National Native Title Tribunal

Registration test decision

Application name	North Eastern Peninsula Sea Claim
Name of applicant	Bernard Richard Charlie, Trevor Henry Lifu, Paul Joseph Ah Mat, Michael Thomas Solomon, Jennifer Jill Thompson, Reginald Williams
NNTT file no.	QC2017/003
Federal Court of Australia file no.	QUD115/2017

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 do not accept this claim for registration pursuant to s 190A of the *Native Title Act 1993* (Cth).

For the purposes of s 190D(3), my opinion is that it is not possible to determine whether the claim satisfies all of the conditions in s 190B because of a failure to satisfy s 190C.

Date of decision: 26 May 2017

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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 not accept the claim for registration pursuant to s 190A of the Act.

[2] The Registrar of the Federal Court of Australia (the Federal Court) gave a copy of the North Eastern Peninsula Sea Claim claimant application to the Registrar on 6 March 2017 pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

[3] Given that the claimant application was made on 27 February 2017 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

[4] 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.

Similarities with the Northern Peninsula Sea Claim application

[5] The application was filed on the same day as the Northern Peninsula Sea Claim application. There are three common persons between the applicant for the Northern Peninsula Sea Claim application, and the applicant for the current application. Both applications were filed by Cape York Land Council (CYLC) as the legal representative for the applicants.

[6] The apical ancestors with reference to whom the members of the native title claim group are described are identical for both applications, except that the Northern Peninsula Sea Claim application names a further 11 apical ancestors, or ancestor couples, in addition to the eight that are common between the two applications. It is my understanding, therefore, that the native title claim group is a broader group of persons for the Northern Peninsula Sea Claim application when compared with the claim group for the current application.

[7] The areas covered by each of the applications is relatively proximate. The Northern Peninsula Sea Claim application covers an area primarily consisting of waters off the north west coast of Cape York, Queensland. The current application covers an area primarily consisting of waters off the northern east coast of Cape York, and including a number of islands around the tip of the Cape.

[8] The factual basis material contained in each of the applications is identical, consisting of Schedules F, G and M. The native title rights and interests claimed in relation to each application, set out in Schedule E, is also identical.

[9] Noting these similarities between the applications, I have considered it appropriate that I rely on my reasons in the decision not to accept the Northern Peninsula Sea Claim application (decision of 25 May 2017) at those conditions where the information before me for my consideration is identical to the information contained in that application. Specifically, I refer to ss 190B(4), 190B(5), 190B(6) and 190B(7).

[10] For the reader's convenience, I have repeated those reasons below at the conditions referred to, but noted that they are an exact copy of what appears at that condition in the Northern Peninsula Sea Claim application decision.

[11] I note that the applicant for the Northern Peninsula Sea Claim application and the applicant for the current application were advised of the deficiencies with their respective applications in advance of my decisions not to register the claims, however no additional material was provided.

Procedural and other conditions: s 190C

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

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

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

[13] 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?

[14] 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.

[15] 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)

[16] A description of the native title claim group appears in Schedule A. It is only where, on the face of the application, it appears that not all of the persons comprising the native title claim group are included in that description, or where the description is of a sub-group or part only of the actual native title claim group, that the application will fail to meet this condition – *Doepel* at [36].

[17] Having considered the description before me, there is nothing to indicate that it seeks to exclude certain persons, or that it describes only part of the actual native title claim group.

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

Name and address for service: s 61(3)

[19] These details appear at Part B of the Form 1.

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

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

[21] My concern at this condition is only that information identifying the native title claim group, in the terms prescribed by s 61(4), is contained in the application – *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 (*Wakaman*) at [34]. I am not to consider the correctness of that information or whether the description provided is 'sufficiently clear' – see *Wakaman* at [34] and *Gudjala People 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [31] and [32].

[22] As above, a description of the persons comprising the native title claim group appears at Schedule A.

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

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

[24] The application is accompanied by six affidavits, one sworn by each of the applicant persons. The affidavits contain identical statements, and having considered those statements, it is my view that they address the matters prescribed by ss 62(1)(a)(i) to (v).

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

Details required by s 62(1)(b)

[26] 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)*

[27] This information appears in Schedule B, and Attachment B to Schedule B.

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

[28] The map is contained in Attachment C to Schedule C.

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

[29] Information about these searches appears at Schedule D.

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

[30] Schedule E contains this description.

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

[31] The factual basis material is contained in Schedule F.

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

[32] These activities are set out in Schedule G.

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

[33] Details of other applications are set out in Schedule H.

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

[34] Information about these notices is contained in Schedule HA.

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

[35] Details of s 29 notices appear at Schedule I.

Conclusion

[36] 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.

[37] The application does not satisfy the condition at s 190C(3).

[38] It is only where there is a previous application that meets all three criteria set out at ss 190C(3)(a), (b) and (c) that the requirement for me to consider the possibility of common claimants between the claim group for the previous application and the claim group for the current application is triggered – *Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

[39] The criterion at s 190C(3)(a) is satisfied. Schedule H states that the applicant is aware of five overlapping applications: Torres Strait Regional Sea Claim (QUD6040/2001), Kaurareg People #1 (QUD266/2008), Kaurareg People #2 (QUD267/2008), Kaurareg People #3 (QUD362/2010) and Gudang Yadheykenu People (QUD269/2008). The geospatial assessment and overlap analysis of the application area prepared by the Tribunal's Geospatial Services (dated 8 March 2017) confirms that these five applications overlap the current application.

[40] The criterion at s 190C(3)(b) is satisfied. The geospatial assessment provides that these five applications were on the Register at the time the current application was made. The Torres Strait Regional Sea Claim has appeared in an entry on the Register since July 2002 and has not been removed since that time. The Kaurareg People #1 and Kaurareg People #2 applications have appeared in an entry on the Register since February 2009 and have not been removed since that time. The Kaurareg #3 application has appeared in an entry on the Register since December 2010 and has not been removed since that time. The Gudang Yadheykenu People application has appeared in an entry on the Register since March 2009 and has not been removed since that time.

[41] The criterion at s 190C(3)(c) is satisfied. From my research of the Tribunal's databases, I am aware that all five previous applications were entered onto the Register following their being considered by a delegate of the Registrar pursuant to s 190A.

[42] It follows that I must consider whether any of the persons comprising the native title claim group for the current application, are also members of the native title claim groups for the five previous applications. My view is that there are common members between the claim groups. Schedule O states:

> Some of the members of the claim group are also members by virtue of common apical ancestry descent of the following native title claim groups for the applications specified below that have been made in relation to part of the area covered by this application…

[43] Following this statement, Schedule O names the Kaurareg People #1, Kaurareg People #2, Kaurareg People #3 and the Gudang Yadheykenu People applications.

[44] On this basis, I cannot be satisfied that no person included in the native title claim group for the current application was a member of the native title claim group for any previous application.

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.

[45] 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.

[46] Schedule R provides that the application is not certified. The requirement at s 190C(4)(b) applies in these circumstances.

[47] I am not satisfied that the requirement at s 190C(4)(b) is met. The information before me is insufficient in detail to allow me to be satisfied of the 'fact of authorisation' – see *Doepel* at [78].

[48] I am, however, satisfied that the information about authorisation is sufficient for the purposes of s 190C(5). That is, it contains the statement prescribed by s 190C(5)(a), and 'briefly' sets out the grounds on which the Registrar should consider the requirement of authorisation met (s 190C(5)(b)).

[49] While a detailed explanation of the authorisation process may not be required, authorisation is a 'matter of considerable importance and fundamental to the legitimacy of native title determination applications' – *Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*) at [57]. Where the material consists only of formulaic statements, it is unlikely to satisfy the Registrar's delegate of the fact of authorisation by all members of the native title claim group – see *Strickland* at [57] and *Doepel* at [78].

[50] The information about authorisation consists of a brief statement in Schedule R, and in the affidavits sworn by the applicant persons pursuant to s 62(1)(a). It asserts that an agreed to decision-making process was used by the native title claim group to authorise the applicant to make the application and deal with matters arising in relation to it. Where this type of decision-making process forms the basis of the applicant's authority, there is no requirement that 'all' the members of the group are involved in making the decision. The material must, however, explain how the members of the group were given 'every reasonable opportunity' to participate in the decision-making process – *Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation NSW* [2002] FCA 1517 (*Lawson*) at [25].

[51] The material states that it was at a meeting of the claim group in Injinoo on 21 May 2015 that the decision to authorise the applicant was made. There is no further information before me, however, about that meeting. Relevant facts might address how the members of the group were notified of the meeting, when they were notified, and whether they were offered assistance to attend the meeting.

[52] In *Ward v Northern Territory* [2002] FCA 171, where the applicant's authority was also given at a meeting of the claim group, O'Loughlin J found the information before him regarding that meeting 'wholly deficient'. His Honour asked the following hypothetical questions about the meeting (at [24]), indicating the type of information that may be required to satisfy the condition at 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?

[53] His Honour held that these questions might not need to be answered on any formal basis, however the substance of the questions must be addressed by the material – at [25].

[54] Having considered the brief material before me, it is my view that it does not address any of these details of the authorisation meeting asserted. Consequently, I cannot 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.

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.

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

[56] As above, a map of the application area is contained in Attachment C to Schedule C, and a description of the boundaries of that area is contained in Attachment B to Schedule B. Information identifying areas within the external boundary that are excluded from the application is contained in Schedule B. It is my view that this approach to describing excluded areas is sufficient at this condition – *Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*) at [50] to [55].

[57] Attachment B is entitled 'Identification of Boundaries', and has been prepared by the Tribunal's Geospatial Services. It describes the external boundary of the application area by metes and bounds, referring to the mainland high water mark, non-freehold parcels, Local Government boundaries and coordinate points. It specifically excludes the land and waters subject to native title determinations QUD6040/2001 Torres Strait Regional Sea Claim, QUD157/2011 Northern Cape York Group #1 and QUD6073/1998 Warraber People, and native title determination application QUD673/2014 Cape York United Number 1.

[58] The map at Attachment C is a colour copy of an A3 map, titled 'North Eastern Peninsula Sea Claim', which has also been prepared by the Tribunal's Geospatial Services. It is dated 23 November 2016 and includes:

- the application area depicted by bold blue outline and hatching;
- the Comalco ILUA depicted by red outline;
- a commencement point;
- scale bar and coordinate grid; and
- notes relating to the source, currency and datum of data used to prepare the map.

[59] The geospatial assessment provides that the map and description are consistent and identify the application area with reasonable certainty. Having considered the information before me about the area covered by the application, I agree with the assessment, and consider that the information allows for the boundaries of the area to be identified on the earth's surface.

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.

[60] The application satisfies the condition at s 190B(3).

[61] The focus of my consideration at this condition is whether the application 'enables the reliable identification of the persons in the native title claim group' – *Doepel* at [51]. The correctness of that information or whether the persons described do in fact qualify as members of the native title claim group is not a matter I am permitted to consider – at [37].

[62] The description of the native title claim group in Schedule A appears as follows:

> The native title group is made up of all persons descended by birth or adoption from the following apical ancestors:
>
> Peter (Pahding) Pablo;
> Wymarra (Wymara Outaiakindi);
> Matthew (Charlie) Gelapa;
> Annie Blanco;
> Ela/Illa (father of Tommy Dodd, Polly and Tommy Somerset)
> Woonduinagrun and Tariba (parents of Tom Redhead);
> Charlotte Ware;
> Queen Baki and Chief Tchiako / Tchiaku / Chiaku.

[63] It is my understanding, therefore, that there are two criteria governing the persons comprising the native title claim group. An individual must either be a biological descendant of one of the named apical ancestors, or they must be a descendant by means of adoption from one of the named ancestors.

[64] I accept that identifying at any one point in time those persons comprising the group would require some factual inquiry. However I do not consider this fatal to the application at this condition – *Western Australia v Native Title Registrar* [1999] FCA 1591 at [67]. In *WA v NTR*, Carr J found a description using the same criteria sufficient for the purposes of s 190B(3).

[65] 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 that group.

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.

[66] My reasons here are an exact copy of my reasons at this condition in the decision not to accept the Northern Peninsula Sea Claim application for registration, dated 25 May 2017.

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

[68] As above, a description of the native title rights and interests claimed appears at Schedule E. It is my understanding that paragraph two of the description includes a right to exclusive possession, and that paragraph one clarifies where within the application area those exclusive rights are claimed.

[69] It is further my understanding that paragraph four of Schedule E sets out three non-exclusive rights and interests, and paragraph three specifies the area within the boundary of the application area where those non-exclusive rights and interests are claimed. The remaining paragraphs of the schedule set out limitations on the extent and operation of the rights and interests claimed.

[70] The test of identifiability at s 190B(4) is whether the claimed native title rights and interests are 'understandable and have meaning' – *Doepel* at [99]. In applying this test, I have had regard to the definition of 'native title rights and interests' in section 223(1) of the Act. I have not, however, undertaken an individual assessment of whether each right or interest claimed satisfies that definition, as I consider this a more appropriate task for the condition at s 190B(6) regarding whether the rights and interests can be prima facie established. This is addressed in my reasons below at that condition.

[71] It is my view that the description of the rights and interests claimed is clear and easily understood, and that the rights and interests set out in Schedule E have meaning as native title rights and interests. There is nothing ambiguous in the description. On that basis, the requirement is met.

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.

[72] My reasons here are an exact copy of my reasons at this condition in the decision not to accept the Northern Peninsula Sea Claim application for registration, dated 25 May 2017.

[73] The application does not satisfy the condition of s 190B(5) because the factual basis is not sufficient to support each of the assertions at ss 190B(5)(a), (b) and (c).

[74] The factual basis material is contained in Schedules F, G and M.

[75] The information necessary to satisfy the condition at s 190B(5) 'must be in sufficient detail to enable a genuine assessment of the application by the Registrar' and be 'something more than assertions at a high level of generality' – *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala 2008*) at [92].

[76] Further, the material must be in sufficient detail so that it can be understood as applying to the particular native title rights and interests claimed, by the particular native title claim group, over the particular land and waters of the application area – see *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [39].

[77] The factual basis information consists largely of generalised facts which lack this level of specificity to the claim area, the native title claim group, and the native title rights and interests claimed.

[78] In my reasons below I address the particular deficiencies of the material in addressing each of the three assertions set out in the three paragraphs of s 190B(5).

Reasons for s 190B(5)(a)

[79] In support of the assertion at s 190B(5)(a), information that speaks to an association between the predecessors of the whole group and the area over the period since sovereignty may be required – *Gudjala 2007* at [52]. The only information before me addressing an association of the predecessors of the group with the area at sovereignty, or European settlement, consists of general non-specific statements. For example, Schedule F states: 'The members of the native title claim group and their predecessors have at all times since sovereignty had an association with the Claim Area by reference to their traditional laws and customs'. There is no information about the association of the named apical ancestors of the group with places within the application area.

[80] The factual basis in support of the assertion at s 190B(5)(a) must also address an association of the group and its predecessors with the entirety of the area – *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) at [26]. While there are some references in Schedule F to certain places on

the coastline of Cape York, communities on Cape York, and camps in the vicinity of the application area, noting that the application area primarily covers waters, rather than land, it is my view the information is insufficient in supporting an asserted association with the application area. The factual basis must have geographical particularity to the land and/or (in this case) waters of the application area to satisfy s 190B(5)(a) – *Martin* at [26].

[81] It may also be necessary that the factual basis speak to an association of the claim group as a whole with the area – *Gudjala 2007* at [52]. The information does not speak in sufficient detail about the association particular members of the native title claim group have with the area presently, nor does it speak to the type of association, whether it be spiritual and/or physical – see *Martin* at [26]. It does not provide examples describing the association of particular named individuals or families of the claim group with certain places within the application area.

[82] Schedule F provides that many members of the native title claim group and many of the predecessors of the group 'live or have lived on or in the vicinity of the Claim Area in communities such as New Mapoon, Old Mapoon, Umagico, Bamaga, Injinoo and Seisia'. This is an example of the highest level of detail provided about the assertion at s 190B(5)(a), however I note that none of these places fall within the boundary of the application area.

[83] It follows that the information is not sufficient to meet the requirement at s 190B(5)(a).

Reasons for s 190B(5)(b)

[84] The material sets out in detail the laws and customs acknowledged and observed by the native title claim group presently. The material asserts that these laws and customs are 'traditional', however there is no explanation of *how* they are traditional. At s 190B(5)(b), the material must address how the laws and customs of the claim group are rooted in the laws and customs of a society at sovereignty, or at least European settlement – see *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA58 (*Yorta Yorta*) at [46]; *Gudjala 2007* at [63]. It is not sufficient to merely assert that laws and customs currently acknowledged and observed are traditional – *Gudjala People #2 v Native Title Registrar* [2009] FCA1572 (*Gudjala 2009*) at [53].

[85] Traditional laws and customs are those that have been passed down through the generations to the members of the native title claim group – *Yorta Yorta* at [46]; *Gudjala 2009* at [52] and [53]. The material does not address the way in which this transfer of knowledge has occurred, other than in general, non-specific terms.

[86] The material at s 190B(5)(b) may also be required to address the claim group's acknowledgement and observance of laws and customs pertaining to the claim area – *Gudjala 2009* at [74]. While the laws and customs are set out in detail, there is no information addressing how those laws and customs are acknowledged and observed by members of the group today in relation to the particular area covered by the application.

[87] Section 190B(5)(b) requires the factual basis to speak to the existence of a pre-sovereignty society, and to identify the persons who acknowledged and observed normative laws and customs at that time – *Gudjala 2009* at [37] and [52]. The information addressing this matter speaks in general terms about the predecessors of the claim group comprising a 'single society' who 'shared laws and customs', and who 'inhabited and occupied the lands and waters in and around the application area' at sovereignty – see Schedule F. This information is insufficient to support the assertion at s 190B(5)(b).

Reasons for s 190B(5)(c)

[88] Noting the reference in the wording of s 190B(5)(c) to 'those laws and customs', where the Registrar's delegate cannot be satisfied that the factual basis is sufficient to support the assertion at s 190B(5)(b), regarding the existence of traditional laws and customs, it follows that the application cannot satisfy the requirements of s 190B(5)(c).

[89] At this condition, the material must address how the native title claim group have continued to hold their native title rights and interests by acknowledging and observing the laws and customs of a pre-sovereignty society, and how they have done so in a substantially uninterrupted way – *Yorta Yorta* at [47] and [87].

[90] Therefore, the factual basis must speak to the existence of a society at sovereignty acknowledging and observing traditional laws and customs from which the present laws and customs were derived and were traditionally passed to the claim group. It must also speak to continuity in the observance of laws and customs by the group and its predecessors, going back to sovereignty or at least European settlement – *Gudjala 2007* at [82].

[91] As above, my view is that the material is insufficient to support an assertion regarding traditional laws and customs, derived from the normative laws and customs of a society at sovereignty in the application area. It follows that it is not sufficient to support an assertion of continuity in the acknowledgement and observance of traditional laws and customs by the group and its predecessors. The information within the application that does speak to the assertion at s 190C(5)(c) is not at a sufficient level of detail and consists only of general statements addressing this matter. The following excerpt from Schedule F is an example of this material:

> The members of the native title claim group and their predecessors have at all times since sovereignty acknowledged and observed without substantial interruption the traditional laws and customs, in particular the laws and customs referred to in this Schedule. These laws and customs have been handed down generation by generation to the native title claim group by word of mouth and common practice of their ancestors – see at [80].

[92] Consequently, this condition is not met.

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.

[93] My reasons here are an exact copy of my reasons at this condition in the decision not to accept the Northern Peninsula Sea Claim application for registration, dated 25 May 2017.

[94] The application does not satisfy the condition of s 190B(6).

[95] Native title rights and interests, in accordance with the definition of that term in s 223(1), are those that are 'possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders'. Therefore, where an application fails to satisfy the requirement at s 190B(5)(b), it follows that it cannot satisfy the requirement at s 190B(6).

[96] It is for this reason that the application does not satisfy the condition. As I was not satisfied the factual basis is sufficient to support an assertion regarding traditional laws and customs at s 190B(5)(b), I cannot consider any of the rights and interests claimed prima facie established as native title rights and interests, held pursuant to the traditional laws and customs of the native title claim group.

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.

[97] My reasons here are an exact copy of my reasons at this condition in the decision not to accept the Northern Peninsula Sea Claim application for registration, dated 25 May 2017.

[98] The application does not satisfy the condition of s 190B(7).

[99] A 'traditional physical connection' is one where 'the relevant connection [is] in accordance with laws and customs of the group having their origin in pre-contact society' – *Gudjala 2007* at [89]. As above, at s 190B(5)(b) I was not satisfied that the factual basis was sufficient to support

traditional laws and customs, derived from the laws and customs of a society at settlement, and acknowledged and observed by the native title claim group. It follows that the application cannot satisfy this condition.

[100] Notwithstanding this, were the condition at s 190B(5)(b) met, my view is that the information within the application addressing the subject matter of s 190B(7) is insufficient to satisfy the requirement. At this condition, the applicant is required to present 'evidentiary material' that allows me to be satisfied of particular facts – see *Doepel* at [18]. The 'focus is upon the relationship of at least one member of the claim group with some part of the claim area' – *Doepel* at [18].

[101] Again, the material speaks only in general terms about the connection of members of the claim group with the application area. It does not include information that names one or more persons within the group and describes time they have spent at a particular location within the application area undertaking activities pursuant to their laws and customs.

[102] It follows that the requirement is not met.

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.

[103] 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)

[104] 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)

[105] 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. The information in Schedule B identifying areas excluded from the application includes 'any area in relation to which a previous exclusive possession act […] was done in relation to the area'.

Section 61A(3)

[106] 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. The description of the native title rights and interests clarifies at paragraph [1(a)] that exclusive native title is only claimed 'where there has been no extinguishment to any extent of native title rights and interests'.

Conclusion

[107] 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.

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

Section 190B(9)(a)

[109] Schedule Q states that no claim is made to minerals, petroleum or gas.

Section 190B(9)(b)

[110] Schedule P states that no claim is made to exclusive possession of any offshore places.

Section 190B(9)(c)

[111] There is nothing within the application and accompanying material to indicate that the native title rights and interests claimed have been otherwise extinguished.

Conclusion

[112] 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

Summary of registration test result

Application name	**North Eastern Peninsula Sea Claim**
NNTT file no.	**QC2017/003**
Federal Court of Australia file no.	**QUD115/2017**
Date of registration test decision	**26 May 2017**

Section 190C conditions

Test condition	**Subcondition/requirement**		**Result**
s 190C(2)			**Aggregate result:** **Met**
	re s 61(1)		**Met**
	re s 61(3)		**Met**
	re s 61(4)		**Met**
	re s 62(1)(a)		**Met**
	re s 62(1)(b)		**Aggregate result:** **Met**
		s 62(2)(a)	**Met**
		s 62(2)(b)	**Met**
		s 62(2)(c)	**Met**
		s 62(2)(d)	**Met**
		s 62(2)(e)	**Met**
		s 62(2)(f)	**Met**
		s 62(2)(g)	**Met**
		s 62(2)(ga)	**Met**

Test condition	Subcondition/requirement		Result
		s 62(2)(h)	Met
s 190C(3)			Not met
s 190C(4)			Overall result: Not met
	s 190C(4)(a)		NA
	s 190C(4)(b)		Not met

Section 190B conditions

Test condition	Subcondition/requirement	Result
s 190B(2)		Met
s 190B(3)		Overall result: Met
	s 190B(3)(a)	NA
	s 190B(3)(b)	Met
s 190B(4)		Met
s 190B(5)		Aggregate result: Not met
	re s 190B(5)(a)	Not met
	re s 190B(5)(b)	Not met
	re s 190B(5)(c)	Not met
s 190B(6)		Not met
s 190B(7)(a) or (b)		Not met
s 190B(8)		Aggregate result: Met
	re s 61A(1)	Met
	re s 61A(2) and (4)	Met

Test condition	Subcondition/requirement	Result
	re ss 61A(3) and (4)	**Met**
s 190B(9)		**Aggregate result:** **Met**
	re s 190B(9)(a)	**Met**
	re s 190B(9)(b)	**Met**
	re s 190B(9)(c)	**Met**

[End of document]