National Native Title Tribunal

Registration test decision

Application name	Port Curtis Coral Coast People
Name of applicant	Kerry Blackman, Dean Sarra, Lurleen Blackman, Richard Johnson, Nat Minniecon, Matthew Cooke, Neville Johnson
NNTT file no.	QC2001/029
Federal Court of Australia file no.	QUD6026/2001

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

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

Date of decision: 20 October 2016

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Heidi Evans

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 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 (the Registrar), for the decision to accept the claim for registration pursuant to s 190A of the Act.

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

Application overview and background

[3] The Registrar of the Federal Court of Australia (the Federal Court) gave a copy of the Port Curtis Coral Coast People claimant application to the Registrar on 13 May 2016 pursuant to s 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

[4] I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to this claim. This is because the application was not amended as the result of an order made by the Federal Court pursuant to s 87A, nor does the application meet any of the criteria set out in ss 190A(6A)(d) regarding the nature of the amendment to the previous application.

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

[6] The application was most recently amended on 2 February 2016, however had not been considered by the Registrar pursuant to s 190A before it was again amended by the applicant. The applicant wrote to the Registrar on 7 April 2016 requesting that the Registrar's delegate defer the testing of the application until it was further amended to remedy a fatal flaw in the application.

[7] The application was first entered onto the Register on 27 February 2002. In August 2007 it was amended, and accepted for registration pursuant to s 190A(6). It has since been amended a number of times, with amended applications filed 12 March 2012, 13 January 2014, 2 May 2014, 20 August 2015, and 2 February 2016. I note that the application currently appears in an entry on the Register of Native Title Claims and that it has remained on the Register since it was first entered onto it in 2002.

Registration test

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

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

Information considered when making the decision

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

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

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

[13] 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.

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

Procedural fairness steps

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

[16] As above, the Port Curtis Coral Coast claim was last amended on 2 February 2016, and prior to it being registration tested by a delegate of the Registrar, the claim was again amended. This is the application before me.

[17] On 17 May 2016, I caused the Practice Leader for the application to write to the applicant, acknowledging receipt of the amended application, and advising that the applicant could provide additional material directly to the Registrar's delegate for their consideration in applying the registration test. The applicant was given until 3 June 2016 to provide any additional material. Prior to that date, the applicant contacted the Practice Leader for the application and requested an extension of time within which to provide additional material. Noting that I had set a decision date for on or before 30 September 2016, I considered it reasonable that the applicant was granted an extension, until 24 June 2016, to provide additional material in relation to the application.

[18] Also on 17 May 2016, I caused the Practice Leader to write to the State and the Federal Court, advising of receipt of the amended application by the Registrar, and inviting the State to make submissions in relation to the registration testing of the claim, by 3 June 2016.

[19] On 15 June 2016, having considered the information contained in the application, I caused the Practice Leader to write again to the applicant, advising the applicant of my preliminary view that there was insufficient information contained in the application to meet certain conditions of the registration test, and indicating the nature of the material that may address the deficiency.

[20] On 24 June 2016, the applicant provided directly to the Registrar additional material for the consideration of the Registrar's delegate in applying the registration test to the amended application. By email of 30 June 2016, the applicant confirmed that the information was not confidential.

[21] On 30 June 2016, the Practice Leader wrote to the State, briefly describing the additional material provided by the applicant. The State was informed that most of the documents listed had been filed in relation to the Port Curtis Coral Coast Claim proceedings, and consequently, that the Registrar's delegate understood the State to have copies of those documents. Regardless, the letter stated that copies of the documents could be made available to the State if required. The State was invited to comment on the additional material, as relevant to the application of the registration test provisions to the amended application.

[22] By email on 1 July 2016, the State confirmed that the Minister did not wish to make submissions in relation to the registration testing of the application.

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.

[23] 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.

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

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

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

Native title claim group: s 61(1)

[27] A description of the persons comprising the native title claim group appears at Schedule A of the application. Following the decision of Mansfield J in *Doepel*, it is only where on the face of the application itself it appears that persons have been excluded from the native title claim group described, or where the group described is a sub-group or part only of the actual native title claim group, that the application will fail to meet this condition – at [36].

[28] Having considered the description of the group in Schedule A, there is nothing to indicate or suggest that the description of the group seeks to exclude persons, or that the group described is a sub-group or part only of the actual native claim group.

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

Name and address for service: s 61(3)

[30] The names of the persons comprising the applicant appear immediately above Part A of the Form 1. The name and address for service of the applicant's legal representative appears at Part B of the Form 1.

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

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

[32] My consideration here is limited to whether the application sets out the native title claim group in the manner prescribed by s 61(4). I am not permitted to consider the correctness of the information provided – see *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 (*Wakaman*) at [34]; *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [31] and [32]. As above, a description of the native title claim group appears at Schedule A of the application.

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

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

[34] The application is accompanied by seven affidavits, one sworn by each of the applicant persons. Those affidavits all contain the same nine paragraphs, with minor differences to provide details relevant to the ancestry of each individual applicant person.

[35] I have considered the information contained in those nine paragraphs, and it is my view that the affidavits contain the statements required by subsections (a) to (v) of s 62(1)(a).

[36] Each of the affidavits is signed, dated and has been competently witnessed.

[37] I am satisfied, therefore, that the application is accompanied by the affidavit required by s 62(1)(a).

Details required by s 62(1)(b)

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

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

[39] Schedule B refers to information identifying the boundaries of the area covered by the application at Attachment B.

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

[40] Schedule C refers to a map showing the boundaries of the area covered by the application at Attachment C.

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

[41] Schedule D provides information about searches undertaken by the applicant.

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

[42] Schedule E refers to a list of native title rights and interests claimed in relation to the application area at Attachment E. It is more than a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

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

[43] Schedule F sets out a description of the factual basis on which it is asserted that the native title rights and interests claimed exist, and refers to further information at Attachments F and M.

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

[44] Activities currently being carried out by members of the native title group in relation to the application area are listed in Schedule G.

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

[45] Schedule H provides that the applicant is not aware of any other such applications to the High Court or Federal Court that overlap any part of the application area.

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

[46] Schedule HA contains information about these types of notifications.

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

[47] Information about s 29 notices appears in Schedule I of the Form 1.

Conclusion

[48] 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.

[49] It is only where there is a previous application that meets all three criteria set out in s 190C(3) that the requirement for me to consider common claimants is triggered – *Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

[50] Turning, therefore, to subsection (a), I must consider whether there is a previous application that overlaps the whole or part of the area of the current application. The geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services in relation to the map and description that accompanied the application, provides that there is one application that overlaps the entirety of the current application area. Namely, this is the Port Curtis Coral Coast application (QC2001/029), the very application I am now considering for registration.

[51] The application I am currently testing is an amended application. Consequently, the previous application was already considered by the Registrar pursuant to s 190A, and as a result, entered onto the Register of Native Title Claims. In my view, the Port Curtis Coral Coast People application cannot overlap itself, and therefore the Port Curtis Coral Coast 'previous application' that appears on the geospatial assessment does not meet the criteria at subsection (a), as it is one-in-the-same with the current application. Further, I consider it clear that the intention of s 190C(3) was not to prevent amended claims being entered onto, or maintained on, the Register as a result of this condition of the registration test, but rather to prevent individuals claiming native title rights and interests over the same area twice, through membership of two different native title claim groups.

[52] Subsequently, as the criterion at s 190C(3)(a) is not satisfied, I have not turned to consider the remaining criteria.

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

Subsection 190C(4)
Authorisation/certification

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

(a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
(b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

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

Section 251B provides that for the purposes of this Act, all the persons in a native title claim group authorise a person or persons to make a native title determination application . . . and to deal with matters arising in relation to it, if:
a) where there is a process of decision–making that, under the traditional laws and customs of the persons in the native title claim group, must be complied with in relation to authorising things of that kind—the persons in the native title claim group . . . authorise the person or persons to make the application and to deal with the matters in accordance with that process; or
b) where there is no such process—the persons in the native title claim group . . . authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision–making agreed to and adopted, by the persons in the native title claim group . . . in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.

Under s 190C(5), if the application has not been certified as mentioned in s 190C 4(a), the Registrar cannot be satisfied that the condition in s 190C(4) has been satisfied unless the application:
(a) includes a statement to the effect that the requirement in s 190C(4)(b) above has been met, and
(b) briefly sets out the grounds on which the Registrar should consider that the requirement in s 190C(4)(b) above has been met.

[54] 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.

[55] Schedule R of the Form 1 confirms that the application is not certified. Therefore, I must be satisfied that the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group, pursuant to s 190C(4)(b).

[56] Where an application is not certified, I note that s 190C(5) requires certain information to be contained in the application. I have considered the information within the application and the accompanying material that addresses authorisation. I am satisfied the statement required by s 190C(5)(a) appears in Schedule R, and the further statement 'briefly setting out' the grounds on which the Registrar should consider the requirement stated met is contained in the affidavit of [name removed] sworn 26 April 2016. Consequently, the requirement at s 190C(5) met.

[57] In *Doepel*, Mansfield J held that '[t]he interactions of s 190C(4)(b) and s 190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s 190C(4)(b), but clearly it

involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given' – at [78]. This followed from His Honour's finding that at s 190C(4)(b) the Registrar is 'required to be satisfied of the fact of authorisation by all members of the native title claim group' – at [78].

[58] Regarding the nature of the material required to satisfy me of the fact of authorisation, noting the use of the word 'briefly' in s 190C(5)(b), I do not consider it necessary that a detailed explanation of the authorisation process be provided - *Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*) at [57], approved by the Full Court on appeal in *Strickland FC*. The case law emphasises, however, that 'authorisation is a matter of considerable importance' and 'is not a condition to be met by formulaic statements in or in support of applications' – *Strickland* at [57].

[59] As above, the material addressing the requirement of authorisation is primarily contained in the affidavit of [name removed] sworn 26 April 2016. This affidavit was supplied directly to the Registrar on 24 June 2016, after the amended application was filed. I note, however, that I am able to have regard to material provided by the applicant or otherwise that is beyond or additional to the material contained in the application itself – see *Strickland* at [57], approved on appeal by the Full Court in *Strickland FC* at [78].

[60] I have summarised below the information provided in the affidavit about the authorisation process for the amended claim:

- Queensland South Native Title Services (QSNTS), as the legal representative for the applicant, notified and convened two meetings of the native title claim group, both of which were held on 24 April 2016 at the Bargara Community Centre in Queensland;
- notice of both meetings was contained in the same notice published on 2 April in three newspapers circulating in the claim area, or accessible to the native title claim group;
- in relation to the first meeting scheduled for 24 April, the notice invited all members of the native title claim group as currently described and recorded on the Register of Native Title Claims (the Register) – the description of the group was included in the notice;
- the purpose for that meeting set out in the notice was twofold: first, for the group to consider the results of recent anthropological advice regarding particular apical ancestors and whether an amendment to the claim group description was required, and; second, to authorise the necessary amendments to the description to ensure it is consistent with the best available evidence supporting the claim;
- the notice then set out the 'amended Port Curtis Coral Coast People claim group description' which included additional apical ancestors and removed one ancestor couple;
- regarding the second meeting scheduled for 24 April, the notice stated, '[d]epending on the decisions made at Authorisation Meeting #1, a further authorisation meeting will be held for those people who fall within the amended Port Curtis Coral Coast People claim group description, as newly described above';

- the purpose of the second meeting, as set out in the notice, was twofold: to authorise an applicant for the amended application, and to consider and approve amendments to the description of the native title rights and interests claimed by the group;
- while not addressed by the sworn statements within the affidavit, the copy of the notice annexed to the affidavit shows that an information session about the proposed amendments to the claim was scheduled for all Port Curtis Coral Coast People on 16 April at the same venue in Bargara;
- the notice states that QSNTS is unable to provide assistance for transport and accommodation to attend the authorisation meetings, however meals for the day of the meeting would be supplied;
- due to a typographical error in one of the apical ancestors names, a correction notice was republished in the same newspapers on 9 and 20 April 2016;
- in addition to the public notification process, on 5 April 2016 QSNTS mailed a copy of a notice containing the same information to 324 persons whose names and addresses appeared on a database of Port Curtis Coral Coast People maintained and periodically checked for accuracy by QSNTS;
- on 19 April 2016, a second letter about the authorisation meetings was posted to the same members of the group by priority post, enclosing an agenda for the meetings, proposed draft resolutions and other papers relevant to the business to be conducted at the meetings;
- from 11 to 22 April 2016, QSNTS employed two Community Relations officers to contact each member of the claim group listed on the database for whom a telephone number was recorded to determine whether they were to attend;
- 249 phone calls were made and 104 responses received;
- persons contacted by QSNTS included descendants of the additional apical ancestors to be considered at the authorisation meetings – these persons both advised they would not be attending the meetings;
- persons in attendance at the first meeting were required to sign attendance sheets and provide information as to the ancestor through whom they identified as a member of the native title claim group – this process was overseen and assisted by a number of QSNTS staff;
- the identification of persons as members of the Port Curtis Coral Coast People was confirmed at the meeting through relevant resolutions passed by those in attendance, regarding the entitlement of persons to be present and to participate in the decision-making process;
- according to the records taken, 106 members of the native title claim group (as then constituted) attended and participated in the first meeting;
- according to the records taken, 92 members of the newly-described native title claim group attended the second meeting;
- no descendant of the proposed additional apical ancestors was present for either of the meetings;
- at the commencement of the first meeting, the Deputy Principal Legal Officer of QSNTS provided information and legal advice to the persons in attendance about the proposed decisions to be made – she also explained resolutions where requested to do so, and answered queries from those present;
- a Research Officer of QSNTS then provided information and explained anthropological advice regarding the claim group description, discussed relevant matters and answered questions;

- at the first meeting, the group resolved to make certain amendments to the description of the native title claim group;
- those present at the second meeting were members of the newly-described claim group;
- at the second meeting, the members of the newly-described group authorised and confirmed the authority of the existing applicant persons to continue as the applicant for the amended application, and to deal with all matters arising in relation to the application;
- also at the second meeting, the group resolved to authorise an amendment to the description of the native title rights and interests claimed by the group;
- as set out in the copy of the Summary of Outcomes from the meetings annexed to the affidavit, the group agreed to and adopted the same decision-making process for making decisions at both the first and second meetings – a process agreed to and adopted by the group after resolving that there is no traditionally-mandated process that must be complied with for authorising things of this kind;
- the adopted process involved resolutions carried by majority vote.

[61] Noting the reference to s 251B following s 190C(4)(b), the material must clearly address the decision-making process employed by the group in authorising the applicant. In my view, having considered the information before me about the authorisation process, I am satisfied that it does address the requirement at s 251B. From the information, I accept that it was an agreed to and adopted decision-making process, pursuant to s 251B(b), which involved discussion around each of the proposed resolutions and then a vote carried by a majority. This process was adopted at the meeting following a resolution passed by those in attendance that there was no decision-making process pursuant to Port Curtis Coral Coast traditional laws and customs that must be complied with for decisions of this nature.

[62] In a situation where it is an agreed to and adopted decision-making process at an authorisation meeting asserted as the basis of the applicant's authority, Stone J, in *Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation New South Wales* [2002] FCA 1517 (*Lawson*), held that there is no requirement for 'all the persons in the native title claim group' to attend and partake in the decision. Her Honour found it is sufficient where a decision is made once the members of the group are given every reasonable opportunity to participate in the decision-making process – at [25]. In making this assessment, Her Honour indicated that relevant factors are whether the meeting was well-attended and whether it was appropriately advertised.

[63] I note there were two meetings that took place on 24 April 2016. While the decision to authorise the applicant to make the amended application took place at the second meeting, those who attended the second meeting, namely the Port Curtis Coral Coast People, were dependent on the decisions made at the first meeting. From the material before me, at the first meeting, those in attendance resolved to amend the description of the native title claim group. It is my understanding that the newly-described group involved clarifications around certain apical ancestors, and the addition of a further apical ancestor. My consideration, therefore, must be

whether all of the persons comprising the newly-described native title claim group were given every reasonable opportunity to attend the meeting where the group authorised the applicant to make the amended application.

[64] Having considered the information before me, it is my view that these persons were given every reasonable opportunity to attend the authorisation meeting. This is due to the actions taken by QSNTS in notifying those persons, namely that public and personal notice was given, with personal notice being given to persons listed on a QSNTS database as Port Curtis Coral Coast People. Personal notice was also provided through telephone contact, not only to the persons on the database listed as members of the existing claim group, but also to persons identified as being descendants of the additional apical ancestor. The material states that these latter persons advised that they would not be attending the meetings.

[65] Both personal and public notice was given approximately two to three weeks before the scheduled meetings. The notices clearly set out the proposed changes to the claim group description, and the business to be conducted at both meetings on the day. Approximately one week before the meetings, specific information about the meetings and their purpose was mailed to the members of the native title claim group, including an agenda and proposed resolutions. Further to this, upon realisation of an error in an apical ancestor's name in the public and personal notices, QSNTS arranged for a correction notice to appear in the same publications. While financial assistance was not offered to attend the meetings, I consider that persons wishing to attend had ample time to make travel and other arrangements to be there. From the way the meetings were notified, it is my view that the members of the existing claim group, and the persons descended from the additional apical ancestor, could make an informed decision as to whether their attendance was required, and therefore, that they were given every reasonable opportunity to attend and participate in the decision-making process.

[66] In *Ward v Northern Territory* [2002] FCA 171 (*Ward v NT*), O'Loughlin J found the information before him about the meeting from which the applicant's authority flowed, 'wholly deficient'. His Honour posed a number of hypothetical questions which indicate the type of information that may be required to address s 190C(4)(b):

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

[67] His Honour held that the substance of these questions must be answered, rather than there being any requirement for answers on a formal basis – at [25].

[68] The authorisation material before me is relatively extensive. I have copies of the notices used to advertise the meetings, copies of the letters sent to Port Curtis Coral Coast persons listed in the QSNTS database, copies of the agenda, attendance sheets, proposed resolutions, and a 'Summary of Outcomes' document, explaining the way in which the meeting was conducted and the decisions made by the group. In the affidavit of [name removed] there are details of the notification process, including telephone calls made by QSNTS to specific members of the native title claim group and the responses of those persons. There are details of the meeting registration process, including the persons charged with assisting and overseeing that process, and details of the way the first meeting and second meeting on the day progressed. In my view, therefore, the material does answer the substance of the questions posed by O'Loughlin J in *Ward v NT* regarding the meeting at which the native title claim group gave their authority to the applicant to make the amended application.

[69] Consequently, in light of the information before me, I am satisfied of the fact of authorisation, namely that the applicant is a member of the native title claim group and is authorised to make the application and deal with all matters arising in relation to it by all the other persons in the native title claim group.

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

Merit conditions: s 190B

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

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

[71] In accordance with the wording of the condition, the requirement at s 190B(2) must be met by the information contained within the application. That information is contained in Attachment B to Schedule B and Attachment C to Schedule C.

[72] Attachment B contains a written metes and bounds description of the external boundary of the application area. The description references Local Government boundaries, road reserves, creeks and rivers, the High Water Mark of the mainland and coordinate points. The description also includes a list of islands, rocks and reefs that are included in the application area. Attachment B1 specifically excludes 89,817 parcels that are freehold or subject to scheduled interests.

[73] Schedule B lists general exclusion clauses, that is, areas within the external boundary that are excluded from the application area. In my view, there is nothing problematic at s 190B(2) in the application adopting this method of describing these areas – see *Strickland v Native Title Registrar* [1999] FCA 1530 at [50] to [55].

[74] Attachment C contains a colour copy of a map entitled 'QUD6026/2001 Port Curtis Coral Coast Claim – Native Title Determination Application', prepared by Queensland South Native Title Services (QSNTS) and dated 5 April 2016. The map includes:

- the external boundary of the application area as a bold dark blue dashed outline;
- the area subject to claim as a bold dark blue outline with light blue fill;
- the area excluded from the claim (Attachment B1) as a grey outline hachured red;
- scalebar, northpoint, coordinate grid and locality diagram; and
- notes relating to the source, currency and datum of data used to prepare the map.

[75] The geospatial assessment prepared by the Tribunal's Geospatial Services in relation to the map and description concludes that they are consistent and identify the application area with reasonable certainty. Having considered the information before me, I agree with the assessment, and consequently consider the map and description sufficient for it to be said with reasonable certainty whether rights and interests are claimed in relation to particular land or waters.

[76] 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.

[77] A description of the persons comprising the native title claim group is at Schedule A. Pursuant to s 190B(3)(b), I must be satisfied, therefore, that the persons in the group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[78] The description provides that '[t]he native title claimant group comprises all the descendants of' 17 named apical ancestors. There are no further conditions or clarifications given in Schedule A.

[79] My role at s 190B(3) is to consider whether the application enables the reliable identification of the persons in the native title claim group – *Doepel* at [51]. I am not permitted to consider the correctness of the description, or whether the described persons do in fact qualify as members of the claim group – see *Doepel* at [37]; *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 (*Wakaman*) at [34].

[80] I note it is not an obstacle at s 190B(3) that it may be necessary to engage in some factual inquiry in ascertaining the persons comprising the native title claim group. In *Western Australia v Native Title Registrar* [1999] FCA 1591, Carr J considered a description of a claim group involving three criteria, including that group members were the biological descendants of named apical ancestors. His Honour acknowledged application of the criteria to individuals asserting membership of the claim group would require some factual inquiry, however found it did not 'mean that the group has not been described sufficiently'. Carr J relied on the remedial character of the legislation in adopting this beneficial construction of the provision, referring to the decision in *Kanak v National Native Title Tribunal* (1995) 61 FCR 103 at 124.

[81] In the description before me, there is only one criterion. That is, a person must be a descendant of one of the apical ancestors named in Schedule A. Schedule A does not specify whether descent must be by biological means or may be by adoption, but in light of any express reference to adoption, I understand descent to refer to biological descent. In my view, therefore, by starting with one individual and applying the criterion of biological descent, with some inquiry, the members of the Port Curtis Coral Coast claim group could be ascertained with sufficient clarity.

[82] Consequently, I am satisfied that the persons in the group are described sufficiently clearly so that it can be ascertained whether any particular person is in the group.

[83] 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.

[84] In *Doepel*, Mansfield J approved the approach of the Registrar's delegate in the case before him where he found the 'test of identifiability' as being 'whether the claimed native title rights and interests are understandable and have meaning' – at [99]. His Honour held that s 190B(4) was 'a matter for the Registrar to exercise his judgment upon the expression of the native title rights and interests claimed' and that it was 'open to the Registrar to read the contents of Schedule E together, so that properly understood there was no inherent or explicit contradiction in Schedule E' – at [123].

[85] The description of the native title rights and interests claimed in relation to the land and waters of the application area appears at Schedule E. Paragraph [1] of that description sets out a list of 12 non-exclusive rights and interests claimed by the native title claim group. Paragraph [2] states: '[f]or the avoidance of doubt, exclusive native title rights and interests are not claimed in relation to any land or waters covered by this application'.

[86] I have read the contents of Schedule E together and I am satisfied there is no inherent or explicit contradiction within that description. I have also had regard to the definition of 'native title rights and interests' in s 223(1) of the Act and consider that the rights and interests claimed are understandable and have meaning as native title rights and interests.

[87] Consequently, I am satisfied that the description contained in the application is sufficient to allow the native title rights and interests claimed to be readily identified.

[88] 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.

[89] Mansfield J, in *Doepel*, explained the approach to be taken by the Registrar's delegate at s 190B(5) in the following way:

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

[90] This approach was affirmed by the Full Court of the Federal Court in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala 2008*) – at [83] to [85]. The Full Court elaborated further on the nature of the material required at s 190B(5), finding that 'it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true', but that the general description provided 'must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A […] and be something more than assertions at a high level of generality – at [92].

[91] In light of these statements of the law, I understand that I am to accept the asserted facts as true, and to consider whether those facts support the claimed conclusions. I am not to approach the factual basis as if it were evidence furnished in proceedings – *Gudjala 2008* at [91] to [92].

[92] Further, noting the finding of the Full Court in *Gudjala 2008* set out above, it is my view that general or formulaic statements where these do not appear to relate to the particular native title claimed by the particular native title claim group over the land and waters subject of the application, will not be sufficient to satisfy the requirements of s 190B(5) – see also *Gudjala 2007* at [39].

[93] The applicant's factual basis material is extensive. I have already set out in my reasons above the information to which I have had regard in considering the application against the requirements of the registration test. Again, for convenience, I set out below those parts of the application and additional documents that comprise the factual basis to which I have had regard at s 190B(5):

- Schedule F;
- Amended Attachment F & M;
- Expert Anthropological Report No. 1, by [name removed], December 2009 (Export Report No. 1);
- Expert Anthropological Report No. 2, by [name removed] September 2010 (Expert Report No. 2);

- Expert Anthropological Report No. 7, by [name removed] July 2012 (Expert Report No. 7);
- Amended Expert Anthropological Report No. 13, by [name removed] November 2015 (Amended Expert Report No. 13);
- Outline of Evidence of [name removed] filed 30 January 2015 (Outline of Evidence MJ);
- Affidavit of [name removed] sworn 7 December 2015 (WQ's affidavit December 2015); and
- Affidavit of [name removed] sworn 28 January 2016 (WQ's affidavit January 2016).

[94] I address each of the assertions at s 190B(5) in my reasons below.

Reasons for s 190B(5)(a)

[95] The assertion at s 190B(5)(a) is that the native title claim group have, and their predecessors had, an association with the area. It is my understanding that the factual basis must speak to an association with the whole of the area, and broad statements that lack geographical particularity will not be sufficient in satisfying the requirement – *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) at [26].

[96] In *Gudjala 2007*, in an aspect of the decision not criticised on appeal by the Full Federal Court, Dowsett J's comments indicate that the factual basis material at s 190B(5)(a) may need to address the following:

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

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

[97] I have summarised below the information before me that I consider addresses the assertion at s 190B(5)(a):

- historical records demonstrate that each of the apical ancestors had an association with part of the application area – see Expert Report No. 2 at [172] to [207]; Amended Expert Report No. 13;
- these ancestors were members of the Gooreng Gooreng/Gurang, Taribelang Bunda and Bailai people – see Expert Report No. 2, at [168] to [171]; Expert Report No. 1 at [34] to [43];
- Tindale associated each of these groups with parts of the claim area – see Expert Report No. 1 at Section 1.3.1;
- places with which the ancestors were associated include the Burnett River, Cania, Gladstone, Mount Perry, Eidsvold, Monto and Miriam Vale Station – see Expert Report No. 2 at Section 4.3; Amended Expert Report No. 13;
- first contact in the claim area was in 1770 when Captain James Cook sailed up the east coast of Australia and anchored within the south point of Bustard Bay – see Expert Report No. 2 at [17];

- various explorers passed through the claim area between 1800 and 1850, making observations of the Aboriginal people inhabiting the area – see Expert Report No. 2 at [17] to [24];
- settlement in the area began with the establishment of pastoral properties from the 1850s onwards – see Expert Report No. 2 at [25];
- due to the establishment of pastoral properties within the claim area, many predecessors of the claimants were able to remain on their traditional country, working on the stations – see Expert Report No. 2 at [25] to [53];
- records demonstrate the first three generations of the claim group lived within or just outside of the claim area – see Expert Report No. 2 at [160] to [163];
- in the fourth and fifth generations, some claimants moved away from the claim area, in some cases as far as Brisbane and Melbourne – nevertheless, 51 percent of claimants continue to live within or in the vicinity of the claim area – see Expert Report No. 2 at [160] to [163].

[98] The material before me also contains statements made by claimants about time they have spent within the application area, and also time their predecessors spent in the area. The following excerpt from Expert Report No. 2 is an example of this type of material:

> [Name removed] also mentioned a men's business place at Eurimbula and another site called BUKARO. She said the wells of the 'old people' "are still there at Miriam Vale over towards Colosseum". She said she has been to the women's place on Greenvale Mountain "because one of my aunties lived there for seven years". [Name Removed] also mentioned a "a [*sic*] skeleton skull" on Middle Island, a place where "the murris used to live". She referred to a site in Bundaberg called MILIQUIN, whose proper name is MEEL GOAN "which means 'spear in the eye'" – at [517].

[99] The following excerpt from the same report is another example:

> [Name removed] was born in Bundaberg. He spent his childhood travelling through country: "Dad was an itinerant, living in tents, we lived in Bundaberg, Mount Larcom, we picked peanuts, cotton, we lived at Wallaville, Gin Gin, Rocky, Marlborough, Bileola, Theodore, Eidsvold, we did fencing, ring barking, scrub clearing, and mustering". He said he used to go fencing with his father at Baralaba. He recalled that "we used to pick 400 pounds of cotton a day at five cents a pound: we used to earn £1000 a week as a family". He also recalled that "we worked on a dairy farm near Jambin". He said his father "worked at the wheat terminal (in Gladstone) and we lived at Rocky Glen". His father also worked at Cracow station and his mother came from Cockatoo Creek near Cracow. [Name removed] said "the first seventeen years of my life we were in the bush, all around this country". He said "Dad took us to Gin Gin, Wallaville, cutting cane, I went to school at many places, Bullyard, Wallaville, Gin Gin" – at [122].

[100] And again, this excerpt from Expert Report No. 2 involves a claimant speaking about the association of one of the apical ancestors with parts of the application area:

> Betsy ([name removed]'s mother's mother's mother's mother) "was born at Mount Perry, or maybe a bit further west, at Roslyn station. [Name removed] said "Betsy was probably born around the 1850s". They believe she was removed to Barambah around 1917. Betsy took some of her

> grandchildren with her to Barambah, including [name removed], [name removed], and [name removed]. He said [name removed] died at Barambah in 1922. [Name removed], [name removed]'s mother's mother's father, worked on Roslyn station as a stockman, and was killed in about 1904 aged 24. [Name removed] said: "Lots of my uncles worked on Roslyn station right up to the 1960s, they also worked on Walla station, close to the Goodnight Scrub. After [name removed] was killed the family was removed to Cherbourg"' – at [130].

My consideration – s 190B(5)(a)

[101] As I have mentioned above, the material before me is extensive. Regarding the requirement at s 190B(5)(a) that the material speak to an association with the entirety of the area, I note that there are numerous place names included in the material, being locations where the native title claim group and their predecessors spent time, worked and/or resided. Using the Tribunal's spatial database, and the map included in the application at Attachment C, I have located these places, and consider that the majority of these places fall within the application area, or are located in the immediate vicinity of the application area. From this exercise, it is also clear that the places named in the material fall across the whole of the area, including those islands off the east coast listed in the external boundary description at Attachment B. On that basis, I am satisfied that the factual basis is sufficient to support an assertion of an association with the entirety of the area claimed.

[102] Section 190B(5)(a) also requires that the material speak to an association of the predecessors of the group with the area over the period since sovereignty or European settlement. I understand the material to assert that settlement in the area occurred in the 1850s, with the establishment of pastoral stations in the area. Noting the excerpt from Expert Report No. 2 in my reasons above (at [100]), it is my understanding the apical ancestors of the native title claim group named in Schedule A (and including Betsy, referred to by a claimant in the excerpt above) were persons who were present in the application area around the time of settlement, or shortly after. Further, the material sets out information about each of the apical ancestors, including the places within the application area with which they are known from historical records to have been associated with. Again, having considered those locations using the Tribunal's spatial database and the map accompanying the application at Attachment C, I am satisfied the factual basis is sufficient to support an assertion of an association of the apical ancestors of the native title claim group with the application area at settlement.

[103] As can be seen in the excerpts above, the material also speaks in some detail about the association of the descendants of the apical ancestors with the area. Referring to historical records and other genealogical sources, the Expert Reports set out the dispersal of the five generations following the apical ancestors from the application area, concluding 'the first three generations of the claim group lived either within or just outside the claim area'. It further concludes that while in the fourth and fifth generations some claimants moved away from the area, today, '51 percent

of claimants continue to live either within the claim area or within 200 kilometres of the claim area' – Expert Report No. 2 at [160].

[104] Expert Report No. 2 notes that the upper generations of some lines of descent lived predominantly around Eidsvold (beyond and to the west of the boundary of the application area), however claimants assert Eidsvold to be within their traditional country, the claim boundary having been withdrawn further east due to a dispute with a neighbouring group. This accords with statements made by claimants elsewhere within the material regarding the boundaries of their traditional country – see Expert Report No. 2 at [671] and [679].

[105] The material contains numerous statements by claimants similar to those excerpted above, where they speak of specific predecessors and the time that those persons spent within the application area. In particular, it is clear from this information that the establishment and success of the pastoral industry and other agricultural activities (for example, cotton farming) in the area allowed the predecessors of the group to remain on and secure employment within the application area.

[106] I note that the material includes statements from a number of different members of the claim group, speaking to a variety of family groups that comprise the native title claim group. Consequently, I consider the factual basis is sufficient in supporting an assertion of an association of the whole group with the area.

[107] Regarding an association of the members of the claim group with the area today, I am also satisfied that the factual basis is sufficient to support this assertion. In addition to the general statements provided in the Expert Reports about claimants continuing to reside within the application area, statements given by claimants set out in the Reports give further detail about the present association. For example, Expert Report No. 2 provides:

> [Name removed] said that he's done most of his hunting "up here in Gladstone", and that he went hunting at the age of 13 with his uncle Darby Hill. He said his children go out hunting and fishing and they were taught to do so by [name removed] – at [353].

[108] In light of this and other similar information within the material before me, I am satisfied that the factual basis is sufficient to support an assertion of the members of the group today with the application area.

[109] From my reasoning above, therefore, it follows that I am satisfied that the native title claim group have, and the predecessors of those persons had, an association with the land and waters of the application area.

[110] The requirement at s 190B(5)(a) is met.

Reasons for s 190B(5)(b)

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

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

[113] The High Court held that not only were 'traditional laws and customs' those that had been passed down from generation to generation of a society, by word of mouth and/or common practice, but there were two further crucial elements that attached to the definition of that term – *Yorta Yorta* at [46]. Firstly, the High Court held that the origins of the content of the law or custom concerned must be found in the normative rules of the relevant Aboriginal pre-sovereignty society, and secondly, the normative system under which those rights and interests were possessed must have continued substantially uninterrupted since sovereignty – at [46]–[47], [79] and [86]–[87].

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

- information addressing how the laws and customs currently observed have their source in a pre-sovereignty society and have been observed since that time by a continuing society – *Gudjala 2007* at [63];
- information that speaks to the existence at European settlement of a society of people living according to a system of identifiable laws and customs, and that identifies the persons comprising that society who acknowledged and observed the laws and customs – *Gudjala 2007* at [65] and [81]; *Gudjala 2009* at [37] and [52];
- an explanation of how current laws and customs can be said to be traditional (that is, laws and customs derived from those of a pre-sovereignty society), and more than an assertion that those laws and customs are traditional – *Gudjala 2009* at [52] and [55];

- an explanation of the link between the claim group described in the application and the area covered by the application, which may involve identifying some link between the apical ancestors named in the application and any society existing at sovereignty, even if the link arose at a later stage – *Gudjala 2007* at [66] and [81];
- information addressing the claim group's acknowledgement and observance of the asserted traditional laws and customs pertaining to the claim area – *Gudjala 2009* at [74].

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

[115] I have summarised below the information before me that I consider addresses the assertion at s 190B(5)(b):

- settlement in the area began with the establishment of pastoral properties from the 1850s onwards – see Expert Report No. 2 at [25];
- the society at sovereignty, or settlement, occupying the application area comprised members of the Gooreng Gooreng, Bayali and Taribelang groups – Expert Report No. 1 at [34];
- the evidence (historical and oral, supplied by claimants) is in favour of a single society extending from Bundaberg to Gladstone, and outweighs the linguistic arguments that place the Taribelang and Bayali in separate social formations to that of Gooreng Gooreng – Expert Report No. 1 at [27];
- the apical ancestors named in Schedule A by reference to whom the group is described, are all recorded in various historical and anthropological records as being associated with the application area, around the time of settlement, or in the decade or so following settlement – Expert Report No. 2 at Section 4.3 and Amended Expert Report No. 13;
- the laws and customs of the society at settlement, as recorded in various historical and anthropological records, include aspects such as decision-making processes and authority structures, rules around group membership, moieties and sections, access rights to land, ceremonies, creation and mythological stories, burials, marriage practices and totems – Expert Report No. 1 at Section 3;
- traditional laws and customs have continued to be acknowledged and observed by the claim group and their predecessors since settlement, including in the present day – Expert Report No. 2 at Section 8.2;
- in accordance with those traditional laws and customs, the claimants assert ownership of the application area in the same way their ancestors did; they manage, conserve and protect country as demanded by spiritual and cultural knowledge; they continue to pass on spiritual and cultural knowledge of their country to younger generations; they follow certain decision-making processes; they seek and give permission regarding access to country and significant sites within it; and, they speak for country – Schedule F.

[116] There are also various statements made by members of the claim group within the application and additional material that speak to the way in which laws and customs have been and continue to be acknowledged and observed by the members of the group and their predecessors since settlement. For example, Expert Report No. 2 provides:

> [Names removed], probably referring to the first decades of the 20th century, said that the people who were sent to Woorabinda "would walk from Woorabinda to the Bunya Nut Festival in the Bunya Mountains, and they would go back to Woorabinda through Lowmead and do ceremonies there" – at [146].

[117] Regarding the observance of ceremonies and traditional dance throughout the period since settlement, Expert Report No. 2 provides:

> Ceremony and traditional dance were still being practiced in living memory. [Name removed] recalled "a lot of traditional dances at Lonweigh" (near Miriam Vale). She said that her grandfather, [name removed], "always made sure there were traditional dances" – at [157].

[118] It further provides that:

> These ceremonies and dances are still practiced by claimants today. [Name removed] said that his brothers and sisters hold traditional camps where they dance and perform ceremony and referred to a video of his family performing traditional dance. He described his granddaughter's christening, how she was smoked and oiled: "they make a coolabah out of palm fronds, then ashes are passed to the aunties, and then the baby is anointed with emu oil" – at [158].

[119] I have acknowledged above that the material before is relatively extensive. Subsequently, the above excerpts are merely an example of the material before me that speaks to acknowledgment and observance of laws and customs by the group and their predecessors over the period since settlement. I refer to further examples in my consideration below.

My consideration – s 190B(5)(b)

[120] The starting point at s 190B(5)(b) is identification of a society at the time of settlement, living according to identifiable laws and customs of a normative content – see *Gudjala 2007* at [65] to [66]. From the information before me, I understand the society at settlement, namely around the 1850s, to have comprised the members of the Gureng Gureng, Bayali, Tulua, Goeng and Taribelang linguistic groups (a number of alternative spellings for these labels are given throughout the material) – Expert Report No. 1 at [34]. Anthropologist Roth, writing in the area in 1898, observed there was political unity amongst the groups occupying the area between Bundaberg in the south and Gladstone in the north, and that the members of these groups appeared to have some level of rights of access for the entirety of the application area – Expert Report No. 1 at [188] and [204].

[121] Excerpts from various historical sources included within the material describe the laws and customs acknowledged and observed by the Indigenous persons at settlement in relation to the claim area. The following excerpt from Expert Report No. 1 speaks specifically to the protocols surrounding access to parts of the application area and neighbouring country acknowledged and observed by the relevant society:

> At Miriam Vale, when on the walk-about, the blacks in the old days, in addition to the employment of smoke signals, would at times (and the custom is still in vogue) signify a particular route taken by marking a tree thus:- a narrow piece of bark is stripped from above down and in the fork, connecting it with the tree-butt, is placed any tusset of grass, the head of which points towards the direction indicated. In approaching camp, strangers would take up their quarters a mile away, and then gradually advance closer and closer each night (Roth 1898: 39) – at [325]. Name removed

[122] Another example of the laws and customs acknowledged and observed by the society at settlement is captured in the following excerpt:

> In 1856 Miriam Vale was no mans land, just a place for the blacks to hold their corroborees… Mount Moogul, or Colosseum as it is now called, was the meeting place of the blacks of Wide Bay, Port Curtis, Burnett River, and also from Fraser Island at Christmas, when all tribal disputes, marriages, and other tribal matters were settled. Christmas of 1856 found a large number of blacks under the shade of Moogul than usual, Bucca Bucca and Boola were to fight to a finish to decide who should be King. Both were well-known warriors and leaders in most of the murders and robberies that had taken place in the Wide Bay, Burnett, and Port Curtis districts… (Richard R. Ware, 'Bucca Bucca, the sable chief. An incident of 1856', ms, J Bates collection, JOL OM80-74) – Expert Report No. 1 at [336].

[123] As set out above, various other aspects of the laws and customs of the society at settlement are described within the material. In my view, these laws and customs are normative in character. In this way, and in light of the material discussed above, I consider the factual basis sufficient to support an assertion that there was a society at settlement acknowledging and observing laws and customs in relation to the application area.

[124] Noting the material before me about each of the apical ancestors, I accept that the material asserts those persons to have been members of the society at settlement, or at least persons who were born into that society in the decades following settlement. That is, they were persons who were present in the area at settlement, acknowledging and observing the laws and customs described within the material. In this way, I consider the factual basis sufficient to support an asserted link between the apical ancestors and the society at settlement, and subsequently, between the claim group described and the application area.

[125] The material also addresses the laws and customs currently acknowledged and observed by members of the claim group. For example, this excerpt from Expert Report No. 2 refers to a claimant speaking about the way in which knowledge of his country was passed down to him by his predecessors, and the importance of continuing to pass this knowledge onto the younger generations:

> [Name removed] said that in his childhood "you weren't allowed to talk about anything aboriginal in those days". But [name removed]'s mother "thought traditional knowledge was very important, for us, she wanted us to know about our aboriginal connection, so she started taking us out a lot on country". He said "my mother has always taken us back up to Goodnight Scrub and showed us what

they did there". [Name removed]'s grandmother did the same for [name removed]'s children and grandchildren – at [494].

[126] Further in the Report, this claimant explains that 'most of the traditional knowledge in his family was passed down by "[names removed]… to our womenfolk"' – at [495]. Having considered the genealogies for each of the named apical ancestors annexed to Export Report No. 2, it is my understanding that [name removed] was one of the children of apical ancestor Betsy (namely, the apical ancestor of whom [name removed] is a descendant).

[127] The material speaks in some detail of the way in which knowledge about country has been passed down through the generations to the members of the claim group today, and the importance members of the group place on continuing this aspect of their laws and customs – see Expert Report No. 2 at [478] to [501]. Noting the reference to one of the children of the apical ancestors, [name removed], carrying out this practice, I consider the material sufficient to support an assertion that this aspect of the laws and customs of the group has continued to be acknowledged and observed in relatively the same manner as it was by the society in the area at settlement. The information that claimants share about massacres and other events affecting their predecessors around the time of settlement, in my view, provides further support for this assertion.

[128] I consider that the material is also sufficient in supporting an assertion that ceremonies, dances and other rituals are another aspect of the laws and customs of the society at settlement that today are acknowledged and observed by the native title claim group in a similar way. For example, the excerpt from a historical source appearing in Expert Report No. 2 set out at [122] in my reasons above speaks of the corroborees held on Miriam Vale Station in the 1850s. Regarding the acknowledgement and observance of similar ceremonies and dances by the claim group today, information is provided by claimants in Expert Report No. 2, which I have included in my reasons above at [116] to [118].

[129] I have before me, therefore, these examples of aspects of the group's laws and customs that appear relatively unchanged from those laws and customs acknowledged and observed by the society at settlement. I also have before me information addressing the strong pattern of inter-generational transfer of knowledge practiced by the group and its predecessors that has continued throughout the period since settlement. In my view, this information supports an assertion that knowledge of laws and customs has been passed down through each generation since settlement, with the result that laws and customs have been acknowledged and observed in much the same way that the predecessors of the group acknowledged and observed them at settlement.

[130] Consequently, I am satisfied that the material is sufficient to support an assertion of laws and customs that are rooted in the laws and customs of a society at settlement. I note that the

information before me speaks in some detail to the continued connection to and presence on the application area of the claim group and its predecessors, and the way in which laws and customs have been acknowledged and observed in relation to specific places and areas within the application area. In my view, this provides further support for the assertion.

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

[132] The requirement at s 190B(5)(b) is met.

Reasons for s 190B(5)(c)

[133] Noting the wording of s 190B(5)(c), it is my understanding that the assertion is 'plainly a reference to the traditional laws and customs which answer the description set out in par (b) of s 190B(5)' – *Martin* at [29]. Therefore, where I am not able to be satisfied that the factual basis is sufficient to support the assertion at s 190B(5)(b), I cannot be satisfied regarding the condition at s 190B(5)(c).

[134] It is also my understanding that the requirement at s 190B(5)(c) can be equated with the second element of the meaning applied to the term 'traditional laws and customs', as discussed by the High Court in *Yorta Yorta*, namely that the native title claim group have continued to hold their native title rights and interests in accordance with laws and customs rooted in pre-sovereignty laws and customs, in a substantially uninterrupted way – see *Yorta Yorta* at [87]. Similarly, the system of laws and customs asserted must be shown to be one that 'has had a continuous existence and vitality since sovereignty' – at [47].

[135] In *Gudjala 2007*, Dowsett J, in reasoning not criticised by the Full Court on appeal, suggested that the following kinds of information may be required to support the assertion at s 190B(5)(c):

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

[136] I have already set out above in my reasons at s 190B(5)(b) the reasons for which I am satisfied the factual basis is sufficient to support an assertion of a society at settlement, acknowledging and observing laws and customs. I have also set out above the reasons for which I am satisfied the factual basis is sufficient to support an assertion of traditional laws and customs acknowledged and observed by the claim group today, passed down through the generations over the period since sovereignty.

[137] In my view, the material speaks in some detail of the way in which laws and customs have been acknowledged and observed by the group and its predecessors in a substantially uninterrupted way. The excerpt from Expert Report No. 2 set out in my reasons at [125] above is an example, noting that it speaks about the way in which a claimant was taught cultural knowledge about his country by his mother, who was passed that information by her grandmother, the daughter of apical ancestor Betsy. The excerpt also refers to the way in which the family continues the practice today.

[138] Another example is in Expert Report No. 2 where a claimant talks about the specific knowledge he possesses regarding how the 'old people' used resources on the application area. The Report provides:

> [Name removed]'s grandson, [name removed], spoke about [name removed] taking them over to Curtis Island to show them where the turtle eggs are. [Name removed] said that he teaches his children about the uses of the quinine tree, about cockatoo apples, and about Burdekin plums. He said he has shown his sons what kind of trees the old people used to make canoes from. This tree is the box-top gum tree: "It is not hollowed out like the canoes from up north, the old people used to take one strip from the tree and another strip from the tree and join them together" – at [490].

[139] In addition to this, I have mentioned above the information before me about the on-going presence of the claimants and their predecessors on the application area. It is also clear from the material that the work claimants and their predecessors engaged in on pastoral properties in the area allowed them to continue to acknowledge and observe their laws and customs on their traditional country – see Expert Report No. 2 at [113] to [135].

[140] Lastly, the material speaks in some detail of the activities undertaken today by the claimants in maintaining their system of laws and customs. This includes teaching on country the spiritual and physical aspects of the area, and teaching stories about their ancestors acknowledging and observing laws and customs in the area. It also includes cultural heritage surveys and programs for taking youth out on country to teach them about culture – Expert Report No. 2 at [466] to [477] and [497]. In this way, I am satisfied that the material is sufficient to support an assertion of a system of laws and customs that has had 'a continuous existence and vitality' since settlement.

[141] In light of the material before me, therefore, I am satisfied the factual basis is sufficient to support an assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[142] The requirement at s 190B(5)(c) is met.

Conclusion

[143] 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.

[144] The relevant standard for the test at s 190B(6) regarding whether rights and interests can be established, is 'prima facie'. In *Doepel*, Mansfield J held that there was no need to depart from the ordinary meaning of the phrase adopted by the High Court in *North Ganalanja Aboriginal Corporation v Queensland* [1996] HCA 2 – *Doepel* at [134]. That meaning is, 'at first sight; on the face of it; as appears at first sight without investigation'.

[145] In affirming this approach, Mansfield J further held that, 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis' – at [135].

[146] I note that there is no requirement that every single one of the rights and interests claimed satisfy the requirement at s 190B(6), and that even where only some of the native title rights and interests can be, prima facie, established, the condition will still be met – *Doepel* at [16].

[147] I do consider, however, that in order for a right or interest to be, prima facie, established, it must truly be of the nature of a 'native title right or interest'. The definition of 'native title rights and interests' appears at s 223(1) as follows:

> (1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.

[148] Consequently, I am of the view that the rights and interests must be shown to be: possessed under the traditional laws and customs of the group; rights and interests in relation to land or waters, and; rights and interests that have not been extinguished over the entirety of the application area.

[149] The claimed native title rights and interests that I consider can be prima facie established are identified in my reasons below. I note that Attachment E includes only non-exclusive rights, and specifies that no claim is made to exclusive rights and interests.

Consideration

The right to access, be present on, move about on and travel over the area

[150] This excerpt is an example of the type of information before me that, in my view, speaks to this right:

> [Name removed] said: "we used to camp nearly every other week, at least every other fortnight, we go way down way out back of Tannum Sands, we used to drag the net and live there" – Expert Report No. 2 at [447].

[151] Elsewhere, Expert Report No. 2 provides that:

> Regarding the trips on country within the claim area, [name removed] said he used to visit Avondale, Lowmead and other places in the claim area when he was a child – at [438].

[152] Information elsewhere in the factual basis material provides that the predecessors of the claim group were born on and resided within the claim area. Further, it provides that members of the claim group continue to live in the claim area, as their families have done since settlement. In light of this information, I consider that the right of the members of the group to access, be present on, move about on and travel over the application area is a right that has been passed down through preceding generations to the claimants, and that it is, prima facie, established.

The right to camp and for that purpose build temporary shelters

[153] This right is addressed in information set out in Expert Report No. 2. The Report provides that:

> [Name removed] said "we used to make shelters, we were taught to do it by the old people when we were camping" – at [431].

[154] The material includes many other statements and recollections of claim group members about camping on the area, including statements about how their predecessors have camped within the area since settlement.

[155] Consequently, I consider the right of the claim group to camp and for that purpose build temporary shelters, prima facie, established.

The right to hunt, fish, and gather on the area for personal, domestic and non-commercial communal purposes

[156] Expert Report No. 2 speaks to this right in the excerpt below:

> [Name removed] recalled her father using a bark poison to catch fish: 'my dad used to use the bark of a special wattle tree (black wattle), throw it in the water and the fish couldn't breathe'. She also remembers fishing with hook and line: "We would sit around the creek and throw a line in, for jewfish, at Lowmead, or fat eel". She said that "the old people used to skin the eel", but [name removed] said she just pours on boiling water – at [358] to [359].

[157] It is clear, in my view, from the information before me about this right, that it has been exercised by the predecessors of the claim group back to settlement in the area, and that it continues to be exercised today. I also consider that the right has been passed down through the generations pursuant to traditional patterns of teaching.

[158] Therefore, I consider the right to hunt, fish and gather on the area, prima facie, established.

The right to take, use and share Natural Resources from the land and waters of the area for personal, domestic and non-commercial communal purposes

[159] This right is spoken of in some detail throughout the material. The following excerpt is an example of this type of information:

> [Name removed] remembers being taught how to dig yams along the creek beds and roasting them on the fires. He recalls gathering Burdekin plums along the Burnett River and said "we still get a feed of plums, Burdekin plums, and bunya nuts". He said "every time my sister's in town I go to the river and get plums for her, bury them in the ground to ripen them, every couple of days you dig them up and see which ones are ripe" – Expert Report No. 2 at [398].

[160] In my view, there is little substantive difference between this right as expressed, and the right discussed immediately above.

[161] Consequently, I consider this right, prima facie, established.

The right to take and use the Water of the area for personal, domestic and non-commercial communal purposes

[162] The material speaks in some detail of the time claimants and their predecessors have spent camping, fishing, hunting and gathering resources around the waterways that cross the application area, including the Burnett River and Baffle Creek. In my view, the material of this nature makes it clear that water was taken for subsistence purposes, including drinking, cooking and preparing resources taken from the land and waters of the application area.

[163] The following excerpt is an example of this type of material:

> [Name removed] said his family used to catch porcupines and described the method they used to prepare the porcupines for cooking: 'we used to clean off the quills with an axe, burning them and then scraping them, and then later we started using knives, and now we just put them in hot water.. we always used to put water on the quills first and then put them in the fire and that sort of softened them' – Expert Report No. 2 at [318].

[164] Another example is the following excerpt:

> [Name removed] remembered that in Granny [name removed]'s times "people used a cord for fishing line because there was no nylon". She recalled that her uncle [name removed] used to get the bark off the mangroves and boil it and then dip the cord in the mangrove mixture to keep it from rotting in the salt water. She remembered her auntie, [name removed]'s wife ([name removed]), used to make cast nets, she would sit under a mangrove tree and make the cast nets". [Name removed] said they used to gather periwinkles in the mangroves – at [372].

[165] In light of this material before me, I consider that the predecessors of the claim group exercised this right, and that it has been passed down through the generations to the claim group today. In this way, I accept that it is a right held pursuant to the traditional laws and customs of the Port Curtis Coral Coast people. Following on from this, I consider that the right to take and use the water of the area for personal, domestic and non-commercial purposes, prima facie, established.

The right to participate in cultural activities on the area

[166] Information addressing this right is contained in Expert Report No. 2. For example, it states:

> [Name removed] said that he has ochre at home and recently he painted his son's face with ochre before taking him fishing: "this is what the old people used to do, and that's why I do it". He said that next weekend "we will do ochre painting on rocks that I have at home" – at [595].

[167] There are various cultural activities spoken of throughout the material, including funerals, christenings, corroborees and bunya nut festivals. It is clear from this information, in my view, that the right was exercised by the predecessors of the group around the time of settlement, and that it was passed down to the claimants today. I consider, therefore, that the right to participate in cultural activities is, prima facie, established.

The right to hold meetings on the area

[168] This right, as set out in Attachment E, does not specify the nature or purpose of the meetings the native title claim group claim a right to hold on the application area. Notwithstanding this, there are a number of references throughout the material to the claim group and their predecessors gathering together, sometimes with other neighbouring groups, for various festivals, celebrations and ceremonies.

[169] For example, section 3.8.1 of Expert Report No. 1 contains a number of excerpts from historical sources, dating as early as the 1850s, telling of observations made by early settlers of gatherings and corroborees of Indigenous people in the area, namely the Port Curtis Coral Coast predecessors – see for example at [336], [337] and [338].

[170] In light of this information, I consider the right is shown to be one that exists pursuant to the traditional laws and customs of the claim group. Therefore, I consider that it is, prima facie, established.

The right to maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and to protect those places and areas from physical harm

[171] Regarding this right, Expert Report No. 2 provides:

> [Name removed] said "I tried to protect Skeleton Creek, just outside Miriam Vale, that's where they lined up one hundred murris, shot them". She said in relation to TAKILBERAN "I cry for those places". [Name removed] said she has done a couple of cultural heritage surveys "for (Dept. of) Main Roads" – at [467].

[172] There is also information before me addressing sacred sites within the application area, and the way in which knowledge about these sites has been passed down to the claimants by their predecessors. In my view, the information indicates that there was a responsibility attached to being passed this knowledge, and that claimants understand it to be their role to ensure protection of these places. In light of this information, I consider that the right is, prima facie, established.

The right to teach on the area the physical and spiritual attributes of the area

[173] The material speaks to this right numerous times. The following excerpt is an example:

> [Name removed]'s grandson, [name removed], spoke about [name removed] taking them over to Curtis Island to show them where the turtle eggs are. [Name removed] said that he teaches his children about the uses of the quinine tree, about cockatoo apples, and about Burdekin plums. He said he has shown his sons what kind of trees the old people used to make canoes from. This tree is the box-top gum tree: "It is not hollowed out like the canoes from up north, the old people used to take one strip from the tree and another strip from the tree and join them together" – Expert Report No. 2 at [490].

[174] From this excerpt, I consider it clear that teaching on the application area the physical and spiritual attributes of the area is a right that was exercised by the predecessors of the group, and one that has been passed down through the generations to the claim group members today. Consequently, I consider the right is, prima facie, established.

The right to light fires on the area for domestic purposes including cooking

[175] There are numerous references within the material to fire being used by the claimants and their predecessors, particularly in the context of cooking and/or preparing resources gathered from the application area. For example, Expert Report No. 2 states:

> [Name removed] described some of the cooking methods they used. They cooked both goannas and possums in hot ashes. They would take the fur off the possum first, "and then the skin it gets cooked in the skin which becomes like a wrapping" – at [329].

[176] In light of this information before me, I accept that the right is one that has been passed down by the predecessors of the group through the generations to the claimants today, in accordance with the traditional laws and customs of the group. I consider, therefore, that the right is, prima facie, established.

The right to be buried and bury native title holders within the area

[177] Regarding this right, at [605], Expert Report No. 2 states:

> [Name removed] said "my father, my mother, my grandmother and auntie and my grandfathers on both sides are buried on our property, Lonweigh, which is inside the claim area". [Name removed] said she was once taken to "Grandad [*sic*] [name removed]'s place where his placenta was buried in a cave at Pig Island". She said 'Grandad [name removed], was also known as 'John Pig Pig'. [Name removed] and [name removed] said that [name removed] buried his mother "in the traditional way at Gin Gin" – at [605].

[178] Again, this excerpt and other information within the material before me, in my view, indicates that knowledge of this right has been passed down by the predecessors of the group to the claimants today, pursuant to traditional laws and customs. Consequently, I consider that the right is, prima facie, established.

The right to be accompanied onto the area by non-native title holders

[179] Attachment E to Schedule E expresses this right in the following way:

The right to be accompanied onto the area by persons who, though not native title holders, are:

i. spouses or partners of native title holders;

ii. people who are members of the immediate family of a spouse or partner of a native title holders

iii. people reasonably required by the native title holders under traditional law and custom for the performance of cultural activities on the area.

[180] While the material does not directly address a right of the members of the claim group to be accompanied onto the area by non-native title holders, there is various information before me that, in my view, allows me to consider such a right, prima facie established.

[181] For example, Expert Report No. 1 provides that 'another characteristic of the pre-sovereignty society [is] a high degree of social interaction both between groups within the claim area and groups from outside the claim area' – at [222]. The report includes references to a range

of historical and anthropological sources that describe the way in which those interactions occurred. In my view, that information strongly suggests non-native title holders coming onto the application area was an inherent part of the social interactions and practices of the Port Curtis Coral Coast predecessors at settlement.

[182] For example, the Report provides that the society at settlement engaged in trade with neighbouring groups, and speaks to the knowledge predecessors of the group had of the well-worn trade routes of their ancestors across the application area – at [270]. Another source within the Report speaks about the Indigenous people living around Miriam Vale Station who traded boomerangs made from a local plant for spears with groups further inland. The Report refers to an anthropological source that provides young girls of the society at settlement 'were often traded as brides between neighbouring groups' for political alliances – at [274]. Expert Report No. 1 also speaks about inter-tribal food gathering events, including the bunya nut festival and annual runs of tailor and mullet fish along the eastern beach of Fraser Island, recorded in various historical and anthropological sources – at [326].

[183] The Report provides that these interactions took place in accordance with strict protocols developed by the Indigenous people of the region for traversing the country of neighbouring groups, and for groups travelling across the application area. Specific examples of such protocols are set out in some of the excerpts included in the Report. Where protocols were broken, the Report refers to sources that speak of inter-tribal fights that would break out – at [327].

[184] From this information, I consider it reasonable to imply that persons who were not Port Curtis Coral Coast people came onto the application area around the time of settlement for a number of reasons. These include for trade, for marriage purposes, for food gatherings and other ceremonial events, also when fights arose between the predecessors of the claimants and neighbouring groups. Noting that the information refers to these practices of the society around the time of settlement in the area, I accept the right is one held pursuant to the traditional laws and customs of the native title claim group.

[185] In my view, there is also material before me that speaks to the exercise of the right today. Claimants talk about times they have undertaken cultural heritage surveys with representatives from mining companies and other government departments on the application area – see Expert Report No. 2 at [466] to [477].

[186] In light of this type of information within the application and accompanying material before me, I consider the right is, prima facie, established.

Conclusion

[187] 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.

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

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

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

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

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

[192] In my consideration at s 190B(7), I note that I am not restricted to the material contained in the application, and therefore additional material supplied by the applicant may be relevant – see *Doepel* at [16].

[193] Noting the wording of s 190B(7), I understand that the focus at this condition should be upon one particular member of the claim group. Consequently, the information I have considered for the purposes of s 190B(7) relates to one particular member of the claim group, namely Mr [name removed].

[194] In his affidavit comprising part of the additional material supplied by the applicant, Mr [name removed] states that he is a Gooreng Gooreng man on both his father's and mother's side, and a descendant of apical ancestors Betsy and Jessie. In light of that information, I am satisfied that Mr [name removed] is a member of the claim group.

[195] Within his affidavit, Mr [name removed] talks about time he has spent on the area, including that:

- he was born in Bundaberg and grew up there, but has also lived in Gladstone, Tairo and Avondale;
- he started work in Bundaberg cutting sugar cane with his brother and has also done ringbarking work on Roslyn Station near Mount Perry;
- he runs a ranger program on his family's property at Thornhill and teaches the rangers how to care for country;
- he was taught about important places by his old people and has also located these places by undertaking cultural heritage walks;
- he has taken school groups out to visit sites on Gooreng Gooreng country;
- he is part of a family dance group that has performed traditional dances across Gooreng Gooreng country, including at Bundaberg, Gladstone and 1770;
- he has been to many places across the application area, hunting, fishing and visiting places or people;
- he used to go crabbing and fishing on the Kolan River when he was younger;
- he used to camp along the rivers or creeks, including Baffle Creek and the Kolan and Burnett Rivers; and
- he remembers that there were four bunya nut trees on Miriam Vale station – he would get the nuts from the trees and eat them.

[196] Mr [name removed] refers to a number of locations within the application area where he has spent time during the course of his life. Consequently, I am satisfied that he has a physical connection with the area.

[197] Regarding whether this connection is 'traditional', having considered the material before me, it is my view that it is. In my reasons above at s 190B(5)(b), I discussed the way the factual basis spoke of the inter-generational transfer of knowledge as being an important aspect of the

group's laws and customs. Noting the statements Mr [name removed] makes about being taught about laws and customs and his country by the 'old people', and the way in which he takes children out on country to teach them in the same way today, I consider this an example of the way in which Mr [name removed]'s connection with the area is a traditional physical connection.

[198] A further example is seen in Mr [name removed]'s statements expressing his knowledge of traditional dances for his country, and how he and his family continue to perform and teach these dances today. He states:

> My father taught me the dances for our country. A lot of our dancing tells our stories or teaches a person the method for doing certain things. An example of this is the Mullet dance which shows the traditional method of fishing for mullet.
>
> In 1992 I formed a family dance group that has been doing our traditional dances for many years. They are called the "Gooreng Gooreng Dancers". We teach the young ones the dances that our father taught us, including the *Yoo/ee/ar* (butterfly) dance; and the *Gooral* (mullet) dance, which is a hunting dance. Our dances tell stories.
>
> The group perform dances across Gooreng Gooreng country, including Bundaberg, Gladstone and Seventeen Seventy (1770). When we took the group to 1770 to dance we took a photo of the group. When we looked at the photo later we could see images of the spirits of the old people in the background. They are always there with us – they never leave us – they are there to encourage us to go on – at [62], [64] and [66].

[199] Further in his affidavit, Mr [name removed] describes a big gathering of Gooreng Gooreng people at Berajondo (in the application area) in the 1980s where language was spoken and traditional dances performed.

[200] I have explained in my reasons above at s 190B(5)(b), the way in which the material before me speaks to traditional dances and ceremonies being another important aspect of the group's laws and customs. I consider, therefore, that this is another example of the way in which Mr [name removed]'s physical connection with the application area is traditional in its nature.

[201] Consequently, I am satisfied that at least one member of the native title claim group has or previously had a traditional physical connection with some part of the land and waters of the application area.

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

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

> The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s 61A (which forbids the making of applications where

there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

Section 61A provides:

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

(2) If:

(a) a previous exclusive possession act (see s 23B) was done in relation to an area; and

(b) either:

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

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

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

(3) If:

(a) a previous non-exclusive possession act (see s 23F) was done in relation to an area; and

(b) either:

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

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

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

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

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

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

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

Section 61A(1)

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

Section 61A(2)

[205] Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply. Schedule B of the Form 1 states that 'the application does not cover any area where a previous exclusive possession act (PEPA) was done'.

Section 61A(3)

[206] 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. Attachment E to Schedule E sets out a list of non-exclusive rights and interests claimed in relation to the area. It also includes the statement: 'For the avoidance of doubt, exclusive native title rights and interests are not claimed in relation to any land or waters covered by this application'.

Conclusion

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

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

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

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

Section 190B(9)(a)

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

Section 190B(9)(b)

[210] Schedule P states that the native title claim group does not claim possession of any offshore places.

Section 190B(9)(c)

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

Conclusion

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

[*End of reasons*]

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Port Curtis Coral Coast Claim
NNTT file no.	QC2001/029
Federal Court of Australia file no.	QUD6026/2001

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:

25 July 2001

Date application entered on Register:

27 February 2002

Applicant:

[as per the Schedule]

Applicant's address for service:

[as per the Schedule]

Area covered by application:

[as per the Schedule]

Persons claiming to hold native title:

The native title claimant group comprises all the descendants of:

1. Dina

2. Jessie
3. Dolly (mother of Johnson Matemate and George Swain)
4. Molly Jones
5. Dulhu/Doolan
6. Buller Tolsen (Norman Buller)
7. Nellie Murray (also known as Nellie Watcho and Alice Murray)
8. Jane
9. Betsy
10. Rosie
11. Maggie Little
12. Rosie Blackman
13. Emma Jones (wife of John Broom/e)
14. John Hill ("Pig Pig")
15. Elizabeth Tan Watt/Daniels
16. Kitty of Gladstone
17. Margaret Grant

Registered native title rights and interests:

[as per the Schedule]

[*End of document*]