

# Registration Decision



<b>Application name</b>	Michael Douglas & Ors on behalf of the Kabi Kabi First Nation Traditional Owners Native Title Claim Group and State of Queensland (Kabi Kabi)
<b>Name of applicant</b>	Mr Michael Douglas, Ms Helena Gulash, Ms Cecilia Combo, Ms Melissa Bond, Mr Norman Bond, Mr Kerry Jones, Mr Brian Warner
<b>Federal Court of Australia No.</b>	QUD20/2019
<b>NNTT No.</b>	QC2018/007
<b>Date of Decision</b>	12 July 2019

## Claim accepted for registration

I have decided the claim in the Kabi Kabi application satisfies all the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).<sup>1</sup> Therefore the claim must be accepted for registration and be entered on the Register of Native Title Claims.

Katy Woods<sup>2</sup>

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<sup>1</sup> All legislative references are to the *Native Title Act 1993* (Cth) (Native Title Act), unless stated otherwise.

<sup>2</sup> Delegate of the Native Title Registrar pursuant to ss 190–190D of the Native Title Act under an instrument of delegation dated 27 July 2018 and made pursuant to s 99 of the Native Title Act.

## Reasons for Decision

### Cases Cited

*Aplin on behalf of the Waanyi Peoples v State of Queensland* [2010] FCA 625 (*Aplin*)

*Corunna v Native Title Registrar* [2013] FCA 372 (*Corunna*)

*Fesl and Others v Delegate of the Native Title Registrar and Another* [2008] FCA 1469 (*Fesl*)

*Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*)

*Gudjala People # 2 v Native Title Registrar* (2008) 171 FCR 317; [2008] FCAFC 157 (*Gudjala 2008*)

*Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*)

*Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31 (*Harrington-Smith*)

*Kanak v National Native Title Tribunal* (1995) 61 FCR 103; [1995] FCA 1624 (*Kanak*)

*Lawson v Minister of Land and Water Conservation (NSW)* [2002] FCA 1517 (*Lawson*)

*Martin v Native Title Registrar* [2001] FCA 16 (*Martin*)

*Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta*)

*Nobel v Mundraby* [2005] FCAFC 212 (*Nobel*)

*Northern Land Council v Quall* [2019] FCAFC 77 (*Quall*)

*Northern Territory of Australia v Doepel* [2003] FCA 1384 (*Doepel*)

*Sampi on behalf of the Bardi and Jawi People v State of Western Australia* [2010] FCAFC 26 (*Sampi FC*)

*State of Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*)

*Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*)

*Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 (*Wakaman*)

*Ward v Northern Territory* [2002] FCA 171 (*Ward*)

*Ward v Registrar, National Native Title Tribunal* (1999) 168 ALR 242; [1999] FCA 1732 (*Ward v Registrar*)

*Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*)

### Background

- [1] The claim in this application was first made on behalf of the Kabi Kabi First Nation Traditional Owners native title claim group (claim group) on 31 May 2013. It was amended in 2017 and again in late 2018 when it was combined with another application: Kabi Kabi Undambi Area Claim (QUD908/2016). The combined application was allocated a new file number (QC2018/007) by the National Native Title Tribunal (Tribunal), and was accepted for registration on 8 February 2019. On 16 April 2019 a further amended application was filed which updated Part A, Schedule A, Schedule F, Schedule R and Attachment F. This is the application now before me.
- [2] This amended application covers approximately 12,422 square kilometres along the coast of Queensland just north of Brisbane. The northern portion of the claim area is inland from Maryborough. The town of Gympie lies in the centre of the claim area and the towns of Caboolture and Redcliffe lie in its southern reaches. The eastern boundary follows the

coastline, extending to the lowest astronomical tide, from Double Island Point in the north to Redcliffe in the south.

- [3] On 17 April 2019 the Registrar of the Federal Court of Australia (Court) gave a copy of the amended application to the Native Title Registrar (Registrar) of the Tribunal pursuant to s 64(4). The granting of leave by the Court to amend the application was not made pursuant to s 87A, and so the circumstance described in s 190A(1A) does not arise. The amendments to the application are greater than the changes prescribed by s 190A(6A), so that provision does not apply. Therefore, in accordance with s 190A(6), I must accept the claim for registration if it satisfies all the conditions in ss 190B–190C.

### Information considered

- [4] I have considered the information in the application and the additional information provided by the applicant, as outlined below.<sup>3</sup>
- [5] I have considered information contained in a geospatial assessment and overlap analysis of the area covered by the application prepared by the Tribunal’s Geospatial Services dated 29 April 2019 (geospatial report) and information available through Geospatial Services in relation to locations mentioned in the application.<sup>4</sup>
- [6] There is no information before me obtained as a result of any searches conducted by the Registrar of state or Commonwealth interest registers,<sup>5</sup> and the Queensland government (state government) has not supplied any information as to whether the registration test conditions are satisfied in relation to this claim.<sup>6</sup>

### Procedural fairness

- [7] On 24 April 2019 a senior officer of the Tribunal (senior officer) wrote to the relevant minister of the state government advising that I would be considering the information in the application in my decision, and should the state government wish to supply any information or make any submissions, it should do so by 3 May 2019. On 26 April 2019 a representative of the state government advised that no submissions would be made by the state.
- [8] On 29 April 2019 the representative of the applicant advised the senior officer that the applicant did not intend to provide any additional information for my consideration.
- [9] On 27 May 2019 the senior officer wrote to representative of the applicant to advise that it was my preliminary view that the certification of this application may be affected by the Full Court's decision in *Quall*, and invited the applicant to make submissions in that regard.
- [10] On 13 June 2019 the senior officer received a letter from the applicant submitting that the application could meet the requirements of s 190C(4)(b), based upon the information enclosed with that letter (additional material), being:
- (a) Sealed copy of the Applicant’s outline of submissions filed 29 March 2019 (applicant’s submissions); and

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<sup>3</sup> Section 190A(3)(a).

<sup>4</sup> Section 190A(3)(c).

<sup>5</sup> Section 190A(3)(b).

<sup>6</sup> Section 190A(3)(c).

(b) Sealed copy of the Affidavit of Anna Penelope Retke filed 26 February 2019 (solicitor's affidavit).

[11] On 17 June 2019 the senior officer wrote to the representative of the applicant to confirm the additional material had been received and requested that the applicant advise whether or not confidentiality was asserted over any of the additional material. The applicant's representative advised that the applicant did not assert confidentiality over the additional material.

[12] Consequently, also on 17 June 2019 the senior officer wrote to the representative of the state government advising the applicant had provided the additional material for my consideration, and should the state wish to comment on that material, to do so by 24 June 2019. No response was received from the state government.

[13] This concluded the procedural fairness process.

## Section 190C: conditions about procedures and other matters

### **Information etc. required by ss 61–2 – s 190C(2): condition met**

[14] To meet s 190C(2), the Registrar must be satisfied the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61–2. I am not required to undertake a merit assessment of the material at this condition.<sup>7</sup> I have not addressed s 61(5) as I consider the matters covered by that condition are matters for the Court.

[15] The application contains the details specified in s 61:

Section	Details	Information	Result
s 61(1)	Native title claim group have authorised the applicant	Part A, Schedule A, affidavits filed with application	Met
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Schedule A	Met

[16] The application contains the information specified in s 62:

Section	Details	Information	Result
s 62(1)(a)	Affidavits in prescribed form	Affidavits filed with application	Met
s 62(2)(a)	Information about the boundaries of the area	Schedule B; Attachment B	Met
s 62(2)(b)	Map of external boundaries of the area	Attachment C	Met
s 62(2)(c)	Searches	Schedule D	Met
s 62(2)(d)	Description of native title rights and interests	Schedule E	Met
s 62(2)(e)	Description of factual basis	Schedule F	Met
s 62(2)(f)	Activities	Schedule G	Met
s 62(2)(g)	Other applications	Schedule H	Met

<sup>7</sup> *Doepel* [16], [35]–[39].

Section	Details	Information	Result
s 62(2)(ga)	Notices under s 24MD(6B)(c)	Schedule HA	Met
s 62(2)(h)	Notices under s 29	Schedule I	Met

## No previous overlapping claim group – s 190C(3): condition met

[17] To meet s 190C(3), the Registrar ‘must be satisfied that no person included in the native title claim group for the application (the **current application**) was a member of a native title claim group for any previous application’.<sup>8</sup> To be a ‘previous application’:

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

[18] The geospatial report states and my own searches confirm there are no applications which overlap the current application, as required by s 190C(3)(a). Therefore, there are no applications which meet the definition of a ‘previous application’ under s 190C(3). This means that the issue of common claimants does not arise and s 190C(3) is met.

## Identity of claimed native title holders – s 190C(4): condition met

[19] To meet s 190C(4), the Registrar must be satisfied:

- (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part; 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.

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

[20] If the application purports to be certified, I must be satisfied:

- (a) the certificate identifies the relevant representative body;
- (b) the representative body has the power under Part 11 to issue the certification; and
- (c) the certificate satisfies the requirements of s 203BE(4).<sup>9</sup>

### ***Is the relevant representative body identified?***

[21] The certificate at Attachment R states it is provided by Queensland South Native Title Services (QSNTS). It is dated 26 February 2019 and signed by the Chief Executive Officer. The certificate states the certification is made in accordance with s 203BE and s 203FEA of the Native Title Act. The geospatial report states QSNTS is the only representative body for the whole of the

<sup>8</sup> Emphasis in original.

<sup>9</sup> *Doepel* [80]–[81].

area covered by the application. I have verified this information against current data in the national map of Representative Aboriginal and Torres Strait Island Body areas. That map shows QSNTS to be the recognised representative body for the area covering the application area, pursuant to s 203FE(1). I am therefore satisfied that the certificate identifies the relevant representative body. I have addressed the issue of the Chief Executive Officer signing the certification, in light of the *Quall* decision, separately below.

***Does the representative body have the power to issue the certification?***

[22] The certificate states QSNTS is funded to perform the functions of a representative body pursuant to s 203FE. This means QSNTS can perform all of the functions listed in Part 11, including, relevantly, the certification functions in s 203BE.

***Does the certificate satisfy the requirements of s 203BE(4)?***

[23] Section 203BE(4) provides that:

A certification of an application for a determination of native title by a representative body must:

- (a) include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs (2)(a) and (b) have been met; and
- (b) briefly set out the body's reasons for being of that opinion; and
- (c) where applicable, briefly set out what the representative body has done to meet the requirements of subsection (3).

***Section 203BE(4)(a) – statements***

[24] Section 203BE(4)(a) requires a representative body to state that it is of the opinion that the requirements of ss 203BE(2)(a)–(b) have been met.

[25] Section 203BE(2)(a) prohibits a representative body from certifying an application unless it is of the opinion that all persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it.

[26] Section 203BE(2)(b) prohibits a representative body from certifying an application unless it is of the opinion that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

[27] As the certificate contains these required statements at paragraphs 2–3, I am satisfied s 203BE(4)(a) is met.

***Section 203BE(4)(b) – reasons***

[28] Section 203BE(4)(b) requires the representative body to briefly set out the reasons for its opinion that ss 203BE(2)(a)–(b) are met.

[29] The certificate sets out QSNTS's reasons for its opinion that ss 203BE(2)(a)–(b) are met at paragraph 4, which sets out that:

- (a) An information session was held on 15 December 2018;
- (b) An authorisation meeting was held on 16 December 2018;
- (c) Both the information session and authorisation meeting were advertised in the *Sunshine Coast Daily* on 23 November 2018 and in *The Koori Mail* on 28 November 2018;

- (d) Consultation with those people who might be affected by the authorisation meeting was conducted prior to the meetings being publicly notified;
- (e) QSNTS mailed notices to 221 members of the native title claim group and made telephone contact with 113 members;
- (f) The authorisation meeting on 16 December 2018 was well attended and the applicant was authorised by an agreed and adopted decision-making process, with records of attendance, meeting procedures and outcomes taken and kept by QSNTS staff.

[30] As the certificate sets out the reasons for QSNTS's opinion that ss 203BE(2)(a)–(b) are met, I am satisfied s 203BE(4)(b) is met.

*Section 203BE(4)(c) – overlapping applications*

[31] Section 203BE(4)(c) requires a representative body to set out, where applicable, what it has done to meet the requirements of s 203BE(3).

[32] Section 203BE(3) states that if the land or waters covered by the application are wholly or partly covered by one or more applications (including proposed applications) of which the representative body is aware, the representative body must make all reasonable efforts to:

- (a) achieve agreement, relating to native title over the land or waters, between the persons in respect of whom the applications are, or would be, made; and
- (b) minimise the number of applications over the land or waters.

[33] Section 203BE(3) also states that a failure by the representative body to comply with this requirement does not invalidate a certification. As there are no overlapping applications, I am satisfied s 203BE(3) and subsequently s 203BE(4)(c) are not applicable to this application.

## Implications of the *Quall* decision

[34] As the certificate identifies the relevant representative body, the representative body has the power under Part 11 to issue the certification, and the certificate meets the applicable requirements of s 203BE(4), the certificate likely meets the requirements of s 190C(4)(a). However, the Full Court in *Quall* considered the certification of applications for registration of indigenous land use agreements (ILUAs) and held that representative bodies cannot delegate or otherwise outsource the performance of their certification functions under s 203BE(1)(b).<sup>10</sup> The Full Court found:

The proper discharge of the certification functions under s 203BE(1)(b) requires the [representative body] itself to hold and state the requisite opinion...The [representative body] will need to follow its established processes for passing resolutions, including any relevant governance and procedural requirements which apply to the conduct of [their] meetings, including such matters as the provision of notice, quorum requirements and the number of votes required for a resolution to be passed.<sup>11</sup>

[35] In my view, and in the absence of any judicial guidance to the contrary at the time of making this decision, it stands to reason that the Full Court's findings in relation to the certification of ILUAs under s 203BE(1)(b) may apply equally to the certification of claims under s 203BE(1)(a). Therefore, I wrote to the applicant's representative to note the possible implications of *Quall* on the certification of this claim and the applicant has requested that I instead consider the

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<sup>10</sup> *Quall* [136].

<sup>11</sup> *Quall* [137].

application against the requirements of s 190C(4)(b), and has provided additional material for that purpose.

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

[36] Section 190C(4)(b) requires two issues to be addressed:

- (a) that the applicant be a member of the native title claim group; and
- (b) that the applicant 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.

[37] Section 190C(5) states that if the application has not been certified under 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) 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.

[38] Therefore, in order to satisfy s 190C(4)(b), an application must also satisfy s 190C(5).

#### ***Does the application satisfy s 190C(5)?***

[39] The affidavits which accompany the application set out that each member of the applicant is a member of the claim group. Each affidavit then summarises the details of the authorisation meeting held on 16 December 2018 at Nambour, including the public notices of that meeting, the decision-making process adopted by the claim group and the resolution authorising the members of the applicant to make the application. Paragraph 20 of each of the affidavits states that members of the applicant, 'who are all members of the Claim Group were authorised by all of the persons in the Claim Group to make the Application and to deal with all matters arising under the NTA in relation to it'.

[40] Part A(2) of the application also states that the applicant was authorised by all members of the claim group at an authorisation meeting held at Nambour on 16 December 2018.

[41] I consider the information in paragraph 20 of the affidavits is a statement to the effect that the requirements of s 190C(4)(b) have been met, sufficient for the purposes of s 190C(5)(a). I note French J's comment that the insertion of the word 'briefly' in s 190C(5)(b) 'suggests that the legislature was not concerned to require any detailed explanation of the process by which authorisation is obtained.'<sup>12</sup> I therefore consider the information in the affidavits and Part A(2) is sufficient for the purposes of s 190C(5)(b). This means s 190C(5) is met.

#### ***Does the application meet s 190C(4)(b)?***

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

[42] The first component of s 190C(4)(b) requires that all the persons comprising the applicant must be members of the claim group.

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<sup>12</sup> Strickland [57].

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

*Is the applicant authorised to make the application by all the other persons in the native title claim group?*

[44] In order to determine whether the applicant is authorised to make the application, it is necessary to identify the decision-making process utilised by the claim group. Section 251B identifies two distinct decision-making processes by which an applicant can be authorised: a process which is mandated by traditional laws and customs, or one which has been agreed to and adopted by the native title claim group. Where a process of decision-making exists under the traditional laws and customs of the claim group, s 251B(1) mandates that process 'must' be used.

[45] Section 190C(4)(b) also requires information to show that the claim group have authorised the applicant such that I can be satisfied of the 'fact of authorisation'.<sup>13</sup> At s 190C(4)(b) I am able to consider information outside the application and I have summarised the information before me which I consider is relevant to this condition below.<sup>14</sup>

#### **Decision-making process**

[46] I have examined the information in the application and the additional material provided by the applicant, as explained at the beginning of these reasons. The affidavits which accompany the application, the applicant's submissions and solicitor's affidavit all provide the same information about the decision-making process used to authorise the applicant, which is summarised in the affidavits as follows:

10. ...the members of the Claim Group present, resolved that the process agreed to and adopted by the Claim Group for voting on all motions (including authorising the Applicant) would be as follows:

- (a) Only people who are members of the Kabi Kabi Claim Group and who are in attendance at the meeting and aged 18 years and over are entitled to vote.
- (b) Voting will be by show of hands with a majority of 50% + 1 persons voting determining whether or not the motion is carried.

11. The members of the Claim Group present at [the authorisation meeting] confirmed, by resolution, that there is no decision making process under traditional law and custom that the Claim Group must use for making decisions of the kind to be made at the meeting in relation to the claim.

[47] The applicant's submissions refer me to Logan J's summary in *Fesl* which distilled a number of authorities concerning s 251B, including *Lawson*, *Harrington-Smith* and *Noble*, as follows:

- a. the effect of s 251B is to give the word 'all' in, materially, the table which appears [in] s 61(1) a more limited meaning that it might otherwise have;
- b. in those cases where there is no traditional decision-making process, s 251B does not mandate any one particular decision-making process, only that it be one that is agreed to and adopted by the persons in the native title claim group or compensation group;

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<sup>13</sup> *Doepel* [78].

<sup>14</sup> *Strickland* [57], approved in *Strickland FC* [78].

- c. 'agreed to and adopted by' imports the giving to all those whose whereabouts are known and have capacity to authorise a reasonable opportunity to participate in the adoption of a particular process and the making of decisions pursuant to that process;
- d. unanimous decision-making is not mandated;
- e. agreement to a particular process may be proved by the conduct of the parties even in the absence of a formal agreement.<sup>15</sup>

#### **Notice of authorisation meeting**

[48] Annexed to the solicitor's affidavit are copies of the public notice of the authorisation meeting in the *Sunshine Coast Daily* on 23 November 2018 and *The Koori Mail* on 28 November 2018. The public notices set out three events to be held at Nambour PCYC:

1. An information session on 15 December 2018;
2. Authorisation Meeting #1 on 16 December 2018; and
3. Authorisation Meeting #2 also on 16 December 2018.

[49] The public notices explain that the purpose of the information session is 'to ensure that informed decisions can be made at the Authorisation Meetings'.

[50] With regard to Authorisation Meeting #1, the public notices invite the members of the Kabi Kabi Traditional Owners claim group, and a description of the then current claim group is included in the notice. The public notices explain that the purpose of Authorisation Meeting #1 was to amend the claim group description by removing five apical ancestors and adding one additional apical ancestor. The relevant ancestors are listed separately in the notice. It is also explained in the notices that the descendants of the additional apical ancestor, Towcha, will not be able to vote at Authorisation Meeting #1, as they will not be included in the claim group until the existing group has voted to amend the description.

[51] With regard to Authorisation Meeting #2, the public notices invite the members of the 'newly described' claim group, which is set out in the notice. The newly described claim group includes the descendants of Towcha but does not include the descendants of the five apical ancestors proposed to be removed from the description at Authorisation Meeting #1. This new description is consistent with the claim group description which appears in Schedule A of the application before me. The public notices explain that Authorisation Meeting #2 will proceed if the new claim group description is authorised at Authorisation Meeting #1. The purpose of Authorisation Meeting #2 is stated in the notices as being to:

1. Authorise the applicant in accordance with section 66B of the Native Title Act;
2. Authorise the applicant to make an application under s 66B to replace the current applicant; and
3. To consider amendments to the Terms and Conditions of Appointment of the Applicant.

[52] In addition to the time, date and location and purpose of the three events, the public notices also include a map of the claim area with various locations labelled, including Childers and Maryborough in the north, Kilkivan and Gympie in the centre, Caboolture in the south, and

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<sup>15</sup> Applicant's submissions [21].

Redcliffe, Bribie Island, Noosa Heads and Double Island Point along the coast of the claim area. A freecall number is also included for enquiries.

- [53] The solicitor's affidavit deposes that notice of the information session and meetings was also given in the following ways by QSNTS:
1. Letter to 210 members of the then current Kabi Kabi claim group, sent on 23 November 2018;
  2. Letter to the descendants of apical ancestor Towcha modified to acknowledge the descendants of Towcha were not members of the Kabi Kabi claim group (at that time), also sent on 23 November 2018;
  3. Phone calls to 113 members of the then current Kabi Kabi claim group between 27 November 2018 and 11 December 2018;
  4. SMS messages to 77 members of the then current Kabi Kabi claim group on 12 December 2018.
- [54] Copies of the letters described above are annexed to the solicitor's affidavit and set out the same information as is included in the public notices, and adds further explanation as to the need for the two meetings, stating '[u]nder the *Native Title Act 1993* (Cth) any change to the composition of the claim group will trigger the need to authorise a new applicant'.
- [55] Also annexed to the solicitor's affidavit is a list of the people telephoned by QSNTS about the authorisation meetings which records whether each person was 'contacted' or a 'message left'. A further annexure lists the people to whom QSNTS sent SMS messages and records the status of each message as 'DELIVRD'.

#### **Conduct of authorisation meeting**

- [56] Annexed to the solicitor's affidavit are the attendance sheets for the information meeting and both the authorisation meetings. According to those sheets, 55 people attended Authorisation Meeting #1 and 52 people attended Authorisation Meeting #2.
- [57] The solicitor's affidavit records the resolutions passed at both authorisation meetings, including the names of the people who moved and seconded the motions, whether each was passed by majority or unanimously, and whether there were any abstentions. A resolution was passed at Authorisation Meeting #1 to amend the claim group description as was set out in the public notices, with the amended claim group thereafter described as the 'newly described claim group'. The resolution confirming the decision-making process, as outlined above, the resolution at Authorisation Meeting #2 to remove the authority from the then current applicant, and the resolution to authorise the replacement applicant to make the application are most relevant to my task at s 190C(4)(b).
- [58] The then current applicant was resolved to be no longer authorised in Resolution 5 of Authorisation Meeting #2. I note that resolution was passed unanimously.
- [59] The solicitor's affidavit deposes that a proposed resolution to replace the then current applicant was displayed at the meeting using PowerPoint and there was then a discussion and consensus reached that the replacement applicant would be comprised of seven members of the newly described claim group. Eight people nominated for the seven positions and so a

secret ballot was conducted to reduce the list to seven persons. The solicitor's affidavit deposes that '[m]embers of the Newly Described Claim Group cast their vote by writing up to a maximum of seven names on the voting slip and placing the voting slip into one of the two ballot boxes'. The deponent and another person 'tallied the votes with the members of the Claim Group observing the vote count.'<sup>16</sup>

[60] The solicitor's affidavit records that Resolution 6: Authorisation of the replacement applicant was then passed unanimously. That resolution states:

That this meeting authorises the following members of the Claim Group as the Applicant:

- (a) to replace the Current Applicant; and
- (b) to make the Application under section 66B of the *Native Title Act 1993 (Cth)* ("NTA") to replace the current Applicant.

And

From the date of this meeting, the Applicant is authorised, subject to the terms and conditions of appointment agreed to and adopted by the meeting, to deal with all matters arising in relation to the Application including making the application under section 64 of the NTA to amend the Kabi Kabi First Nation Traditional Owners claim group description in accordance with the amendments authorised at Authorisation Meeting #1.

1. Brian Warner
2. Helena Gulash
3. Norman Bond
4. Mick Douglas
5. Kerry Jones
6. Melissa Bond
7. Cecilia Combo

[61] I note the individuals which comprise the replacement applicant are the same as those persons named as the applicant in the application before me.

#### *Consideration*

[62] I note the applicant's submissions and solicitor's affidavit were filed in the Court for the purposes of a s 66B application to replace the applicant, and that the Court has accepted that application. In my view, this does not relieve me of the requirement to consider whether the applicant is authorised to make the application under s 190C(4)(b). I do consider however, that the fact that the Court has accepted the s 66B application carries considerable weight. I also note the state government has not made any submissions as to the authorisation of the applicant, either in light of the *Quall* decision or generally.

[63] With regard to the decision-making process, I note the resolutions at both Authorisation Meeting #1 and #2 all appear to have been passed in accordance with the decision-making process agreed to and adopted by the claim group at Authorisation Meeting #1, and this process is further confirmed in the affidavits of the members of the applicant. I note the other relevant resolution, described above, confirming there is no traditional decision-making process which must be used by the claim group. In my view, the material before me is clear

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<sup>16</sup> Solicitor's affidavit [28].

and consistent about the decision-making process agreed to and adopted by the claim group and accords with s 251B(b).

[64] I note in particular the applicant's submission that "agreed to and adopted by" imports the giving to all those whose whereabouts are known and have capacity to authorise a reasonable opportunity to participate in the adoption of a particular process and the making of decisions pursuant to that process'.<sup>17</sup> I consider the notice of the authorisation meetings provided such a 'reasonable opportunity': the notices advise when and where the meetings would take place, thus allowing the claim group members to choose whether to attend and participate. The notices are also clear about why the authorisation meetings were convened, and that notice was given in a variety of formats – in newspapers, by letter, phone call and SMS message. As the public and personal notices occurred on 23 November 2018, the members of the claim group received at least two to three weeks' notice of the authorisation meetings on 16 December 2018. The public notices state that the meeting is for the 'Kabi Kabi First Nation Traditional Owners' and includes the description of the claim group with reference to the apical ancestors. I also consider the public and private notices appropriately summarise the agenda for the authorisation meetings.

[65] Finally, I consider the solicitor's affidavit provides detailed information about who attended each of the authorisation meetings and describes in sufficient level of detail the conduct of those meetings, including the resolutions passed and whether they were passed unanimously or by majority. Incidents of abstention from voting on particular resolutions are also recorded. The solicitor's affidavit also deposes that two QSNTS paralegal officers recorded the outcomes of both authorisation meetings.<sup>18</sup>

[66] I note O'Loughlin J's theoretical questions about the meeting at which the applicant was authorised in the circumstances of the case of *Ward v Northern Territory*, the substance of which His Honour held must be addressed:

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?<sup>19</sup>

[67] In my view, there is sufficient information to address the substance of those questions, such that I can be satisfied of the 'fact of authorisation'.<sup>20</sup> It follows that I am satisfied that the applicant 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.

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<sup>17</sup> Applicant's submissions [21].

<sup>18</sup> Solicitor's affidavit [5].

<sup>19</sup> *Ward v Northern Territory* [25]–[26].

<sup>20</sup> *Doepel* [78].

## Conclusion

[68] As I consider the requirements of s 190C(5) are met, and that all the components of s 190C(4)(b) are met, including that the material addresses s 251B(b), I am satisfied s 190C(4) is met.

## Section 190B: conditions about merits of the claim

### **Identification of area subject to native title – s 190B(2): condition met**

[69] To meet s 190B(2), the Registrar must be satisfied the information and map contained in the application are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

[70] I understand the questions for this condition are whether the information and map provide certainty about:

- (a) the external boundary of the area where native title rights and interests are claimed; and
- (b) any areas within the external boundary over which no claim is made.<sup>21</sup>

### **Does the information about the external boundary meet this condition?**

[71] Schedule B refers to Attachment B, which describes the application area in metes and bounds, referencing rivers and creeks, roads, Mount Bauple, the Lowest Astronomical Tide, the High Water Mark, Mary River Basin Catchment, surrounding native title determinations, lot on plan, easements, local government boundaries and coordinate points identified by longitude and latitude to six (6) decimal places.<sup>22</sup>

[72] Schedule C refers to Attachment C, which contains a colour copy of a map titled 'QUD280/2013 Kabi Kabi First Nation (Combined) Native Title Determination Application' prepared by QSNTS. It is dated 10 September 2018 and includes:

1. The application area depicted by bold blue outline with blue stipple fill;
2. Lot 509 on NPW594 labelled;
3. A Commencement Point;
4. Topographic basemap showing roads, watercourses and placenames;
5. Scalebar, coordinate grid, north point and map legend; and
6. Notes relating to the source, currency and datum of data used to prepare the map.

[73] The assessment in the geospatial report is that the map and description are consistent and identify the application area with reasonable certainty. I have considered the map and description and I agree with that assessment.

### **Does the information about excluded areas meet this condition?**

[74] Schedule B lists general exclusions including areas which are subject to freehold estates, various types of leases, and areas where native title has been validly extinguished.

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<sup>21</sup> *Doepel* [122].

<sup>22</sup> Geocentric Datum of Australia 1994.

[75] Attachment B specifically excludes any lands or waters within the external boundaries subject to:

- QUD6128/1998 Jinibara People as determined by the Federal Court 20 November 2012.
- QUD288/2009 - Butchulla Land & Sea Claim #2 as accepted for registration 11 February 2105.
- QUD91/2012 - Wakka Wakka People 4 as accepted for registration 19 July 2016.
- QUD621/2011 - Wakka Wakka People #3 as accepted for registration 2 June 2016.
- QUD6196/1998, QUD586/2011 - Yugara/YUgarapul [sic] People and Turrbal People as determined by the Federal Court 16 March 2015.

[76] I note French J's comment regarding s 190B(2): 'it is unrealistic to expect a concluded definition of the areas subject to these provisions to be given in the application. Their applicability to any area will require findings of fact and law to be made as part of the hearing of the application'.<sup>23</sup> Following this reasoning, I am satisfied the description of the excluded areas will be sufficient to ascertain any such areas at the appropriate time.

## Conclusion

[77] As I consider that both the external boundary and the excluded areas of the application can be identified from the map and description with reasonable certainty, I am satisfied that s 190B(2) is met.

## Identification of the native title claim group – s 190B(3): condition met

[78] To meet s 190B(3), the Registrar must be satisfied that:

- (a) the persons in the native title claim group are named in the application; or
- (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[79] I understand I am not required to do more than make 'an assessment of the sufficiency of the description of the group for the purpose of facilitating the identification of any person as part of the group' at this condition.<sup>24</sup>

[80] Schedule A states:

The Kabi Kabi First Nation Traditional Owners are those people:

- (a) Who are descendants of the following apical ancestors: [list of 20 people]

And

- (b) Who identify as and are recognised as members of the Kabi Kabi First Nation Traditional Owners in accordance with the system of traditional laws and customs.

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

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<sup>23</sup> *Strickland* [55].

<sup>24</sup> *Wakaman* [34].

## Is the description sufficient to ascertain the members of the claim group?

[82] From the above description, I understand an individual is a member the native title claim group by virtue of being a descendant of one of the named apical ancestors, self-identification as a Kabi Kabi person and recognition by the claim group in accordance with their traditional laws and customs.

### ***Descent***

[83] The Court has previously held that describing a claim group with reference to descent from named ancestors satisfies the requirements of s 190B(3)(b).<sup>25</sup> I consider that requiring a person to show descent from an identified ancestor provides a clear starting point to commence an inquiry about whether a person is a member of the claim group. I consider that factual enquiries would lead to the identification of the people who meet this criterion.

[84] I note that the description does not specify whether ‘descendants’ is limited to biological descendants or includes descendants by adoption. I note that it is open to me to read Schedule A as a whole, and that the description in Schedule A refers to the traditional laws and customs of the claim group, which are further outlined in Schedule F and Attachment F to the application. I consider it is by that ‘set of rules or principles’ that it can be ascertained whether or not the claim group includes descendants by adoption.<sup>26</sup> In reaching this view I have also considered the judicial guidance that is appropriate to construe the requirements of the Native Title Act beneficially.<sup>27</sup>

### ***Identification and recognition***

[85] The second criterion in paragraph (b) has two limbs. The first limb requires an individual to ‘identify’ as a member of the native title claim group. I consider this can be ascertained by making enquiries of the individual in question.

[86] The second limb requires a person be ‘recognised’ as a member of the group ‘in accordance with the system of traditional laws and customs’. I note the Court has previously held that membership of a native title claim group must be based on group acceptance, that being inherent in the nature of a society.<sup>28</sup> I note in particular that the Full Court’s comments in *Sampi FC*, that ‘in determining whether a group constitutes a society in the *Yorta Yorta* sense is the internal view of the members of the group – the emic view. The unity among members of the group required by *Yorta Yorta* means that they must identify as people who are bound by the one set of laws and customs or normative system’.<sup>29</sup> Schedule F asserts that the claim group’s rights to the claim area are in accordance with traditional laws and customs, which the claim group continues to acknowledge and observe. I therefore consider it is with reference to those laws and customs that the people who meet the requirements of the second limb of paragraph (b) would need to be ‘recognised’ as members of the claim group by other Kabi Kabi people.

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<sup>25</sup> *WA v NTR* [67].

<sup>26</sup> *Ward v Registrar* [25].

<sup>27</sup> *Strickland* [55].

<sup>28</sup> *Aplin* [260]; *Yorta Yorta* [108].

<sup>29</sup> *Sampi FC* [45].

## Conclusion

[87] I am satisfied the application describes the persons in the native title claim group sufficiently clearly such that it can be ascertained whether any particular person is a member of the group as required by s 190B(3)(b). This means s 190B(3) is met.

## Identification of claimed native title – s 190B(4): condition met

[88] To meet s 190B(4), the Registrar must be satisfied the description contained in the application is sufficient to allow the claimed native title rights and interests to be identified. I have not considered whether the rights and interests claimed can be considered ‘native title rights and interests’ in accordance with s 223 as I consider that is part of the task at s 190B(6), where I must decide whether each of the claimed rights is established on a prima facie basis.

[89] I understand it is open to me to read Schedule E ‘as a whole’ so there is ‘no inherent or explicit contradiction’.<sup>30</sup>

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

[90] Schedule E requires applicants to provide a description of the native title rights and interests claimed. It states that the group claims:

The non-exclusive rights to:

- a. access, be present on, move about on and travel over area;
- b. camp on the area, and for that purpose, erect temporary shelters on the area;
- c. hunt, fish and gather on the land and waters of the area for personal, domestic and non-commercial communal purposes;
- d. take, use and share Natural Resources from the land and waters of the area for personal, domestic and non-commercial communal purposes;
- e. take and use the Water of the area for personal, domestic and non-commercial communal purposes;
- f. participate in cultural activities on the area;
- g. hold meetings on the area;
- h. 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;
- i. teach on the area the physical and spiritual attributes of the area;
- j. light fires on the area for domestic purposes including cooking, but not for the purpose of hunting or clearing vegetation;
- k. be buried and bury native title holders within the area.

[91] I therefore understand that only ‘non-exclusive’ rights are claimed, which are not to the exclusion of all others. In my view, there is no contradiction between any of the rights claimed.

## Conclusion

[92] I am satisfied the description is sufficient to understand and identify all the claimed rights and interests, which means s 190B(4) is met.

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<sup>30</sup> *Doepel* [92], [123].

## Factual basis for claimed native title – s 190B(5): condition met

[93] To meet s 190B(5), the Registrar must be satisfied there is sufficient factual basis to support the assertion that the claimed native title rights and interests exist. 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 native title rights and interests; and
- (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[94] I understand my task is to assess whether the asserted facts can support the existence of the claimed native title rights and interests, rather than determine whether there is ‘evidence that proves directly or by inference the facts necessary to establish the claim’.<sup>31</sup>

### What is required to meet s 190B(5)(a)?

[95] To meet s 190B(5)(a) the factual basis must be sufficient to show:

- (a) the claim group presently has an association with the area, and the claim group’s predecessors have had an association with the area since sovereignty or European settlement;<sup>32</sup>
- (b) there is ‘an association between the whole group and the area’, although not ‘all members must have such association at all times’;<sup>33</sup> and
- (c) there is an association with the entire area claimed, rather than an association with only part of it or ‘very broad statements’, which have no ‘geographical particularity’.<sup>34</sup>

### ***What information has been provided in support of the assertion at s 190B(5)(a)?***

[96] Schedule F refers to Attachment F, which has as its first heading ‘Association of the Kabi Kabi First Nation Native Title Claim Group with the application area’. Under that heading it is asserted that the Kabi Kabi First Nation Traditional Owners have, and their predecessors had, an association with the claim area.<sup>35</sup>

#### *Association of the predecessors of the claim group with the claim area*

[97] Within Attachment F there is a summary of each of the named apical ancestors from Schedule A. That summary states that the apical ancestors and their immediate descendants are recorded as being of the Kabi Kabi language group, and associated with locations in and around the claim area including Gympie, Yandina, Bribie Island, Mooloolah, Buderim

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<sup>31</sup> *Doepel* [16]–[17]; *Gudjala 2008* [83], [92].

<sup>32</sup> *Gudjala 2007* [52].

<sup>33</sup> *Ibid.*

<sup>34</sup> *Martin* [26]; *Corunna* [39], [45].

<sup>35</sup> Attachment F [1].

Mountain, the Maroochy River, Kenilworth, Tiaro, Kilkivan, Nambour and Childers.<sup>36</sup> It is recorded that several apical ancestors are buried at specified locations within the claim area.<sup>37</sup>

- [98] Attachment F also includes a table of ‘Laws and Customs’ with two columns: ‘At sovereignty – mid-20<sup>th</sup> Century’ and ‘Mid-20<sup>th</sup> Century to Present Day’. Within that table there are numerous examples of the association of the native title claim group’s predecessors with the claim area. For example, in relation to the presence of the predecessors around the time of sovereignty:

Mathews’ (1898a: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.”<sup>38</sup>

- [99] Claim group members recall their parents and grandparents living in and around the claim area and teaching them about Kabi Kabi country. One claimant recalls his grandparents as identifying as Kabi Kabi / Gubbi Gubbi and states that:

Mum told us about the Kabi Kabi boundaries running 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’Acquilar Range to North Pine River, our northern boundary with the Turrbal and through to Redcliffe. I learnt this from my mother and uncle ...<sup>39</sup>

- [100] Another claimant recalls:

Where the Maroochy River mouth is, I was always told that there is sacred clay which is pure white and that it is a resting place for the Rainbow Serpent. I remember diving in an getting this clay [sic]. Everyone remembers when I came out of the water I was covered in white clay. My sons ... were there. ... Everyone wanted to have that same glow about them. I was told about that site by Nana ... when she used to sit down on the coffee rock.<sup>40</sup>

- [101] Attachment F includes another table, titled ‘Table 2: Comparative table of instances of the exercise of native title rights and interests for the periods “At Sovereignty to the Mid-20<sup>th</sup> Century” and “Mid-20<sup>th</sup> Century to the Present”’. Table 2 states that:

- (a) Aboriginal movement between the hinterland and the coast during the period 5500 and 2300 years ago is evident from tool fragments in coastal campsites in the Cooloola region. I note Cooloola is located in the north east of the claim area.
- (b) Local aboriginal guides led missionaries, explorers and timbergetters along major pathways in and around the claim area into the late 19<sup>th</sup> century. In the 1840s the German mission was established and Europeans in Maryborough acknowledged Aboriginal navigational expertise. I note Maryborough is also in the north east of the claim area.

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<sup>36</sup> Ibid 23–27.

<sup>37</sup> Ibid 24–26.

<sup>38</sup> Ibid 29. Both ‘Mathew’ and ‘Mathews’ are referred to in Attachment F. I understand ‘Mathew’ to be a typographical error and both spellings are used to refer to Robert Hamilton Mathews. I have therefore used ‘Mathews’ in these reasons.

<sup>39</sup> Ibid 34–35.

<sup>40</sup> Ibid 73.

- (c) Official records, including marriage and death records, confirm that Aboriginal people continued to be present in the claim area after the implementation of the 'removals' policy at the turn of the 20<sup>th</sup> century, through employment on the claim area, 'continual absconders' and many families who were 'exempted'.<sup>41</sup>

*Association of the current claim group with the claim area*

[102] Table 2 also includes a summary of the association that a number of current claim group members have with the claim area, describing in detail the parts of the claim area where they grew up, fished, collected bunya nuts, hunted, got married, camped and built gunyahs.<sup>42</sup> For example, one claim group member states:

- (a) She is a descendant of apical ancestor Maggie Cadenti.
- (b) Her mum told her which part of Kabi Kabi country particular people and families came from.
- (c) Her family would often go fishing at Bribie Island and also around the Gympie area, and gather bunya nuts round the Kenilworth/Maleny area.
- (d) The men of her family go hunting for porcupine around Kenilworth.
- (e) Her sister takes the kids down to the creek and talks about the significance of a rare frog, lungfish and other fish for Kabi Kabi people.<sup>43</sup>

[103] Another claimant states:

- (a) He is a descendant of apical ancestor Annie Laurie;
- (b) He travels from Mudjimba to the north point of the Maroochy River to fish for whiting.
- (c) He also goes to 'the back country' of Kilkivan, Tiaro and Gundiah where he hunts for kangaroo, possum and freshwater eel, amongst other things.
- (d) He has taken his children, nephews, nieces and grandchildren camping to 'significant saltwater and fresh water places' that he himself was taken to by his elders.<sup>44</sup>

[104] Another claimant states:

- (a) She is a descendant of apical ancestor Jacky Baul.
- (b) She walked across the country with her mother, who taught her about different places including Bli Bli and Mapleton (in the south) through to Maryborough and Torquay (Hervey Bay) (in the north).
- (c) She travels to the Bunya Festival at the Bunya Mountains, camping on river banks along the way and collecting bunya nuts to make soup. 'People from all over' would attend the Bunya festival to get married or be promised.<sup>45</sup>

[105] I note the references and descriptions of current claim group members to places in and around the claim area on all sides, including Bribie Island, Buderim Mountain, Old Woman

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<sup>41</sup> Ibid 79.

<sup>42</sup> Ibid 79–98.

<sup>43</sup> Ibid 79–80.

<sup>44</sup> Ibid 81–82.

<sup>45</sup> Ibid 80.

Island, Mt Tinbeerwah, Rainbow Beach, Mary River, Agnes Vale, Biggenden, Kilkivan, Manumbar, the Glasshouse Mountains and Moreton Bay.

[106] I also note the references by claim group members to their immediate family members, their parents, siblings and children, as well as references to their broader family of grandparents, uncles, aunts and cousins.

***Is the factual basis sufficient to support the assertion at s 190B(5)(a)?***

[107] I understand that in assessing the factual basis for the purposes of s 190B(5)(a), I am not obliged to accept very broad statements which have no geographical particularity.<sup>46</sup> I do not consider this application is of that nature. In my view, the information at Attachment F describes in a sufficient level of detail the association of the claim group with the claim area, both at the time of sovereignty and since that time. I have considered whether there is information sufficient to support the requirements of s 190B(5)(a) below.

*Does the application support an association between the claim group at sovereignty and since that time?*

[108] Using information available from the Tribunal's geospatial database I can see that the locations mentioned in Attachment F are spread across the claim area. I note that the apical ancestors, the intervening generations and the current members of the claim group are all described with reference to their association with particular parts of the claim area. For example, apical ancestor Willie Kina was recorded by Tindale as belonging to the Kabi Kabi language group and being 'of the Gympie district'.<sup>47</sup> His descendants, including current claim group members, continue to camp and fish around Brooloo, in the south of the Gympie district in the claim area.<sup>48</sup>

[109] I note the application asserts that the claim group have been associated with the claim area 'since sovereignty'. I understand that the assertion of British sovereignty occurred in 1788, however settlement of the claim area occurred much later, around the early 1860s.<sup>49</sup> I note that several of the apical ancestors are recorded as being born before settlement, in the 1830s and 1840s.<sup>50</sup> In my view, the apical ancestors who were born around the time of settlement likely had the same association with the claim area as their parents and grandparents, who would have been alive around the time of sovereignty. In making this retrospective inference I have considered the judicial guidance of Lindgren J on making such inferences in *Harrington-Smith*, and of French J in *Kanak* on construing the Native Title Act beneficially.<sup>51</sup> There is also no information nor submissions before me to suggest that such an inference should not be made.

*Does the application support an association between the claim group and the area currently?*

[110] In my view, the factual basis is sufficient to support the assertion that the claim group currently has an association with the claim area. In forming this view I have considered the

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<sup>46</sup> *Martin* [25].

<sup>47</sup> Attachment F 24.

<sup>48</sup> *Ibid* 81.

<sup>49</sup> *Ibid* 24.

<sup>50</sup> *Ibid* 24–25.

<sup>51</sup> *Harrington-Smith* [294]–[296], *Kanak* [73].

information in the tables at Attachment F, which set out in detail the claimants' knowledge of and association with the claim area. Table 2 in particular describes various claimants' association with parts of the claim area, several examples of which I have summarised above. I note the information about the current claim group's association refers to the children and grandchildren of the claimants experiencing the same physical association with the claim area as their predecessors through activities such as camping, hunting and fishing.

*Does the application support an association, both past and present, with the whole area claimed?*

[111] I understand the task of the Registrar at s 190B(5)(a) is limited to assessing whether the factual basis is sufficient to support the assertion that the claim group have, and their predecessors had, an association over the whole area of the claim.<sup>52</sup> It is not a requirement that the whole of the claim group have an association at all times with the whole of the claim area.

[112] As discussed above, I can see the locations referred to lie in and around the claim area in all directions, and include references to the significant topographical features of Buderim Mountain, the Glass House Mountains, and the Mary and Gregory Rivers. In my view, the information about the association of each of the apical ancestors, and their descendants, to particular parts of the claim area supports a physical association of the claim group with the whole area claimed.

#### **Conclusion - s 190B(5)(a)**

[113] In my view, the information provided by the applicant is sufficient to support the assertion that the claim group have, and its predecessors had, an association with the claim area. This is because the material demonstrates sufficient geographical particularity to locations where claim group members and their predecessors were born, married, camped, hunted, fished and were buried. I am satisfied there is sufficient factual basis to support an assertion of a physical association of the claim group to the whole claim area, which means s 190B(5)(a) is met.

#### **What is required to meet s 190B(5)(b)?**

[114] To meet s 190B(5)(b), the factual basis must be sufficient to support an assertion that there exist *traditional laws acknowledged* by, and *traditional customs observed* by, the native title claim group that give rise to the claim to native title rights and interests. 'Native title rights and interests' is defined in s 223(1)(a) as those rights and interests 'possessed under the *traditional laws acknowledged*, and *traditional customs observed*,' by the native title holders.<sup>53</sup> Applying the approach of Dowsett J in *Gudjala 2007*, I have interpreted s 190B(5)(b) in light of the judicial consideration of the meaning of those same words in s 223(1)(a).<sup>54</sup>

[115] In *Yorta Yorta* the plurality of the High Court held that a 'traditional' law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. The High Court further held that in the context of the Native Title Act, 'traditional' also carries two other elements, namely:

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<sup>52</sup> *Corunna* [31].

<sup>53</sup> Emphasis added.

<sup>54</sup> *Gudjala 2007* [26], [62]–[66], which was not criticised by Full Court on appeal in *Gudjala 2008*.

- (a) ‘...it conveys an understanding of the *age of the traditions*: the origins of the content of the law or custom concerned are to be found in the *normative rules* of the Aboriginal and Torres Strait Islander *societies* that existed before the assertion of sovereignty by the British Crown. *It is only those normative rules that are "traditional" laws and customs*’; and
- (b) ‘the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a *continuous existence and vitality since sovereignty*. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist’.<sup>55</sup>

[116] In *Gudjala 2009*, Dowsett J provided further guidance to the Registrar in assessing the asserted factual basis, including that if descent from named ancestors is the basis of membership of the group, the factual basis must demonstrate some relationship between those ancestors and the pre-sovereignty society from which the laws and customs of the claim group are derived.<sup>56</sup>

[117] I therefore understand my assessment of the sufficiency of the factual basis under s 190B(5)(b) requires the identification of:

- (a) a society which existed at sovereignty in the claim area, the members of which were united through their observance of normative rules;
- (b) a link between the pre-sovereignty society, the apical ancestors and the claim group; and
- (c) the continued observance of normative rules through the generations down to the current claim group, such that the normative rules can be described as ‘traditional laws and customs’.

***What information has been provided in support of the assertion of a society at settlement?***

[118] Attachment F asserts:

4. The ethno-historic data regarding the laws and customs of social organisation of Aboriginal people of South East Queensland demonstrates a shared regional society extending across the geographic area between the Logan River in the south to Port Curtis in the North and west to the Condamine River.
5. This regional society shared a common set of social practices and institutions including:
  - a. a shared moiety and section system;
  - b. totemic matrilineal;
  - c. group recruitment with a loose preference for patrilineal; and
  - d. a set of overarching language identities derived from local terms for the word “No”.
6. Members of this society would have recognised cultural commonalities as a means to identify a shared way of speaking, thinking and acting such that they would have considered themselves to have laws and customs in common.
7. The local groups that make up the Kabi Kabi First Nation Traditional Owners are part of this regional society.

[119] In support of this assertion, the first table of ‘Laws and Customs’ at Attachment F summarises the information about ‘participation in a wider regional society’. This information includes a description from Petrie of a corroboree and joint initiation ceremony, at which ‘Ipswich tribes’ came together with the ‘Northern tribes’, which consisted of people from ‘Bribie, Moololah,

<sup>55</sup> *Yorta Yorta* [46]–[47], emphasis added.

<sup>56</sup> *Gudjala 2009* [40].

Maroochy, Noosa, Durundur, Kilcoy and Barambah'. These groupings are recorded as camping separately and hunting in different areas during the ceremony.<sup>57</sup>

[120] As quoted above in my consideration of s 190B(5)(a), Mathews in 1898 described the regional society or 'nation' extending from the upper Clarence River to Port Curtis, including the claim area, as 'Dippil'.

[121] The apical ancestors of the claim group are described by Tindale and others as being of the Kabi Kabi language group.<sup>58</sup>

***What information has been provided in support of the assertion of traditional laws and customs?***

[122] Attachment F asserts, under the heading 'Traditional Laws and Customs of the Kabi Kabi First Nation Native Title Claim Group':

10. Rights and interests in land are seen to be derived from the actions of ancestral beings that imprinted the language and identifies for people and country onto the country during their creative travels in the originary epoch.
11. The cosmological scheme represented by the regional Sky-God provided a lawful underpinning for human action and exerted a pressure towards conformity to established law and custom.
12. Rights and interests flow from structural modes of recruitment to country, and in the case of the Kabi Kabi First Nation Traditional Owners, from filiation to named ancestors associated with the claim area.

[123] Attachment F provides the following information in support of the assertion of traditional laws and customs:

(a) Rights and interests in land:

(a) Mathews noted in 1887 that the lands of the 'communities' or 'small tribes' were 'their peculiar inheritance' although they maintained a right of access to the lands of their allies 'in all directions'.<sup>59</sup>

(b) A current claimant explains: 'you gain rights in Gubbi-Gubbi country through those blood lines. But you can also gain some rights through marriage or adoption. But ultimately the bloodline person has first priority and can speak for country. I learned this from my elders'.<sup>60</sup>

(c) Another claimant states: '[m]y kids will have the same rights and interests as me... They will control the country from Buderim down'.<sup>61</sup>

(d) Another claimant describes the rights and interests in country as follows:

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 customs 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... 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.<sup>62</sup>

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<sup>57</sup> Ibid 28.

<sup>58</sup> Ibid 23–27.

<sup>59</sup> Ibid 32.

<sup>60</sup> Ibid 40.

<sup>61</sup> Ibid 33.

<sup>62</sup> Ibid 37–38.

(b) Kinship rules and totem affiliation:

- (a) Mathews recorded in 1910 that '[t]he community or bora, to which one belonged, was that of the father. The totem seems to have been transmitted by inheritance through the mother'.<sup>63</sup>
- (b) One claimant states: '[n]ow that my grandchildren are dating, they ask me about whether this one and that one are related. I tell them to ask them where their grandmother comes from. That's the only way I can work it out, so that I know that their totem is'.<sup>64</sup>
- (c) Another claimant states: '[o]ur family's totem is the sea-hawk because we are saltwater people. When we were growing up we were taught not to harm our totems in any way... We could get sick or even worse depending on what we did'.<sup>65</sup>
- (d) Mathews also recorded that 'mutual avoidance' was observed in the relationship between mother-in-law and son-in-law, and that 'the members of the tribal council were responsible for looking after the marriages'.<sup>66</sup>
- (e) A claimant states: '... if my grandmother wanted anything off dad, she'd relay it to my mother. And my mother would tell my father... But all the time, when I was growing up, I never ever seen my father talk directly to my grandmother or my grandmother talk directly to my father'.<sup>67</sup>
- (f) A claimant recalls that she was told by her mother 'the rules' of who she could and could not marry, and that she could not 'partner up' with another member of the Kabi Kabi extended family.<sup>68</sup>

(c) Spiritual beliefs connected to country:

- (a) Mathews in 1887 and Radcliffe-Brown in 1926 both described the importance of the rainbow, or 'dhakkan', which manifests as a snake and lived in particular waterholes.<sup>69</sup>
- (b) Langevad writes in 1982 that 'all were afraid to enter the places where the rainbow serpent lived' and this is supported by the recollections of claimants who were taught to avoid particular waterholes because of the risk of misfortune such as drowning or physical injury.<sup>70</sup>
- (c) Current claimants explain that there were taught not to go swimming in particular water holes because of the presence of the rainbow serpent.<sup>71</sup>

(d) Ceremonial practices:

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<sup>63</sup> Ibid 32.

<sup>64</sup> Ibid 45.

<sup>65</sup> Ibid 36.

<sup>66</sup> Ibid 45.

<sup>67</sup> Ibid 48.

<sup>68</sup> Ibid 45.

<sup>69</sup> Ibid 70–71.

<sup>70</sup> Ibid 71–72.

<sup>71</sup> Ibid 70.

- (a) Curr describes in 1887 that ceremonies were held at a place where a circular mound had been made – a bora ring. He describes a male initiation ceremony and how the boys participating were prohibited from eating particular foods during that time.<sup>72</sup>
- (b) In 1859 the Moreton Bay Courier reported a ‘very large congregation’ of Wide Bay Aborigines at Caloundra on their way to a corroboree with the Bribie Islanders.<sup>73</sup> I note these locations lie within the claim area.
- (c) A claimant describes witnessing corroborees when he was growing up, in which the Gubbi Gubbi participated along with neighbouring tribes. He recalls that only men were allowed to participate.<sup>74</sup>

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

*Does the factual basis address the identity of a pre-sovereignty society for the area?*

[124] I consider there is sufficient information in the application to support the existence of a regional society in the early years of settlement which included the claim area. The factual basis material asserts that in and around the claim area this society was identifiable, through the use of the Kabi Kabi language, adherence to rules pertaining to rights and interests in land, kinship rules and totem affiliation, among other things. In my view, the level of detail in the factual basis material is sufficient to support that assertion. I also consider it reasonable to infer this society existed at sovereignty and was not substantially changed between sovereignty and settlement in the 1860s, in the absence of any information before me to the contrary.

*Does the factual basis address the link between the pre-sovereignty society, the apical ancestors and the claim group?*

[125] As discussed above at s 190B(5)(a), I consider the factual basis shows that the apical ancestors were born in or around the claim area around the time of settlement and lived, worked and married in the area in the early decades of settlement. As the apical ancestors were born around settlement, I consider I can infer their parents and grandparents were part of the society in the claim area at that time. It follows that it is reasonable to infer there is a link between the pre-sovereignty society and the apical ancestors at the time of settlement. I understand that the current claim group members are descendants of the apical ancestors, thus demonstrating the requisite link between them.

*Is the factual basis sufficient to support the assertion of the existence of ‘traditional laws and customs’?*

[126] I consider the information at Attachment F provides descriptions of the laws and customs observed by the apical ancestors at settlement. Attachment F also describes how the laws and customs have been passed down to and observed by the successive generations of the claim group, in relation to the claim area and across the regional society. For example, the information about how rights and interests in land were inherited by the predecessors reflects

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<sup>72</sup> Ibid 74.

<sup>73</sup> Ibid 90.

<sup>74</sup> Ibid 76–77.

the current claimants' understanding, that 'you gain rights in Gubbi-Gubbi country through those blood lines'.<sup>75</sup> The emphasis the current claim group members give to their totems and the kinship rules of the group, reflects those which were recorded as being observed by the predecessors, such as the mother-in-law / son-in-law avoidance rules. Similarly the belief in the rainbow serpent, its association with particular waterholes and the prescription to avoid those places is reflected throughout the historical records across the generations since early settlement and in the information from the current claimants.<sup>76</sup> Overall, I consider the detailed accounts from claimants about their totemic associations, the acquisition of rights to country through one's predecessors and rules relating to marriage and kinship, reflect to a large degree those ascribed to the claim group at the time of settlement by contemporary observers.

[127] In my view, there is sufficient information in the application about how the laws and customs were acknowledged and observed by the apical ancestors, the intervening generations and the current members of the claim group, to support the assertion that the laws and customs are 'traditional' in the *Yorta Yorta* sense.<sup>77</sup> This is because there are examples provided about the observation of the various laws and customs by successive generations of the claim area. In my view there is also sufficient information about how the laws and customs have been passed down to the members of the current claim group by their predecessors, through teaching, oral transmission and common practice. I consider that it is reasonable to infer the predecessors of the current claim group acquired their knowledge of the laws and customs in much the same way as they passed it on to their descendants, thus supporting the assertion that the laws and customs are 'traditional'.

### **Conclusion – s 190B(5)(b)**

[128] I am satisfied the factual basis is sufficient to support the assertion that there was a pre-sovereignty society in the claim area, as asserted at Attachment F. I am satisfied there is a link between the pre-sovereignty society in the claim area, the apical ancestors and the current members of the claim group. I am also satisfied the factual basis is sufficient to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by the native title claim group. This means s 190B(5)(b) is met.

### **What is required to meet s 190B(5)(c)?**

[129] Meeting the requirements of this condition relies on whether there is a sufficient factual basis to support the assertion at s 190B(5)(b), that there exist traditional laws and customs which give rise to the claimed native title rights and interests.<sup>78</sup> It also requires a sufficient factual basis to support an assertion that there has been continuity in the observance of traditional laws and customs going back to sovereignty or at least European settlement.<sup>79</sup>

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<sup>75</sup> Ibid 40.

<sup>76</sup> Ibid 70–71.

<sup>77</sup> *Yorta Yorta* [46]–[47].

<sup>78</sup> *Gudjala 2009* [29].

<sup>79</sup> *Gudjala 2007* [82].

***Is the factual basis sufficient to support the assertion of the continuity of traditional laws and customs?***

[130] As summarised above in relation to ss 190B(5)(a)–(b), the factual basis demonstrates an ongoing association with the claim area, identifies the relevant pre-sovereignty society and supports the existence of traditional laws and customs. Attachment F provide examples of how the laws and customs have been passed down to current members of the claim group by their predecessors through oral transmission and common practice. For example, the information summarised above shows that men’s ceremonial business took place in bora rings since at least early settlement. One female claimant states that her mother taught her ‘never to enter bora rings as they were a men’s spiritual ceremonial place’.<sup>80</sup> The continuing observance of the rules relating to kinship and totemic affiliations provide further examples which I consider are relevant to s 190B(5)(c). In my view, there are sufficient examples at Attachment F of how the laws and customs have been observed by the claim group, substantially uninterrupted, since at least settlement in the claim area.

***Conclusion – s 190B(5)(c)***

[131] I am satisfied the factual basis is sufficient to support the assertion that the claim group have continued to hold their native title rights in accordance with traditional laws and customs since settlement in the claim area. This is because the material before me demonstrates that claimants possess knowledge about how the generations since the apical ancestors acknowledged and observed their laws and customs in relation to the claim area around the time of settlement, so as to permit an inference that the claim group is a ‘modern manifestation’ of the pre-sovereignty society in the claim area.<sup>81</sup> I consider the factual basis sufficient to support an assertion of continuity in the observance of traditional laws and customs, which means s 190B(5)(c) is met.

**Conclusion**

[132] As I consider the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support the three assertions of ss 190B(5)(a)–(c), I am satisfied s 190B(5) is met.

**Prima facie case – s 190B(6): condition met**

[133] To meet s 190B(6), the Registrar must consider that, prima facie, at least some of the native title rights and interests claimed can be established. According to s 223(1), a ‘native title right or interest’ is one that is held under traditional laws acknowledged and traditional customs observed by the native title claim group.

[134] I note the following judicial guidance about s 190B(6):

- (a) it requires some measure of the material available in support of the claim;<sup>82</sup>
- (b) it appears to impose a more onerous test to be applied to the individual rights and interests claimed;<sup>83</sup> and

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<sup>80</sup> Attachment F 92.

<sup>81</sup> *Gudjala 2009* [31].

<sup>82</sup> *Doepel* [126].

(c) the words ‘prima facie’ mean ‘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’.<sup>84</sup>

[135] It is not my role to resolve whether the asserted factual basis will be made out at trial. My task is to consider whether there is any probative factual material which supports the existence of each individual right and interest, noting that as long as some rights can be prima facie established, the requirements of s 190B(6) will be met. Only those rights and interests I consider can be established prima facie will be entered on the Register.<sup>85</sup> I have grouped rights together in my consideration below where it is convenient to do so.

***Which of the claimed native title rights and interests are established on a prima facie basis?***

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

[136] Attachment F summarises the archaeological and historical records, including marriages and deaths as evidence for Aboriginal presence in the claim area both at sovereignty and into the 20<sup>th</sup> century.<sup>86</sup> Attachment F also summarises the activities of various claimants, as well as their grandparents, parents, children and grandchildren, accessing the claim area and travelling across it. For example, one claimant was taken by her mother along Noosa and Alexander Headlands as well as Bribie Island. Today she takes her children up to Gympie, over to Noosa and stays at Bribie Island with family.<sup>87</sup>

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

*The right to camp on the area, and for that purpose, erect temporary shelters on the area*

[138] Attachment F summarises the historical records of Mathews who described how ‘[a] few families claiming the same territory usually camped and travelled together...’.<sup>88</sup> Current claim group members describe going camping with their predecessors when they were younger and continue this practice today with their own descendants, at locations including the Bunya Mountains, Maryborough, Bribie Island, Brooloo and Turner’s Camp.<sup>89</sup>

[139] Attachment F also states that Flinders’ exploration party found ‘five or six huts’ on Bribie Island resembling ‘a covered archway’.<sup>90</sup> A current claimant recalls her father making a gynyah ‘like a dome’ out of leaves, branches and sticks.<sup>91</sup>

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

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

[141] Attachment F summarises the historical records of Flinders (1799), Lang (1847), Meston (1895) and Curr (1887) in relation to hunting, fishing and gathering items such as ‘wild

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<sup>83</sup> Ibid [132].

<sup>84</sup> Ibid [135].

<sup>85</sup> Section 186(1)(g).

<sup>86</sup> Attachment F 79–80.

<sup>87</sup> Ibid 80.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid 80–81.

<sup>90</sup> Ibid 82.

<sup>91</sup> Ibid 83.

animals', fish, 'shipworm' and bunya nuts. Current claimants describe fishing and hunting in various parts of the claim area, and the recurrent 'Bunya festival' on the Bunya Mountains.<sup>92</sup>

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

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

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

[143] Attachment F describes how swamp oaks were cut and piled in large heaps in the water so that, after a year, they would be infested with the 'highly prized ship worm'.<sup>93</sup> It also describes how paperbark is used for cooking,<sup>94</sup> and water taken and carried in bags made from a certain palm tree.<sup>95</sup> One claimant states: '[a]nother thing we were always taught is that we have to share. Old people. Old people always got first priority... We'd go hooking for the crabs... Big feed of crab, take them give them to all the relatives'.<sup>96</sup>

[144] I consider these rights are prima facie established.

*The right to participate in cultural activities on the area*

*The right to hold meetings on the area*

[145] Attachment F describes corroborees and ceremonial fights in the historical record, including in 1859 and 1865 at Nambour, Caloundra and the Glasshouse Mountains.<sup>97</sup> Claimants describe the Bunya festival and locations related to women's business and to men's business.<sup>98</sup>

[146] I consider these rights are prima facie established.

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

[147] Attachment F describes how bora rings and tracks used by the predecessors of the claim group are regarded as highly significant by the current claim group, and believed to be 'imbued with the living presence of Kabi Kabi ancestral beings'.<sup>99</sup> The current claimants describe their knowledge of the importance of bora rings and their involvement in the protection of sacred sites.<sup>100</sup>

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

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

[149] Attachment F summarises an account given to early anthropologist Winterbotham from a Kabi Kabi informant around 1873-1881, in which he describes the role of 'head-men' in mediating the relationship between the Sky-God and the group, and teaching others about how

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<sup>92</sup> Ibid 84–85.

<sup>93</sup> Ibid 89.

<sup>94</sup> Ibid 88.

<sup>95</sup> Ibid 89.

<sup>96</sup> Ibid 53.

<sup>97</sup> Ibid 90.

<sup>98</sup> Ibid 90–91.

<sup>99</sup> Ibid 92.

<sup>100</sup> Ibid.

misbehaviour or ‘wrong action’ would lead to spiritual punishment.<sup>101</sup> The current claimants describe learning from their elders about appropriate behaviours, including not entering gender restricted areas, not removing rocks from country, refilling holes dug on the beach so as not to ‘disturb the balance’ and ‘about the spiritual realm and how to be calm in it’, among other things.<sup>102</sup>

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

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

[151] Attachment F describes how Flinders’ exploration party climbed Beerburrum mountain and observed ‘large smoke’ and people cooking fish over an open fire. Current claimants describe how they were taught to cook animals and fish, and a soup made from bunya nuts over a fire or hot coals.<sup>103</sup>

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

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

[153] Attachment F summarises the accounts of burial practices given to Winterbotham by his Kabi Kabi informant. These practices included wrapping the body in paperback and placing it on a tree platform which would then be burnt so as to enable to return of the dead person’s spirit to its ancestral home. Current claimants describe the locations of their ancestors’ ashes, including those associated with ‘spiritual trees’.<sup>104</sup>

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

## Conclusion

[155] I am satisfied the application contains sufficient information about all of the rights claimed such that they can be said to be established on a prima facie basis. I am also satisfied those claimed rights which are established prima facie can be considered ‘native title rights and interests’. This is because there is information in the application to show how the rights were observed in the early years of settlement as well as in recent times. Additionally, according to the definition in s 223(1), a native title right or interest is one held under traditional laws and customs, and I am satisfied there is sufficient factual basis to support the assertion of the existence of traditional laws and customs, as discussed above at s 190B(5)(b). This means s 190B(6) is met.

## Traditional physical connection – s 190B(7): condition met

[156] To meet s 190B(7), the Registrar must be satisfied 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

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<sup>101</sup> Ibid 93.

<sup>102</sup> Ibid 94–95.

<sup>103</sup> Ibid 96.

<sup>104</sup> Ibid 97–98.

- (b) previously had and would reasonably have been expected currently to have such a connection but for things done by the Crown, a statutory authority of the Crown or any holder of or person acting on behalf of the holder of a lease, other than the creation of an interest in relation to land or waters.

[157] I note this condition requires the material to satisfy the Registrar of particular facts such that evidentiary material is required, and that the physical connection must be in accordance with the traditional laws and customs of the claim group.<sup>105</sup>

***Is there evidence that at a member of the claim group has a traditional physical connection?***

[158] Based on the information in the application and Attachment F in particular, I consider at least one claim group member currently has a traditional physical connection to the land and waters covered by the application. The information about claim group members living in and around the claim area, hunting animals, catching fish and collecting bunya nuts, protecting and passing on stories about sacred sites such as bora rings, demonstrates there is a physical connection to the claim area. I have summarised several examples of the physical connection of current claim group members in my consideration of s 190B(5)(b) above.

[159] I also consider the claim group members' connection with the claim area is 'traditional' in the sense required by s 190B(7). I consider their knowledge of the claim area has been passed to them from the predecessors of the claim group while spending time on the lands and waters of the claim area. As I am satisfied the factual basis material is sufficient to support an assertion that traditional laws and customs acknowledged and observed by the predecessors of the claim group have been passed down to the current members of the claim group, it follows that I am satisfied the current claim group members' connection with the claim area is in accordance with those traditional laws and customs.

**Conclusion**

[160] I am therefore satisfied at least one member of the native title claim group currently has a traditional physical connection with a part of the claim area as required by s 190B(7)(a), and so s 190B(7) is met.

**No failure to comply with s 61A – s 190B(8): condition met**

[161] In my view the application complies with the provisions of ss 61A(1)–(3) and therefore satisfies the condition of s 190B(8):

Section	Requirement	Information	Result
s 61A(1)	No native title determination application if approved determination of native title	The geospatial report states and my own searches confirm that the application does not cover an area where there has been an approved determination of native title.	Met
s 61A(2)	Claimant application not to be made covering previous exclusive possession act areas	Schedule B, para 2(a)(ii)	Met – see reasons below

<sup>105</sup> Doepel [18], Gudjala 2009 [84].

s 61A(3)	Claimant application not to claim possession to the exclusion of all others in previous non-exclusive possession act areas	Schedule E, Schedule B, para 5	Met – see reasons below
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**Section 61A(2)**

[162] Paragraph 2(a) of Schedule B specifies the areas which are not covered by the application, including freehold estates. I consider this statement is sufficient for the purposes of s 61A(2).

**Section 61A(3)**

[163] Schedule E states that only non-exclusive rights are claimed. Paragraph 5 of Schedule B states that the application claims the benefit of ss 47–47B.

[164] I understand that a statement in an application that ss 47–47B applies can be relied upon to reach the necessary satisfaction under s 190B(8) in relation to both previous exclusive possession acts (s 61A(2)) and previous non-exclusive possession acts (s 61A(3)).<sup>106</sup>

[165] I therefore consider the statements in the application summarised above are sufficient to show that the application complies with s 61A(3).

**No extinguishment etc. of claimed native title – s 190B(9): condition met**

[166] In my view the application meets the requirements of s 190B(9):

Section	Requirement	Information	Result
s 190B(9)(a)	No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q states that the applicant does not claim any minerals, petroleum or gas wholly owned by the Crown.	Met
s 190B(9)(b)	Exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P states that no claim of exclusive possession is made in relation to any offshore place.	Met
s 190B(9)(c)	Native title rights and/or interests in the claim area have otherwise been extinguished	Paragraph 2(c) of Schedule B states that any areas where native title has been otherwise extinguished are excluded from the application. There is no information in the application that discloses to me that native title rights and interests in the claim area have otherwise been extinguished.	Met

*End of reasons*

<sup>106</sup> *Doepel* [111], [138]–[139].

## Attachment A

### Information to be included on the Register of Native Title Claims

Application name	Kabi Kabi
NNTT No.	QC2018/007
Federal Court of Australia No.	QUD20/2019
Date of Registration Decision	12 July 2019

#### Section 186(1): Mandatory information

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

**Application filed/lodged with:**

Federal Court of Australia

**Date application filed/lodged:**

16 April 2019

**Date application entered on Register:**

12 July 2019

**Applicant:**

As per Schedule

**Applicant's address for service:**

As per Schedule

**Area covered by application:**

As per Schedule

**Persons claiming to hold native title:**

As per Schedule

**Registered native title rights and interests:**

As per Schedule

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Katy Woods

Delegate of the Native Title Registrar pursuant to ss 190–190D of the Native Title Act under an instrument of delegation dated 27 July 2018 and made pursuant to s 99 of the Native Title Act.