in *Yorta Yorta* and the Federal Court's decision in *Gudjala 2009* are of primary relevance in interpreting the requirements of s 190B(7). In the latter case, Dowsett J observed that it 'seems likely that [the traditional physical] connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs' — at [84]. In interpreting connection in the 'traditional' sense as required by s 223 of the Act, the members of the joint judgment in *Yorta Yorta* felt that:

> the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs … "traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty — at [86].

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

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

[194] I note that the factual basis contains relevant information that describe a traditional physical association of the Darumbal People with the application area, including travelling, hunting, fishing, gathering natural resources and camping on country — see for instance affidavit of 3 November 2010 at [6], [8] and [10] – [12]. The claimants also continue other traditions on country such as burial rites and smoking ceremonies — at [23] – [25]. There are also references to claim members being born on and residing on the application area and also working within it — Attachment F at [21] – [28] and [37] – [38].

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

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

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

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s 61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

Section 61A provides:

(1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.

(2) If :

(a) a previous exclusive possession act (see s 23B) was done, and

(b) either:

(i) the act was an act attributable to the Commonwealth, or

(ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s 23E in relation to the act;

a claimant application must not be made that covers any of the area.

(3) If:

(a) a previous non-exclusive possession act (see s 23F) was done, and

(b) either:

(i) the act was an act attributable to the Commonwealth, or

(ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s 23I in relation to the act;

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

(4) However, subsection(2) and (3) does not apply if:

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

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

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

Reasons for s 61A(1)

[198] Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title.

[199] The geospatial assessment states that no determinations of native title fall within the external boundaries of the application area. The results of my own search of the Tribunal's mapping database confirm that there is no overlap with any native title determination. It follows that the application is not made in relation to an area for which there is an approved determination of native title.

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

Reasons for s 61A(2)

[201] Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply.

[202] The application indicates that areas which are subject to valid exclusive possession acts are excluded from the application — see Schedule B.

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

Reasons for s 61A(3)

[204] Section 61A(3) provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done, unless the circumstances described in s 61A(4) apply.

[205] I am satisfied that the application does not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area that is, or has been, subject of a previous non-exclusive possession act, except to the extent that ss 47, 47A or 47B of the Act may apply — see Schedules B and L.

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

Conclusion

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

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

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

(a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or

(b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or

(c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss 47, 47A or 47B.

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

Reasons for s 190B(9)(a)

[209] Schedule Q provides that the native title claim group does not claim ownership of minerals, petroleum or gas which are wholly owned by the Crown.

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

Reasons for s 190B(9)(b)

[211] Schedule P indicates that the native title claim group does not claim exclusive possession of any offshore place.

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

Reasons for s 190B(9)(c)

[213] The application does not disclose, nor is there any information before me to indicate, that the native title rights and interests claimed have otherwise been extinguished. The application provides that any land or waters where the native title rights claimed have been otherwise extinguished are excluded and the application also claims the protections afforded by ss 47, 47A and 47B — see Schedules B, E and L.

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

Conclusion

[215] The application **satisfies** the condition of s 190B(9), because it **meets** all of the three subconditions, as set out in the reasons above.

[End of reasons]

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Darumbal People
NNTT file no.	QC2012/008
Federal Court of Australia file no.	QUD6131/1998

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

Section 186(1): Mandatory information

Application filed/lodged with:

Federal Court of Australia

Date application filed/lodged:

26 July 2012

Date application entered on Register:

23 November 2012

Applicant:

As appears on the extract from the Schedule of Native Title Applications

Applicant's address for service:

As appears on the extract from the Schedule of Native Title Applications

Area covered by application:

As appears on the extract from the Schedule of Native Title Applications

Persons claiming to hold native title:

As follows:

The native title claim group is the Darumbal People. The Darumbal People are those people who:

(a) are descendants of the following deceased persons:

- Brothers John McPherson and Harry Bauman
- Kate Reid and James Hector
- Clara McKenzie
- Jack Naylor (Jnr)
- Maria McKenzie
- Clara Wallace
- Mundabel
- Mary Jones
- Maggie (Mitchell)
- Yorky
- Kitty Mulway and Pompey of Stanage; and

(b) are recognised by the living Darumbal People according to their traditional laws and customs as Darumbal People.

Registered native title rights and interests:

Non-exclusive rights to:

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

(b) camp, and live temporarily on the area as part of camping, and for that purpose build temporary shelters on the area;

(c) hunt, fish and gather on the land and waters of the area for personal, domestic and non-commercial communal activities;

(d) take, use and share Natural Resources from the land and waters of the area for personal, domestic and non-commercial communal purposes;

(e) take and use the Water of the area for personal, domestic and non-commercial communal purposes;

(f) conduct smoking, welcome and cleansing ceremonies and ceremonies associated with the repatriation of remains on the area;

(g) be buried on and bury native title holders within the area;

(h) maintain and protect places of importance and areas of significance to the native title holders under their traditional laws and customs;

(i) teach on the area the physical, cultural, and spiritual attributes of the area;

(j) hold meetings on the area; and

(k) light fires on the area for personal and domestic purposes including cooking, but not for the purpose of hunting or clearing vegetation.

[End of document]