

Registration test decision

Application name	Kabi Kabi First Nation
Name of applicant	Alex Davidson, Bianca Beetson, Norman Bond, Kerry Neill, Helena Gulash, Kerry Jones and Brian Warner
NNTT file no.	QC2013/003
Federal Court of Australia file no.	QUD280/2013

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 March 2017

Renee Wallace

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 21 December 2016 and made pursuant to s 99 of the Act.

Reasons for decision

Introduction

[1] This application is made by the Kabi Kabi People, who claim to hold native title rights and interests in the area covered by the application. I am also currently considering a related application, being the Kabi Kabi Undambi Area Claim (QUD908/2016; QC2016/011), which is made on behalf of the same native title claim group.

[2] These two claims share a border. The Kabi Kabi Undambi Area Claim commences at the southern boundary of the Kabi Kabi First Nation application area, extends east to the western coastline of Bribie Island, and covers areas such as Caboolture, the Pine River and Redcliffe. The Kabi Kabi First Nation Claim encompasses a large area of approximately 11,700 square kilometres and includes areas such as Gympie, the Mary River, Nambour, Buderim, Maroochydore and Caloundra.

[3] The Kabi Kabi (also sometimes referred to throughout the material as Gabbi Gabbi) is comprised of local groups with defined areas of country within a shared regional society that extends across the geographic area between the Logan River in the south to Port Curtis in the north and west to the Condamine River. These groups are often defined and distinguished by reference to their language and are referred to in the historical records as tribes that existed within a broader 'nation.'

[4] 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.¹ The Registration test contains both procedural and merit based conditions, all of which the Registrar has to consider and be satisfied have been met before an application can be accepted for registration.

[5] Given that these claims are made on behalf of the same native title claim group and that the supporting material is, in most respects, identical, my reasons for decision for each claim reflect this. I have, however, considered each application separately against the conditions of registration and I have formed a view about these based on the particular application and the information and circumstances relevant to that application.

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

[6] As this application is amended I have considered whether either s 190A(1A) or s 190A(6A) applies. I am satisfied that neither applies to this amended claim. The nature of the amendments are described in Schedule S of the application and, among others, these include changes to the native title claim group description, the area covered by the claim, the native title rights and interests claimed and the factual basis of the claim. This means that the application must be considered under s 190A(6).

Procedural and other conditions: s 190C

Subsection 190C(2)

[7] In this subsection, there is a requirement that the application contain particular details and other information. These are the details and other information referred to in ss 61 and 62. The condition in s 190C(2) is primarily procedural 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.

[8] 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.

[9] In summary, 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.

Native title claim group: s 61(1)

[10] This requires the application be made by a person or persons who are authorised by all the persons in the native title claim group. That is, the application must contain the details of the person or persons who are the applicant and also the persons on whose behalf the application is made (i.e. the native title claim group). The native title claim group referred to in s 61(1) is a reference to all the persons 'who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.'

[11] The condition at s 190C(2) 'directs attention to the contents of the application' and its purpose is to ensure the application contains all the details and information required by ss 61 and 62. If, however, those contents are found to be lacking, this necessarily signifies issues. At the outset it is important for the purpose of registration 'to ensure that a claim, on its face, is brought on behalf of all members of the native title claim group' — *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*),124/[35].

[12] The application names seven persons as together comprising the applicant and states that they are authorised by the native title claim group to make the application and deal with matters arising in relation to it. Schedule A contains a description of the native title claim group, being

those persons who are descended from named persons and who identify as and are recognised as members of the Kabi Kabi First Nation Traditional Owners.

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

Name and address for service: s 61(3)

[14] The name and address for service of the applicant is contained in Part B

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

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

[16] Section 61(4) requires the persons in the native title claim group be either named (s 61(4)(a)) or described sufficiently clearly (s 61(4)(b)) *in* the application. The task here is essentially limited to considering whether there ‘appears’ to be a description, which may meet the requirements of the Act, whereas at the corresponding merit condition of s 190B(3), I must consider whether the description operates to effectively describe the persons in the native title claim group — *Gudjala People 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala* [2007]), 123/[32] .

[17] As stated above, Schedule A of the application contains a description of the native title claim group, such that s 61(4)(b) is applicable here. I am satisfied that this meets the requirements of s 61(4) in that the persons in the native title group are described.

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

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

[19] Section 62(1)(a) requires an affidavit from the applicant in a prescribed form to accompany the application. This section also requires the inclusion of certain statements and information within the affidavit/s.²

[20] Because the applicant is generally comprised of more than one person, this means that an affidavit from each of those persons should accompany the application — *Doolan v Native Title Registrar* [2007] FCA 192, [67].

[21] The application is accompanied by affidavits sworn by each of the seven persons who together comprise the applicant. These affidavits contain the statements and information required by s 62(1)(a)(i)-(v). This includes details about the decision-making process used to authorise the making of an application, being an agreed to and adopted decision-making process as provided for in s 251B(b).

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

² s 62(1)(a)(i)-(v).

Details required by s 62(1)(b)

[23] 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)

[24] The application must contain details and other information which describe the boundaries of the application area. These are the areas covered by the application and any areas within those boundaries that are not covered.

[25] Attachment B contains a description of the external boundaries of the area covered, being the area required by s 62(2)(a)(i). Attachment B also describes areas within that external boundary that are not covered, as required by s 62(2)(a)(ii). Schedule B(2) also describes areas within the external boundary that are not covered.

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

[26] A map of the application area must be included in the application. Attachment C contains a map of the application area, showing the external boundaries in a bold outline and stipple fill.

Searches: s 62(2)(c)

[27] The application should contain details and results of any searches carried out by or on behalf of the native title claim group to determine the existence of any non-native title rights and interests in relation to the application area. Schedule D states that no tenure searches have been carried out by the applicant.

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

[28] This requires that the application contain a description of the native title rights and interests claimed. This description must not merely be a statement that all native title rights and interests in relation to the area are claimed. Schedule E contains a list of non-exclusive native title rights and interests that is not merely a statement that all native title rights and interests are claimed.

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

[29] The application must contain a 'general description' of the factual basis on which it is asserted that the native title rights and interests are said to exist. This general description must include details and other information relating to the particular matters described in s 62(2)(e)(i), (ii) and (iii). The sufficiency of this factual basis is considered in the merit condition at s 190B(5).

[30] Attachment F contains information about the claimants' factual basis. I consider this to be a general description of the factual basis that meets the requirement at s 62(2)(e).

Activities: s 62(2)(f)

[31] If the native title claim group carries on any activities in the application area, the application must contain details of those activities. Schedule G contains a list of activities currently carried on by the native title claim group in the application area.

Other applications: s 62(2)(g)

[32] The application must include details of any other applications to the Court or recognised State/Territory body that have been made over the application area and of which the applicant is aware. Schedule H contains a statement to the effect that there are no other applications of which the applicant is aware.

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

[33] The application must contain details of any notifications under paragraph 24MD(6B)(c) that have been given over the application area and of which the applicant is aware. Schedule HA states that the applicant is not aware of any notices of this kind over the application area.

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

[34] The application must contain details of any notifications under s 29 of the Act (or under a corresponding State/Territory law) that relate to the application area and of which the applicant is aware. Schedule I states that the applicant is aware of one notice of this kind, being EPM 26330 notified on 16 October 2016.

Conclusion

[35] 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

[36] This section requires the Registrar to consider whether there are common members in the native title claim group for a previous application and this application (i.e. current application).

[37] A previous application is defined in s 190C(3) as being an application that overlaps the whole or part of the area covered by the current application, which was on the Register of Native Title Claims (Register) when the current application was made and that entry was made or not removed because of consideration under s 190A.

[38] The geospatial assessment and overlap analysis dated 4 January 2017 identified one application that is on the Register of Native Title Claims (Register). The application is Kabi Kabi First Nation (QC2013/003), which is this application.

[39] It would, in my view, be illogical to treat this as a previous application within the meaning of s 190C(3). I do not consider that s 190C(3) applies to the same application that is being tested, such that it is treated as a previous application.

[40] Given this, it is my view that I do not need to consider the issue of common claimants.

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

Subsection 190C(4)

Authorisation/certification

[42] 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.

[43] The application is accompanied by a certification from Queensland South Native Title Services (QSNTS), being the native title service provider for the area covered by the application. The certification is signed and dated 22 November 2016. Thus, I consider that s 190C(4)(a) contains the relevant condition that is intended to be satisfied.

[44] I am satisfied that QSNTS is the only relevant body that could certify the application and that they are funded to perform the functions of a representative body for the application area, including the certification functions under s 203BE(5).

[45] The certification contains a statement of opinion from QSNTS that the requirements of s 203BE(2)(a) and (b) are met. The statement is that all persons in the Kabi Kabi First Nation Traditional Owners native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it and that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the claim group.

[46] QSNTS's reasons for being of that view are also contained in the certification. These reasons are very brief, referring only to the details of authorisation meetings held between 22-23 October 2016. As noted in *Doepel*, the Registrar's consideration here is confined to identifying the relevant native title representative body and addressing 'the terms of the certificate.' Section 190C(4)(a) 'does not require the Registrar to consider the correctness of the certification by the representative body, but only its compliance with the requirements of s 203BE' — [80]-[82].

[47] Although the body's reasons are scant and are focused only on providing details of the authorisation meeting, I consider that the certification contains the relevant statement of opinion and sets out the body's reasons for holding that opinion. I do not consider that I can scrutinise their reasons for the holding of the relevant opinion or their brevity. I am satisfied that the certification contains the statements and information required by s 203BE(4). That is, the

certification addresses the matters set out in s 203BE(4)(a) and (b). I do not consider that s 203BE(4)(c) is applicable.

[48] I am satisfied that the requirements set out in s 190C(4)(a) are met because the application has been certified by each Aboriginal/Torres Strait Islander body that could certify the application.

Merit conditions: s 190B

Subsection 190B(2)

Identification of area subject to native title

[49] This condition of registration requires that I be satisfied the information and map contained in the application about the area covered by the claim, are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land and waters.

[50] This requires consideration of the description and map of the application area in the application, and for me to be satisfied the boundaries of the area covered, and those areas not included, are identifiable.

[51] Schedule B refers to Attachment B as containing a written description of the boundaries of the area covered by the application. This is a metes and bounds description referencing rivers and creeks, roads and other landmarks.

[52] Attachment C contains a map showing the external boundaries of the area covered by the claim. The application area is clearly identified by a blue outline and stipple effect.

[53] To assist in my consideration I have had regard to information in the geospatial assessment and overlap analysis dated 4 January 2017, which states that the description and map are consistent and identify the application area with reasonable certainty. I agree with this assessment and consider that the external boundaries of the area are sufficiently identified.

[54] Schedule B contains general exclusions within the external boundaries of the area. For instance, Schedule B excludes a number of areas within the boundary where there are specific interests and title that are inconsistent with the continued existence of native title rights and interests. The more general or generic exclusions are provided for the purpose of s 62(2)(a)(ii), being information that enables the identification of any areas within the external boundaries that are not covered by the application. The use of general exclusions may be considered appropriate given that issues of tenure are often not settled until the application is well advanced. In my view, it seems the appropriate level of detail in these circumstances.

[55] In my view, the description of the boundaries and the maps of the external boundaries are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land and waters.

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

Subsection 190B(3)

Identification of the native title claim group

[57] This condition requires that I be satisfied the persons in the native title claim group are named in the application or otherwise described sufficiently clearly so that it is possible to ascertain whether a person is a member of the group.

[58] As noted above in these reasons, Schedule A contains a description of the native title claim group such that I must be satisfied it reliably enables the identification of persons in the group — *Gudjala [2007]*, [33].

[59] The description in Schedule A contains two criteria or rules of membership. These are descent from a named apical ancestor and identification and recognition as members of the Kabi Kabi First Nation Traditional Owners in accordance with the system of traditional laws and customs.

[60] Descent from named persons is a relatively common method of description used in such applications and, in my view it provides an objective criteria by which to ascertain whether a particular person is a member of the group. The Court has held that this type of criterion of membership is sufficient for this purpose — *Western Australia v Native Title Registrar (1999)* 95 FCR 93 (*WA v NTR*).

[61] The second criterion of membership relates to self-identification and recognition. This kind of criteria, in some instances, may be cause for concern in terms of its clarity and how it operates. For instance, in *Wakaman People 2 v Native Title Registrar and Authorised Delegate [2006]* FCA 1198 Kiefel J observed, but did not have to decide, that a requirement of self-identification may not meet the objective of providing a clear description of the persons making up the group because ‘[a]t a practical level it cannot be known whether descendants will or will not identify with the group’ — [38].

[62] It is my view, however, that the description describes the claim group sufficiently clearly so that it can be ascertained whether a person is a member of the group. The criterion of descent from a named apical ancestor is clearly the primary and fundamental basis for membership to the native title claim group. This is borne out in the factual basis material. For instance, a claim group member describes that ‘[u]nder our law and custom you can only speak for a particular area if

you are connected to an ancestor for that area and have knowledge of your story line that connects you to that area' (Attachment F, Table 1, 39).

[63] The self-identification and recognition criterion is discussed within the factual basis. For instance, one claimant says that she is a 'Joondoburri woman through my father, my grandmother and my great grandmother Kal-ma-kuta, and am therefore a member of the Kabi Kabi language group. I am recognised by the broader Kabi Kabi community as a member of the Kabi Kabi group, but I identify with my local tribal group, Joondoburri' (Attachment F, Table 1, 33).

[64] Throughout the factual basis material, members of the claim group describe their line of descent, how they identify with, and are recognised by, the native title claim group. My understanding is that the criteria of self-identity and recognition are inherently linked to members' descent from a named ancestor.

[65] In considering the test at s 190B(3)(b), I have turned my mind to the question of 'whether the application of the...rule describes the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is in that group'. In doing so, I consider that a description does not necessarily fail because some factual inquiry is necessary. Nor is it fatal that the application of the rule or rules may prove difficult — *WA v NTR*, [67].

[66] In my view, the description of the native title claim group contained in the application is such that, on a practical level, it can be ascertained whether any particular person is a member of the group. The native title claim group is described sufficiently clearly so that it is possible to ascertain whether a person is a member of the group.

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

Subsection 190B(4)

Native title rights and interests identifiable

[68] This condition requires the description contained in the application to be sufficient to enable the native title rights and interests claimed to be readily identified.

[69] Schedule E contains a list of non-exclusive rights that are claimed in relation to the application area. These generally consist of the right to access the claim area and to conduct cultural, spiritual and other activities on the claim area.

[70] The rights and interests described in Schedule E are clear and, in my view, they can be understood as native title rights and interests — *Doepel*, 139/[99].

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

Subsection 190B(5)

Factual basis for claimed native title

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

[73] The factual basis must be sufficient to support each of the assertions at s 190B(5). There are three assertions relating to: the association with the claim area; the traditional laws and customs of the original society; and their continuity over the period since sovereignty — ss 190B(5)(a)-(c). The task here is not to test whether the facts of the claim are true. Rather, it is to make a decision about whether those facts are sufficient to support each assertion — *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*), 340/[92]; *Doepel*, 120/[17].

[74] In assessing whether the stated facts are sufficient to support each assertion there must be enough detail, including particular facts about the native title claim group, their own association (and that of their predecessors) with the claim area and the traditional laws and customs of their predecessors that have continued since the time of sovereignty. The factual basis must explain how the identified native title claim group possess the claimed native title rights and interests through their acknowledgement and observance of traditional laws and customs — *Gudjala* [2007], [39].

Section 190B(5)(a)

[75] The factual basis must demonstrate the whole claim group presently have an association with the claim area and their predecessors also had an association since sovereignty, or at least since European settlement. This does not mean ‘that all members must have such an association at all times’ but there be some ‘evidence that there is an association between the whole group and the area’ and a similar association of the predecessors over the period since sovereignty — *Gudjala* [2007], [52].

[76] Generally, a sufficient factual basis to support the association will need to include details specific to the area claimed, including details of either a physical or spiritual association with places within the area covered by the application. Broad and general references to the area will usually not be enough and the facts must be sufficient to support that the association is with the whole claim area — *Martin v Native Title Registrar* [2001] FCA 16, [26] and *Corunna v Native Title Registrar* [2013] FCA, [39].

Claimant’s factual basis about their association with the claim area

[77] The claimant’s assert that the Kabi Kabi First Nation Traditional owners have, and their predecessors had, an association with the application area. Accordingly, the traditional owners identify their country by reference to named places or other geographic referents. The factual

basis cites evidence that 'local groups throughout the claim region identified themselves by both a toponym and by reference to a dialect' that was particular to them (for example, Mooloolah, Undambi and Dala).

[78] Attachment F also includes references to evidence about occupation by Indigenous persons in the claim area at and prior to effective sovereignty or European contact. For instance:

The network of pathways in and around the claim area attest to considerable occupation and traffic prior to European occupation. Local Aboriginal guides led missionaries, explorers and timbergetters along major pathways into the late 19th century. The German mission of the 1840s was sited on 'the great thoroughfare' running north-south along the coast. European interests in Maryborough in the 1860s acknowledged Aboriginal expertise in navigating river channels (Kidd 2009:ii).

Official records, including marriage and death records, confirm that Aboriginal people continued to be present in the claim area after implementation of the 'removals' policy at the turn of the 20th century. This included the many employed and self-supporting families who were not relocated, contracted workers making their way between employment and the settlements the many and continual absconders, those who failed to return after their contracted work period, and the many families 'exempted' from the Acts. (Kidd 2009:ii).

A few families claiming the same territory usually camped and travelled together, sometimes in larger numbers. I characterise such family groups as communities...designated by some feature distinguishing themselves on their country, the term for which was prefixed to the termination – bora (Mathew 1910: 128-9)

Mathew noted that although the lands of these "communities" (which he also termed "small tribes") were "their peculiar inheritance" they nevertheless maintained rights of access to the land of their allies in all directions (Mathew in Curr 1887:152) (Attachment F, Table 2, 83).

[79] There is also information about the named ancestors of the native title claim group and their association with areas within and close to the application area. Below, I highlight the information about some of the identified ancestors from Attachment F:

- The ancestor, Maggie, is documented by Tindale as a full blood Aboriginal woman from Gympie, being of the Kabi Kabi language group. Her daughter, [name deleted], is also recorded by Tindale as the wife of Albert Williams, a Kabi Kabi man;
- Ngimburum is recorded as a Kabi Kabi man from Brisbane and born on Bribie Island. His son was an initiated senior man.
- Kaloma-kuta is well-documented as are her descendants. She spent most of her life on Bribie Island and was buried there.

- Willie Kina is recorded by Tindale as belonging to the Kabi Kabi language group and as being from the Gympie district.
- Susan Andy was born at Mooloolah in 1853. She married [name deleted] in the Caboolture district. She was removed from the Mooloolah area in 1917. It is likely that she was born on her traditional country.
- Jacky Ball was born on the Maroochy River at Bli Bli, which is where he is also buried. He was a full-blood Kabi Kabi man who lived a traditional life at the Yandina camp. His son, [name deleted], is recorded as belonging to the Kabi Kabi language group and from the south Burnett area. Maggie Caine is recorded as belonging to the Kabi Kabi language group. She is the wife of Jacky Ball and the mother of [name deleted].
- James Crowe, born in 1830, was married to Maggie Palmer and is buried at Kenliworth. They are both Kabi Kabi. Maggie was from the inland Mary River Valley. They are the parents of [name deleted] who was born around 1871 at Kenliworth and [name deleted], born in 1874. Both [name deleted] and [name deleted] and their families were removed from Cooran (within the claim area) and sent to Barambah.
- Emma Dunne's status as a Kabi Kabi ancestor is widely supported amongst those who were consulted. Emma's son, [name deleted], was born at Kenliworth in 1878. He is recorded on Tindale's genealogical record as coming from Kilkivan. He married [name deleted] in 1919.
- Annie Laurie was born in Yandina in 1873. She is buried on Buderim Mountain. Her descendants are recorded as being associated with areas such as Caloundra, Maroochy River, Bli Bli, Beerwah and Beerburrum.
- Tindale records May Burnett as of the Kabi Kabi language group and as having lived at Moreton Bay. She was born around 1898 and was at Fraser Island Mission.
- Tommy of Noosa was recalled by early settlers as being the King Tommy of Noosa and was observed to take his sons tracking and netting mullet and flathead in the shallow waters of Lake Doonella and Lake Weyba.
- Tindale recorded Sara Di:naba as Kabi and that she was associated with the country from Brisbane to Tin Can & Mooloola & Nambour.

[80] Throughout the claimant's material, there are numerous accounts of the continuing association of the native title claim group with the application area. In these current accounts,

claimants often refer to their forebears and provide details of their association with the application area, thus providing facts that support a historical as well as a current association. Below, I outline some examples of these accounts.

[81] [Name deleted] says that his mother taught him about Kabi Kabi boundaries:

Our traditional Gubbi Gubbi country followed the Gregory River, which is north of Maryborough to the foot of the main range. Then goes along the east side of the main range to Kilkivan and on to Manumbar and continues to the North Pine River abutting Toorbul country to the coast at its mouth.

...from Gregory River, down through Appletree Creek, Biggenden, down to the base of the coastal range to Manumbar Mill, to Conondale Range, down the eastern side of the Stanley River straight down to the D'Aacquilar Range to North Pine River, our northern boundary with the Turrbal and through to Redcliffe. I learnt this from my mother and uncle [name deleted]. [Name deleted] knew a lot about country from being at Barambah. Mum and her brother grew up there and lived on the Mary River wherer they were born at Tuchikong township. [Name deleted] worked at Kenliworth Station, the winter camp, where she met her second husband, [name deleted] (Attachment F, Table 1, 35-36).

[82] [Name deleted] recounts details of her association with the area and places that are sacred to her and her family:

Mum was able to tell us which part of Kabi Kabi country particular people and their families came from. Places of particular importance to me and my family are in and around Kilkivan and the Mary River, and from Bribie Island along the Conondale Ranges back to Kilkivan (Attachment F, Table 1, 39).

The Glasshouse Mountains are the most significant place in my family's country. Beerwah and the whole Glasshouse Mountains are considered a special birthing area. There are caves around the area to show this. My mother used to know the names of every single one of the Glasshouse Mountains, which she would tell us when we were children travelling throughout our country (Attachment F, Table 1, 78-79).

[83] [Name deleted] provides information about the clan system of the Kabi Kabi and the areas with which they were and continue to be associated with:

Joondoburri clan area is Bribie Island, south to the Caboolture River where we shared country with Ninghi Ninghi clan. Ninghi Ninghi are part of the Kabi Kabi language group as well. Following the coastline you could only go so far to Redcliffe and then you had to stop because that clan came in. You had to stop until someone gave you permission to go through...As a Joondoburri woman I have the right to speak for Joondoburri country. All Joondoburri have the right to speak for our country...Growing up around Turner's Camp there was a strong sense that this was our country (Attachment F, Table 1, 43-44).

[84] Claimants retain knowledge of their descent lines by which they inherited their rights and interests in country. For example, [text deleted].

[85] It is also clear that stories and myths often inform claimant's knowledge of country and the boundaries. For instance:

Where the [place name deleted] is, I was always told that there is sacred clay which is pure white and that it is a resting place for the [text deleted]. I remember diving in an [sic] getting this clay. Everyone remembers when I came out of the water I was covered in white clay ([name deleted], Attachment F, Table 1, 77).

Then there's older stories about [text deleted]. So, [place name deleted]'s a sacred place, but there's a connection between [place names deleted] in that story (Alex Davidson, Attachment F, Table 1, 77).

The story of Maroochy and Coolum that I know tells the story of how parts of our traditional lands and waters were created. I have adapted the story that I learned from my elders and tell it orally to children, including school kids and my own kids and others who want to learn (Kerry Neill, Attachment F, Table 1, 82).

[86] In addition, claimants provide details of activities that they continue to undertake on the application area, which often mirror their forebears practice. These activities include, hunting, fishing, camping and performing ceremony:

Her mother told her all about the places they travelled before they came to Cherbourg. They used to go on walks to places like Bli Bli, Mapleton, Torquay and would attend the Bunya festival held at the Bunya Mountains ([name deleted], Attachment F, Table 1, 84).

When [name deleted] was growing up her mother took her along Noosa to Alexander Headlands. [She] takes her grandchildren up to Gympie area and over to Noosa and they stay at Bribie Island with family. [Name deleted]'s son still go fishing on country and they hunt porcupine and kangaroos around the Traveston area ([name deleted], Attachment F, Table 2, 85).

Because his grandfather was known as [name deleted], [name deleted] grew up being taught about the various hunting and fishing techniques. [Name deleted] would go from Mudjimba to the north point of the Maroochy River to fish for whiting using sea worms as bait ([name deleted], Attachment F, Table 2, 86-87, 92).

[Name deleted] takes his eldest son, [name deleted], on country at the Pine River and teaches him about being on country. [Name deleted] taught his eldest son how to fish and hunt. [Name deleted] taught him the best times to fish and some of the best fishing holes and spots ([name deleted], Attachment F, Table 2, 100-101).

Sufficiency of factual basis to support the assertion about the predecessors' and claim group's association with the claim area

[87] The factual basis must be sufficient to support the assertion the predecessors had an association with the claim area and similarly the native title claim group have a current association. In addition, the factual basis must be sufficient to demonstrate the history of association between the period at sovereignty or contact through to the present. This then

requires more than facts which simply support the assertion of an association of the predecessors at sovereignty or contact and the association of current claim group members. It requires, in my view, sufficient facts about a continuous association during that period— *Gudjala* [2007], [51]-[52].

[88] As detailed above, historical and other sources evidence the presence of the group's predecessors and named ancestors in the area, dating back until at least the time of European contact, including:

Mathews' (1898:328: Appendix A Mathews 1898) used the term "Dippil" (adopted from Ridley 1875) to describe the "nation" extending from the upper Clarence River in northern New South Wales to Port Curtis in central eastern Queensland, and included people living on the "Brisbane, Mary, Burnett, Dawson, Upper Condamine and other rivers: together with Moreton, Stradbroke, Fraser and other islands on the adjacent coast". He named "the principal and best known tribes" in this "Dippil nation" (defined as an aggregate of those using the same set of section and moiety names) as the "Dippil, Turrubul, Paiamba, Kitabool, Kaiabara [AR: one local group name used to designate the entire Kabi grouping, see Mathew 1910:xxi], Goonie, Murrungama."

[89] Given the information within the written historical sources, I consider that there is a sufficient account of the association of the claim group's predecessors with the claim area and its vicinity.

[90] Current claimants also retain clear information about the association of their forebears, dating back several generations to the identified ancestors of the claim group. For instance, [name deleted] says that his father's father Jackey (Menvil Wanmuran) Delaney (one of the named ancestors of the claim group) was born about 1830 in Stoney/Burpengary Creek and died in 1900 in that same area. His tribal name was Melville Wamuran. He was known as the "King of Stoney Creek", but took the name Delaney after an early settler who he worked for. His main camp-site was at Burpengary Creek (Attachment F, Table 1, 43).

[91] In this way, the material evidences a history of association, with information that supports both current and previous generations having had an association with the area. I consider that there are sufficient examples of claimants describing their own association and that of their forebears, including parents and grandparents. The current claimants retain detailed knowledge of their local group and descent lines, which in turn informs their understanding of boundaries within their country. For instance, one claim member describes that she is 'a Joondoburri woman through my father, my grandmother and my great grandmother Kal-ma-kuta' and she is therefore a member of the Kabi Kabi language group, but also identifies with her local tribal group. The area of her clan is around Bribie Island and south to the Caboolture River (Attachment F, Table 1, 33, 37).

[92] Knowledge of country, descent lines and clan group is clearly very important in terms of who has the right to speak for particular country within the claim area. One claimant says that he

is a descendant of two apical ancestors and that this gives him the right to speak for two different areas. Under the relevant laws and customs, claim group members can only speak for an area with which they have a connection and have knowledge of their story line (Attachment F, Table 1, 39).

[93] Claimants very clearly affiliate with the Kabi Kabi language group and this is integral in understanding the relationship that all members have in common with the relevant area. They believe that the land and waters within the claim belongs to the Kabi Kabi People, even though there may be smaller groups or localised clans that have rights over particular country.

[94] Throughout Attachment F, there are various stories and accounts of current claimants and these contain references to numerous places, townships and landmarks within the application and around the claim area.

[95] When considering the material, I have had regard to the map provided with the application and have been able to identify many of the places mentioned. I note that the material evidences an association with places within and close to this application area dating back to the time of the group's ancestors. For instance, some of the named ancestors have recorded associations with Kenilworth (James Crow and Emma Dunne), Gympie (Maggie Cadenti and Willie Kina), Tiaro (William Glenbar) and Noosa (King Tommy of Noosa).

[96] Current claimants also describe the area covered by this application as falling within their traditional lands and their predecessors have taught the knowledge they have of these boundaries to them. For instance, one claimant describes that his grandfather was Cob (an identified ancestor of the group) who was from the Buderim and Gympie areas. He has been to Cob's Gully and this is the country of his family. Another claimant describes how his family will 'control the country from Buderim down. Kabi country runs from Buderim, Gympie, Yandina and down to Maleny that way' (Attachment F, Table 1, page 34).

[97] The material, in my view, is sufficient to support that the association is with the whole of the claim area. I consider that the factual basis is sufficient to support the assertion at s 190B(5)(a).

Section 190B(5)(b)

[98] Support for the assertion that there are 'traditional' laws and customs does not arise from simple statements that laws and customs are traditional. There must be an outline or explanation of the basis upon which it is claimed the laws and customs are traditional. A sufficient factual basis for this purpose must clearly identify a relevant pre-sovereignty society and provide facts about that society. There must be some basis for my inferring the factual basis gives details of a society that existed prior to European contact and 'which had a system of laws and customs from which relevant existing laws and customs were derived and traditionally passed on to the

existing claim group'. The facts set out must support the assertion those laws and customs give rise to the claimed native title rights and interests of the group—*Gudjala* [2007] at [62], [66] and [81]; *Gudjala* [2009], 76-77/[52] and 80/[69].

[99] Where the membership of the current native title claim group is based on descent, which it is here, the factual basis must provide an explanation of the link between the ancestors of the group and the society they say existed at sovereignty. This is because the factual basis must provide an explanation of how current laws and customs are said to be traditional and this, in part, comes from describing how the group's predecessors were connected to the society — *Gudjala* [2009], 72/[40].

Claimant's factual basis about the society and its traditional laws and customs

[100] The application area falls within a regional society that extends across the geographical area between the Logan River in the south to Port Curtis in the North and west to the Condamine River. This society shared a common set of social practices and there is evidence of local groups that possessed a language/dialect identity, which acted as a label for their local territory. Mathews, for instance, used the term 'Dippil' to describe the 'nation' that extended over the country that is part of the claim area.

[101] There is evidence of participation in this wider society and how the groups co-existed. This comes from observations of early research conducted in relation to the area and claimant accounts of what they were taught by their forebears. For instance, the following extracts explain how the sub-groups and tribes co-existed in the region of the claim:

They were taught how to explain, and how to speak to people of other tribes, and also the names of the totem and classes of these tribes. If a small company sought and obtained permission to travel through another tribal territory, they must of course not hunt for food while so passing through, and as evidence of their bona-fide they must keep very strictly in a straight line behind each other. Such a party would consist of only six, possibly ten, men (Langevad 1982:29).

Mathew noted that although the lands of these "communities" (which he also termed "small tribes") were "their peculiar inheritance" they nevertheless maintained rights of access to the lands of their allies in all directions (Mathew in Curr 1887:152).

Waka Waka, Gabi Gabi (also called Kabi Kabi), Bujibara, Dungibara, Dugundeir or Dakundeir (also called Djakunda), Dowarbara, Dundubara, Undumbi, Badtala (Batjala), Dulingbara, Ngulungbara, and his own tribe, Jinibara, which was comprised of four local groups: Dungidau, Dal:a, Nalbo, and Garumnga. The last named may actually have been a separate tribe. In addition there was the Jukambe (Jugambeir), the Jergarbal, and the Kitabal (Gitabal) tribes who together were known as the Biri:n people (1982: 26).

In regard to the tribal names, I point out that in the south-eastern Queensland, the group names ending in -bara are local groupings and that up to a dozen of them may constitute a

tribe. The [In:ibara] was a local group living on the north side of the Brisbane River. I think that you will find they are [Dal:a] tribes folk...We know for example that the [Waka Waka] is divided into numbers of local groups about Murgon and the west (Tindale to Winderbotham, Aug. 17 1950). (Attachment F, Table 1, 33-34).

[102] Current claimants refer to this regional system of groups that is still present today. For instance, one claimant explains that growing up she did many journeys, meeting with different 'mobs.' She says that there is a meeting place on the north side of Moreton Bay where mobs such as Turbal, Jinibara, Ninghi and Kabi Kabi would meet for big ceremonies ([name deleted], Attachment F, Table 1, 29).

[103] They also demonstrate knowledge of the boundaries of their country and that of others within the region. For instance, [name deleted] retains knowledge of his family's song line that goes 'right along the coast from Noosa to the Pine River'. He says that '[f]or our family group, when the creator stepped off Fraser Island he put one foot on the shores of Urangan and the second step he took was on Bauple Mountain because of the groove of his foot between two peaks' ([name deleted], Attachment F, Table 1, 79).

[104] Current claimants provide their understanding of the society at sovereignty and how current practice continues to reflect the traditional system of land tenure. For instance, [name deleted], a current claim group member recounts that:

Back before settlement a particular camp would be allocated a particular area to look after. And a lot of them were bound by creeks. So a camp would have an area to live on and manage and maintain according to the laws and customs. And they'd look after it and manage it and maintain it and the head man of that camp, he'd be the one to see about what business goes on there and he'd be looking after it and manage it and look after that area. And he'd have to report to and take orders from the head man of several camps. And he'd take direction from the bora council, you know the top man of the tier, he sat there, a 60, 70, 80 year old man. You know, and that law was passed down that way (Attachment F, Table 1, 32).

[105] Senior men and women are said to play a vital role in the continuity of the regional law and custom of the south-east Queensland Aboriginal society, by maintaining 'the rich oral lore of the region, performing at ceremonies, producing artefacts, and teaching the bushcrafts learnt from their elders to the junior generations.' Through this, they have been able to keep 'alive a detailed knowledge of the social geography of the region in terms of local groupings and their dialects as well as wider language group identities and the tracts of country associated with each of them' (Attachment F, Table 1, 79).

[106] There is evidence about the tribal system and how this continues to inform the rights and interests held by members. For instance, [name deleted] explains that within the Kabi Kabi language group 'no person from another tribe should talk for your country'. The final say about a particular area is for the 'elders from the tribal group of that area...because it is custom to show

respect for your elders', something which he has known for his whole life (Attachment F, Table 1, 62).

[107] This system of local or smaller groupings having rights and interests in defined areas is consistent with information from the historical record. For instance, the following extract is contained in the factual basis:

The territory of each tribe is subdivided moreover amongst the different families of which it consists and the proprietor of any particular subdivision has the exclusive right to direct when it shall be hunted over, or the grass burned and the wild animals destroyed (1847:392) (Attachment F, Table 1, 43).

[108] The skin and totemic system was observed in historical and expert recordings, including that there was a system of 'rigid laws concerning forbidden marriage relationships' which involved four classes and two moieties or skins into which tribes within the region were divided. The classes were the same in each tribe but the names varied (Attachment F, Table 1, 49).

[109] This system remains of importance in defining relationships within the native title claim group and the wider region of the claim. Claimants provide examples of how this has continued to be observed throughout the generations:

I was told by my mother the rules of who I could and could not marry. I could not partner up with another member of the Kabi Kabi extended family. My mother knew about the different "skins" and which skin group could intermarry with another skin group in Kabi Kabi and Wakka Wakka (Attachment F, Table 1, 48).

We all learned about our bloodlines and wrong way marriages. We always knew that we couldn't be in a relationship with those who were close to us. It is something we took for granted as one of the things we have always known. They were very strict rules which were important to us for the continuation of our mob (Attachment F, Table 1, 50).

[110] The material elicits details of a vibrant ceremonial and spiritual community, both at the regional and local levels. For instance, the historical record reflects details of ceremonial and initiation events observed by Curr in 1887 and Mathew in 1910 (Attachment F, Table 1, 77-78).

[111] That ceremonial and spiritual life continues in the present context as evidenced by statements of the current claimants:

At Cherbourg there were people that were the son and dance men, and the lead dancers, such as [name deleted] grandfather and great grandfather. [Name deleted] father became the head teacher for Gubi-Gubbi for the song and dance after his father passed.

Growing up I saw one or two corroborees in Cherbourg. There would be Gubbi Gubbi, Kullilli, Wakka Wakka and Gurang Gurang people and they would all get together and do corroborees. I was only about seven or eight years old at the time. At that time women and

children were not allowed to dance – only the men were allowed to dance (Attachment F, Table 1, 79-80).

[112] In addition, the material provides details of the importance of storytelling and belief in the supernatural and how this connects the native title claim group members to the land and waters. Radcliffe-Brown recorded that:

[Text deleted] (Radcliffe-Brown 1926:20) (Attachment F, Table 1, 74).

[113] This remains an important aspect of current claimant's lives and how they teach their children and grandchildren about their country. Bianca Beetson says that she regularly takes her sons to meet with elders on country to listen to their stories. She shares with them the Kabi Kabi placenames that she was taught, their meanings and interpretation (Attachment F, Table 1, 80).

Sufficiency of factual basis to support the assertions at s 190B(5)(b)

[114] As stated above, the factual basis must clearly identify the relevant pre-sovereignty society and give details of that society. The relevant society must be identified as it is 'the source of the traditional laws and customs' that establishes a group's claim to hold the native title rights and interests — *Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal* [2012] FCA 1215, [40].

[115] As I understand here the relevant society is a regional one, within which the Kabi Kabi People derive their laws and customs. This is supported by references in the material from historical sources that demonstrate some of the features of that society and how it operated. In some instances this is referred to as the "Dippil" nation (Attachment F, Table 1, 30). There is evidence of a regional society coming together for particular events, but tribal or local clans operating quite independently or asserting authority in regards to their country. One source describes the relationship between the Kabi Kabi and the Wakka Wakka (both groupings that fall within the regional society) stating that although these dialects are distinct, 'the two tribes followed very much the same customs' and were friendly and intermarried freely conforming to the same class restrictions (1910:68) (Attachment F, Table 1, 31-33).

[116] There is material that evidences participation in a wider regional society. For instance, Petrie observed 'early indications of the alliances and systematic oppositions characteristic of Sunshine Coast and Moreton Bay social groupings when he described the arrival of about seven hundred Aboriginal people near Samford Gate to witness a new corroboree performed by the "Ipswich tribes" (likely to correspond with Jagara) following a joint kippa initiation ceremony...These groupings had also camped separately and hunted in different areas during the performance' (Attachment F, Table 1, 29).

[117] [Name deleted], [text deleted], explains his understanding of the Kabi Kabi and how he acquired rights and interests in country. [Text deleted].

[118] As well as identifying the relevant society, I consider that there is information that links the ancestors of the claim group to that society. In that regard, there is information from historical sources that place many of the group's ancestors within the claim area during their lifetime. For example Mary Ann Thompson is recorded on Tindale's Cherbourg Sheet No 6 as being from the Gympie District. Attachment F provides information about each of the ancestors, including historical records that identify them as Kabi Kabi. Given this kind of information, I consider that I can reasonably infer from the information that if the ancestors and their descendants were in or around the application area at a time close to effective sovereignty (which is what the material supports), they were also part of the relevant society or had some connection to that society and similarly so did their predecessors.

[119] Although I recognise that the historical recordings cited are not altogether coherent, there are in my view sufficient references that support the Kabi Kabi's connection to this regional society. There is also information that the Kabi Kabi is a broad language group, which consists of smaller tribes or clans who had their own areas. The oral history also records that many of the ancestors were from the claim area and that they were Kabi Kabi. Current claimants identify their lineage, such as [name deleted] (who claims descent from Mary Ann Thompson), who says that she knows that Mary Anne Thompson was the wife of [name deleted]. She was told this by her mother, grandmother and aunties. She was also taught that you 'gain rights in Gubbi Gubbi country through those blood ties' and 'ultimately the bloodline person has first priority and can speak for country' (Attachment F, Table 1, 42).

[120] Current claimants also identify with the Kabi Kabi language group as well as their tribal or clan groups and they retain intimate knowledge of their forebear's history and country. For instance, one claim group member explains that:

Kabi Kabi is [a] broad language group that Joondoburri is connected with. It is a collection of different tribes that are all interrelated through marriage and regional laws and customs. I am a Joondoburri woman through my father, my grandmother and my great grandmother Kalma-kuta, and am therefore a member of the broader Kabi Kabi language group. I am recognised by the broader Kabi Kabi community as a member of the Kabi Kabi group, but I identify with my local tribal group, Joondoburri (Attachment F, Table 1, 33).

[121] Another claim group member says that:

My mother was [name deleted]. She was born at the Mary River on 1 September 1909. Her tribal name was [name deleted] She had a younger brother, [name deleted]. Both her and Uncle [name deleted] were members of the Gubbi Gubbi tribe. When mum died at age 96 in 2005, she was the senior female elder of the Gubbi Gubbi people (Attachment F, Table 1, 45).

[122] There is, in my view, information within the factual basis that presents a sufficiently clear narrative of the pre-sovereignty society, its laws and customs and how it gives rise to the Kabi Kabi People claiming native title rights and interests in the area. In that regard, I consider that the pre-sovereignty society is identified and its connection to the claim group is sufficiently explained. In addition, the above material explains how current claimants are linked to that society, by providing information that supports their descent from the identified ancestors.

[123] The material also provides some explanation of how laws and customs of the current claim group may be said to be traditional in that there is clear evidence of the transmission and teachings from one generation to the next. Of itself, the assertion that laws and customs have been handed down from generation to generation may not be sufficient to support the assertion at s 190B(5)(b). However, when complemented by tangible examples of transmission as well as facts that elicit a similarity between the laws and customs of the earlier society to those now acknowledged and observed, the material may be sufficient.

[124] One claim group member explains that her children will have the same rights in Kabi country as she does and how others cannot encroach on their country without permission. She says that '[m]y kids will have the same rights and interests as me and I will always try to take one or two of them with me to meetings.' Under the relevant laws and customs '[t]hey will control the country from Buderim down. Kabi country runs from Buderim, Gympie, Yandina and down to Maleny that way.'

[125] [Name deleted], a claim group member, also speaks of the transmission of laws and customs and teaching about their country, which she experienced as a child and now emulates for her children and grandchildren:

I've always been taught to respect my elders and have taught my children to do the same. I was taught that if we did the wrong thing by others, particularly our elders, or our country then the ancestors would punish us. I have taken my children and grandchildren to our country and talked to them about how important it is to us. We've taken them to sacred site and go camping and fishing on the rivers. I have taught my children and grandchildren the stories that I was taught by my father and his mother as well as [name deleted] (Attachment F, Table 1, 59).

[126] The material is sufficient to support the assertion that there has been a continuation of laws and customs of the pre-sovereignty society rather than a recent revival by providing information that enables a comparison of what was acknowledged and observed in historical times to that which is acknowledged and observed currently and which was taught to claimants by their forebears. For instance, the subdivision of each tribe's territory, observed in the historical context continues to inform claim group members responsibilities in the claim area. [Text deleted]. [Name deleted] grew up knowing the country that belonged to the Joondoburri clan as this was taught to her (Attachment F, Table 1, 38).

[127] I consider that the factual basis is sufficient to support the assertion at s 190B(5)(b).

Section 190B(5)(c)

[128] This assertion relates to whether the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the native title rights and interests claimed. Upon my understanding, this assertion relates to the continued holding of native title in the area claimed through the continued observance of the traditional laws and customs of the group.

[129] For the factual basis to meet this requirement there must be sufficient facts about the continuity of the connection of the native title claim group with the claim area in accordance with their traditional laws and customs. There should be tangible examples of how the laws and customs of the pre-sovereignty society have continued since at least the time of effective sovereignty.

[130] Much of the factual basis about this requirement is outlined above, including information about the pre-sovereignty society, the persons who acknowledged the laws and customs of that society, the links between that society and the current native title claim group and material that demonstrates a continuity— see, *Gudjala* [2009], 72/[33].

[131] Claim group members describe this continuity and how important adherence to law and custom remains today:

I believe that being a descendant from two apical ancestors means that I have the right to speak for two different areas of Kabi Kabi country. Under our law and custom you can only speak for a particular area if you are connected to an ancestor for that area and have knowledge of your story line that connects you to that area...Although we didn't call it 'right people for country' in those words, I learned about this law from listening to my Dad and his father (my grandfather) speak when I was young. My grandfather shared his knowledge to Dad and I learned that way. I took notice because it was my future children's knowledge. These days, you see some people from certain family groups getting wild: because someone from another family group is not-respecting the law relating to only speaking for your own country (even though they know what the rules are) (Attachment F, Table 1, 39).

[132] From this kind of material within the factual basis it is possible to conclude that there is sufficient information to support the assertion of a continuity of laws and customs.

Conclusion

[133] 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

[134] This condition requires me to consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.

[135] Generally, being satisfied for the purpose of this condition requires consideration of whether the material presents an arguable basis for the existence of the claimed rights and interests under the traditional laws and customs. A right or interest may be said to be prima facie established 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis' —*Doepel* at 147/[135].

[136] It may require the making of some favourable assumptions. It may also involve some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed.' Where appropriate, s. 190B(6) may also require some consideration of contradictory material —*Doepel*, 145-146/[126], [127] and [132].

[137] In *Gudjala* [2007], Dowsett J referred to the decision of the High Court in *Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors* (2002) 214 CLR 422;[2002] HCA 58 (*Yorta Yorta*) and to the Court's consideration of s. 223 and 'traditional' where it held 'the rights and interests which are said now to be possessed must nonetheless be rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the peoples in question' —[86].

[138] Given that native title '*owes its existence and incidents to traditional laws and customs* [emphasis added], not the common law' (*Yorta Yorta* at [110]) a prima facie case to establish a particular native title right or interest is one that provides a sufficient factual basis that the right or interest arises from the laws and customs of the pre-sovereignty society.

[139] Often the factual basis will provide examples of current exercise of the claimed rights and interests. Whilst the focus is not on exercise but possession under the relevant laws and customs, this kind of material can assist in demonstrating the relevant laws and customs and it may be possible to infer current exercise is in accordance with traditional laws and customs that were acknowledged and observed prior to European contact.

Consideration of claimed native title rights and interests

[140] The rights and interests claimed are set out in Schedule E and are all claimed as non-exclusive. Below I consider whether each of those claimed rights and interests are prima facie established.

access, be present on, move about on and travel over area[s];

[141] This right is a reflection of the claimants' inherited rights of occupation and responsibility for their predecessors' country. The factual material demonstrates a continual association with the area covered by the claim dating back to the period at effective contact. In the written record, many of the claim group's ancestors are identified as being associated with the claim area as members of the Kabi Kabi community. Current claim group members also evidence that they and their forebears, including parents, grandparents, uncles, aunts and other relatives have all been present on the application area during the course of their living memories.

[142] Historical sources are said to evidence a 'network of pathways in and around the claim area', which attest to considerable occupation prior to European settlement. There is evidence of significant Aboriginal removals during the 20th century, but many families did not suffer this fate by continuing to work on stations within the application area or by absconding (Attachment F, Table 1, 83).

[143] The material clearly demonstrates continuity in terms of association with the area and that the association is in accordance with traditional laws and customs. For example:

When [name deleted] was growing up her mother took her along Noosa to Alexander Headlands. They used to go up that way camping when they were younger. When they were young they used to go for camping holidays to Bribie Island.

[Name deleted] takes her grandchildren up to the Gympie area and over to Noosa and they stay at Bribie Island with family.

[144] Claimants retain knowledge of their 'bora'. Claim group member, Alex Davidson says that '[i]f we pass over our bora rights, we might as well walk away from the land too. Because it's a significant custom that holds our people together, to our laws' (Attachment F, Table 1, 29-30).

[145] I consider that this right is prima facie established.

camp on the area, and for that purpose, erect temporary shelters on the area

[146] The right to camp within the application area is also associated with one's bora. A historical source from 1910 cited that families 'usually camped and travelled together' over the claim area. They were characterised as family groups or communities 'designated by some feature distinguishing themselves or their country, the term for which was prefixed to the termination – bora' (Attachment F, Table 1, 43).

[147] Current claimants have clearly continued to visit the claim area and their country, including by exercising their right to camp. The material suggests that this has been ongoing for many generations. For instance, one claim group member describes taking his sons, daughters, nieces

and grandchildren camping on country to different locations, particularly to places where his elders took him (Attachment F, Table 2, 88).

[148] I consider that this right is prima facie established.

hunt, fish and gather on the land and waters of the area for personal, domestic and non-commercial communal purposes

[149] A number of sources cite these activities as occurring in the historical context and there is evidence that there were quite specific laws and customs that informed these practices:

In 1799 Flinders met people on the southern end of Bribie Island carrying nets also in the huts at White Patch he found nets. While Flinders was there he observed each morning at dawn the mainland group going up the passage and scooping fish into the nets and cooking them over an open fire. On one occasion 20 men drove fish into a few nets in the tidal shallows (Kidd 2009:4).

The strangers were received with every hospitality. The bunyas were gathered by the proprietor tribes and presented to the guests, who were not allowed to climb the trees or take the bunyas for themselves (Meston 1895:82).

(Attachment F, Table 2, 89).

[150] These customs have clearly continued into the present context, with many claimants continuing to undertake these activities mindful of the traditional laws and customs:

[Name deleted] taught his eldest son, how to fish and hunt. [Name deleted] taught him the best times to fish and some of the best fishing holes and spots. He taught him about the kangaroo which was plentiful on country and the carpet snake which were often present when they were on country. The carpet snakes would acknowledge them and they would acknowledge them.

Sharing is an integral part of [name deleted]'s culture and he was always required to share the food he hunted and fished with the family and the wider tribe. If he killed a kangaroo, he would be required to share the kangaroo. The best cuts of the kangaroo would be given to family/tribal members that you shared special relationships with or held certain positions of respect with your family/tribe.

(Attachment F, Table 2, 91-94).

[151] I consider that this right is prima facie established.

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

[152] The use of natural resources of the claim area by the native title claim group and their predecessors is reflected in information about their hunting and gathering activities. Examples of these are outlined above.

[153] On the basis of this material, I consider that this right is prima facie established.

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

[154] The claim group's relationship with water is outlined in Attachment F. It is clear that water is of spiritual significance to the claim group and that they consider the use of water and its natural resources to be a right that arises pursuant to their traditional laws and customs.

[155] Mathew describes the group's beliefs about the [text deleted], which he says:

...amongst the Kabi indicate strong commodities with wider continental beliefs on this subject, particularly in regard to the [text deleted] (Mathew 1887:177) (Attachment F, Table 2, 96).

[156] Current claimants also refer to their use of water throughout the material and how significant water features of their country, such as creeks and rivers, are used to define boundaries.

[157] I consider that this right is prima facie established.

participate in cultural activities on the area; hold meetings on the area

[158] Historical references highlight the importance of cultural and ceremonial activities for the claim group's predecessors, such as:

Two words were employed by the Kabi to designate the man-making ceremonies, [text deleted]. I am not aware of initiation on a grand scale having taken place after 1865, the date of my first acquaintance with the natives. In former years, special places for conducting ceremonies were selected, on which various tribes would converge, in order that they might all participate by contributing candidates and assisting in their performances (Mathew: 1910:97-98) (Attachment F, Table 2, 96).

[159] Historical sources also refer to large corroborrees that were held in the 1860s.

[160] [Name deleted], a descendant of Jacky Baul recalls that people from all over would come together and get married at the Bunya Mountains 'or be promised'. Her grandmother also told her about women's business and showed her a women's place. This was a bora ring located on the [place name deleted].

[161] [Name deleted] speaks of his father and grandfathers having conducted meetings about men's business on the application area.

[162] It is clear from the material that cultural, meeting and ceremonial activities were and continue to be part of the claim group's life on the application area.

[163] I consider that these rights are prima facie established.

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

[164] Redmond indicates that 'bora traditions continued to be highly valued into the mid-twentieth century' which is indicated in Tennant Kelly's research at Cherbourg in the 1930's. Claimants also continue to attach great significance to tracks on country that were utilised by their ancestors as they are 'believed to be imbued with the living presence of Kabi Kabi ancestral beings' (Attachment F, Table 2, 98).

[165] In addition, the material also contains extracts from claimants who speak about their responsibility to care for country and to maintain places of significance. [Text deleted].

[166] I consider this right is prima facie established.

teach on the area the physical and spiritual attributes of the area

[167] Teaching is fundamental to the continuation of the claim group's laws and customs. Research conducted in relation to the claim group and the native title rights and interests highlights the significance of elders in teaching about their country:

Children were taught the spiritual aspects of the native beliefs by any of the old men, and he would call on them to desist from any wrong action by saying "Ben:ewa waru (Ben:ewa sees you)" (Redmond 2015:38) (Attachment F, Table 2, 99).

[168] Claimants refer extensively to the teachings of their elders, who taught them about the boundaries of their country and their laws and customs. [Name deleted] says that she learnt about Kabi Kabi laws and customs through her mother who told her stories about her family, country and cultural practices (Attachment F, Table 2, 99).

[169] Current claimants also refer to how they now have responsibility for teaching their children and grandchildren.

[170] I consider this right is prima facie established.

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

[171] The lighting of fires on the application area is closely connected with other rights and interests, including hunting and fishing and taking natural resources. The material contains

examples of this right existing pursuant to relevant traditional laws and customs. The information includes extracts from expert reports that identify the practice of lighting fires in historical accounts of the claimants' predecessors. Current claimants also refer to their use of fire on the application area, including [name deleted] who has been taught traditional cooking methods using coals and fire. Before he goes fishing 'he performs a customary act of lighting a fire', which he does for several reasons, including so 'the old people would know that he belonged to country and to keep warm before and after their catch and finally to cook, eat and talk about their catch (Attachment F, Table 2, 104).

[172] I consider this right is prima facie established.

be buried and bury native title holders within the area

[173] Customary burial practices are referred to throughout the material, including that 'before the funeral began, a number of men who had belonged to the same totem in each tribe and others who had been friends of the dead man, would paint and decorate themselves with their totemic markings' (Attachment F, Table 2, 105). Current claimants have knowledge of burial sites of their predecessors on the application area. [Name deleted] says that when she was growing up 'some of the practices for burials were still in place' and whilst contemporary funerals have changed they are informed by 'old practices' that remain (Attachment F, Table 1, 67).

[174] I consider this right is prima facie established.

Conclusion

[175] The application satisfies the condition of s 190B(6).

Subsection 190B(7)

Traditional physical connection

[176] This condition is about being satisfied at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application. Alternatively, it may be that a person reasonably would be expected to have a traditional physical connection, but for things done by the Crown or a government authority or a holder of a lease over the land or waters.

[177] The material about this must be capable of satisfying the Registrar of a particular fact(s), specifically that at least one member of the claim group 'has or had a traditional physical connection' with any part of the claim area. While the focus is necessarily confined, as it is not the same consideration given by the Court in making a determination, it 'is upon the relationship of at least one member of the native title claim group with some part of the claim area' —*Doepel* at [18].

[178] The reference to this being a ‘traditional physical connection’ is about the connection being pursuant to the traditional laws and customs of the native title claim group. In that way, it is likely this connection is in exercise of a right or interest held under the traditional laws and customs — *Gudjala* [2009], [84].

[179] There are numerous examples within the material of current claimants and their forebears having a traditional physical connection with the application area.

[180] For instance, Attachment F contains information about each of the identified ancestors and their connection with the claim area and that of their children. For example, Maggie Palmer, an identified apical ancestor of the group, was a Kabi Kabi woman from the inland Mary River Valley born in 1840. She was married to James Crow/Crowe who is also a Kabi Kabi apical. Their children were also born in the application area.

[181] As well as details of the ancestors’ physical and spiritual connection with the area, claimants also continue to maintain both a physical and spiritual relationship with the application area. They talk extensively about their country and areas of importance and how they maintain their connection through continuing acknowledgement of traditional laws and customs. For instance [name deleted] notes that the places of particular importance to her are ‘the Maroochy River, Maroochydore, Gympie and surrounding areas, Sippy Mountain and Buderim.’ She still maintains her connection with these places by visiting with her sister and whenever she goes there she experiences ‘a sense of peace and tranquility’ (Attachment F, Table 1, 42).

[182] Claimants continue to take their children and grandchildren throughout the claim area and teach them relevant laws and customs. For example, fishing, hunting and camping are activities that appear to be frequently undertaken by claim group members, which they use as opportunities to teach the younger generation.

[183] I consider that there is sufficient evidence about the traditional physical connection of at least one member of the native title claim group.

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

Subsection 190B(8)

No failure to comply with s 61A

Section 61A(1)

[185] This requirement is 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.

[186] The information in the geospatial assessment and overlap analysis dated 4 January 2017 confirms that there is no approved determination of native title over the application area. I consider that this information is still current at the date of this decision.

Section 61A(2)

[187] 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.

[188] Schedule B contains exclusions to the application area and I consider that this includes any areas covered by a previous exclusive possession act. The application does not exclude areas where ss 47, 47A or 47B would apply.

Section 61A(3)

[189] 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.

[190] The application only claims non-exclusive native title rights and interests.

Conclusion

[191] 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

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

Section 190B(9)(a)

[193] The application does not include a claim to the ownership of minerals, petroleum or gas wholly owned by the Crown (*see Schedule Q*).

Section 190B(9)(b)

[194] The application does not include a claim to exclusive possession of offshore waters (*see Schedule P*).

Section 190B(9)(c)

[195] There is no information before me that would suggest the native title rights and interests claimed have otherwise been extinguished.

Conclusion

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

[End of reasons]