



Registration Decision

Application name	Lui Ned David & Ors on behalf of the Torres Strait Regional Seas Claim (Part C) (TSRSC Part C)
Name of applicant	Lui Ned David, Kabay Tamu, Frank Faud, Ted Mosby, Iona Manas, David Bosun, Alick Tipoti, Troy Laza, Kapua Gutchen, Brian Williams, Sabu Wailu, John Zaro
Federal Court of Australia No.	QUD227/2022
NNTT No.	QC2022/001
Date of Decision	25 July 2022

Claim not accepted for registration

I have decided that the claim in the TSRSC Part C application does not satisfy all of the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).¹

For the reasons attached, I do not accept this claim for registration pursuant to s 190A.

For the purposes of s 190D(3), my opinion is that the claim does not satisfy the condition in s 190C(3).

Radhika Prasad

Delegate of the Native Title Registrar pursuant to ss 190–190D of the Act under an instrument of delegation dated 19 May 2021 and made pursuant to s 99 of the Act.

¹ A section reference is to the *Native Title Act 1993* (Cth) (the Act), unless otherwise specified.

Reasons for Decision

Cases Cited

Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal [2012] FCA 1215 (*Anderson*)

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

Bell v Native Title Registrar [2021] FCA 229 (*Bell*)

Burrabungba on behalf of the Wangan and Jagalingou People v State of Queensland [2017] FCA 373 (*Burrabungba*)

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

Dann v Yamera [2017] FCA 513 (*Dann*)

Evans v Native Title Registrar [2004] FCA 1070 (*Evans*)

Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People [2019] FCAFC 177 (*Warrie*)

Griffiths v Northern Territory of Australia [2007] FCAFC 178 (*Griffiths*)

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 FC*)

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

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

Hazelbane v Doepel [2008] FCA 290 (*Hazelbane*)

Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales [2002] FCA 1517 (*Lawson*)

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*)

Northern Territory of Australia v Doepel (2003) 133 FCR 112; [2003] FCA 1384 (*Doepel*)

Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group (Alyawarr)

Risk v National Native Title Tribunal [2000] FCA 1589 (*Risk*)

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*)

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

Weribone on behalf of the Mandandanji People v State of Queensland [2013] FCA 255 (*Weribone*)

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

Western Australia v Ward [2002] HCA 28 (*Ward HC*)

Wiri People v Native Title Registrar [2008] FCA 574 (*Wiri People*)

Background

- [1] The claimant application was made on 1 July 2022 on behalf of the members of the Meriam, Erubam Le, Ugarem Le, Masigalgal, Porumalgal, Warraberalgal, lamalgal, Badulgal, and Mualgal island communities (sea claim group), covering an area of approximately 5,450 square kilometres in the Torres Strait.²

² Schedule A, Attachment A and geospatial assessment prepared by the Tribunal's Geospatial Services on 8 July 2022 (geospatial assessment).

- [2] The Registrar of the Federal Court (Court) gave a copy of the application and accompanying affidavit of a solicitor from Dillon Bowers Lawyers, being the applicant's legal representative, dated 30 June 2022 (DBL affidavit) to the Native Title Registrar (Registrar) on 4 July 2022 pursuant to s 63 of the Act.
- [3] If the claim in the application satisfies all the registration test conditions in ss 190B and 190C, then the Registrar must accept the claim for registration.³ If it does not satisfy all the conditions, the Registrar must not accept the claim for registration.
- [4] As discussed in my reasons below, I consider that the claim in the application does not satisfy all of the conditions in ss 190B and 190C and therefore it must not be accepted for registration.⁴

Information considered

- [5] In reaching this decision, I have considered s 190A(3) which directs me to have regard to certain information when testing an application for registration. I understand this provision to stipulate that the application and information in any other document provided by the applicant is the primary source of information for the decision I make. Accordingly, I have taken into account the following material:
- the information contained in the application and accompanying documents;
 - email from Dillon Bowers Lawyers to the Registrar dated 4 July 2022 (DBL email);
 - the geospatial assessment; and
 - the results of my own searches using the Tribunal's registers and mapping database.

Procedural fairness process

- [6] As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness. Those rules seek to ensure that decisions are made in a fair, just and unbiased way. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication.⁵ I have followed the case law regarding procedural fairness requirements when applying the registration test and note that the following steps were undertaken to ensure procedural fairness has been observed:⁶
- On 7 July 2022, the senior officer for this matter sent a letter to the State of Queensland (State) informing the State that any submission in relation to the registration of this claim should be provided by 14 July 2022. No submission was received from the State.

³ Section 190A(6).

⁴ Section 190A(6B); see Attachment A of these reasons for decision, which contains a summary of result for each condition.

⁵ *Hazelbane* [25].

⁶ See for instance *Hazelbane* [23] – [31]; *Bell* [73] – [84].

- The senior officer, also on 7 July 2022, wrote to inform the applicant that any information additional to the application should be provided by 14 July 2022. No additional material was received from the applicant.

Procedural and other matters (s 190C)—Conditions not met

Information etc. required by sections 61 and 62 – s 190C(2): condition met

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

What is required to meet this condition?

[8] In coming to the above conclusion, I understand that the condition in s 190C(2) is procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents prescribed by ss 61 and 62. This condition does not require me to go beyond the information in the application itself nor undertake any merit or qualitative assessment of the material for the purposes of s 190C(2).⁷ Accordingly, the application must contain the prescribed details and other information in order to satisfy the requirements of s 190C(2).

[9] It is also my view that I need only consider those parts of ss 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s 190C(2)). I therefore do not consider the requirements of ss 61(2) and (5), as those subsections either impose no obligations of this nature in relation to the application or are already tested where required by those parts of ss 61 and 62.

Does the claim contain the prescribed information and is it accompanied by prescribed documents?

[10] The claim does meet this condition because it is accompanied by the prescribed affidavits and information, as set out below.

Applications that may be made: s 61(1)

[11] Schedule A and Attachment A of the application provide a description of the native title claim group and Schedule R indicates that the persons comprising the applicant are all members of the native title claim group. There is nothing on the face of the application that causes me to conclude that the requirements of this provision, under s 190C(2), have not been met.

Applicant's name and address for service: s 61(3)

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

Applications authorised by persons: s 61(4)

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

⁷ *Doepel* [16], [35] – [37] and [39].

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

[14] The application is accompanied by affidavits by the applicant.⁸ I consider the affidavits contain the statements required by s 62(1A).

Section 47C agreement: s 62(1)(d)

[15] Schedule L indicates that there are no agreements entered into under s 47C.

Information about the boundaries of the area covered by the application and any areas within those boundaries not covered and map showing the boundaries: s 62(2)(a) & (b)

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

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

Searches of any non-native title rights and interests carried out: s 62(2)(c)

[18] Schedule D provides that no searches have been carried out to determine the existence of any non-native title rights and interests in relation to the land or waters in the area covered by the application.

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

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

General description of factual basis for assertion that native title exists: s 62(2)(e)

[20] Schedule F contains information pertaining to the factual basis on which it is asserted that the rights and interests claimed exist.

Activities: s 62(2)(f)

[21] Schedules E, F and G include information about the activities currently undertaken by members of the claim group on the land and waters of the application area.

Other applications: s 62(2)(g)

[22] Schedule H states that QUD24/2019 Kaurareg People #3 and QUD115/2017 North Eastern Peninsular Sea Claim Group applications cover the application area.

Future act notices: ss 62(2)(ga) and (h)

[23] Schedule HA states that the applicant is not aware of any notifications under paragraph 24MD(6B)(c) that have been given and relate to the whole or part of the application area.

[24] Schedule I provides that the applicant is not aware of any notice under s 29 (or corresponding provision of a law of a State or Territory) that has been given and that relates to the whole or part of the application area.

⁸ DBL affidavit Annexure 'JMD-10'.

Any conditions: s 62(2)(i)

[25] Schedule IA provides that the conditions under s 251BA on the authority of the applicant to make the application and deal with matters arising in relation to it are contained in Attachment IA.

No previous overlapping claim group – s 190C(3): condition not met

[26] As indicated in my reasons below, the application does not satisfy the condition of s 190C(3).

What is required to meet this condition?

[27] In my view, this condition requires the Registrar be satisfied that there are no common claimants where there is a previous application that comes within the terms of subsections (a) to (c).⁹

[28] I understand that s 190C(3) was enacted to prevent overlapping claims by members of the same native title claim group from being on the Register of Native Title Claims (Register) at the same time.¹⁰ That purpose is achieved by preventing a claim from being registered where it has members in common with an overlapping claim that is on the Register when the registration test is applied. I consider that this approach reflects the intention of the legislature.

[29] I note that in assessing this requirement, I am able to address information which does not form part of the application.¹¹

[30] I also note that in reaching my view, I understand the nature of the Registrar's task here is not to find 'in all respects the real facts on the balance of probabilities, or on some other basis' or 'to supplant the role of the Court when adjudicating upon the application for determination of native title, or generally to undertake a preliminary hearing of the application'.¹²

Consideration

[31] The geospatial assessment and Schedule H identify the Kaurareg People #3 and North Eastern Peninsula Sea Claim Group claimant applications as covering parts of the area covered by the current application. I have undertaken a search of the Tribunal's mapping database and confirm that the applications overlap the current claim area. In my view, these applications meet the condition specified under subsection (a).

[32] Subsection 190C(3)(b) requires an entry relating to the claim in the overlapping application to be on the Register when the current application was made. The current application was made on 1 July 2022 when it was filed with the Court. I have undertaken a search of the Register and this revealed that the Kaurareg People #3 application was accepted for registration and an entry for the claim in the application was added to the Register on 3 December 2010. My search of the North Eastern Peninsula Sea Claim Group application reveals that the application was not accepted for registration on 26 May 2017. Therefore, when the current application

⁹ *Strickland FC* [9].

¹⁰ Explanatory Memorandum to *Native Title Amendment Bill 1997*, 29.25 and 35.38.

¹¹ *Doepel* [16].

¹² *Doepel* [16]; *Dann* [21].

was made, only an entry relating to the claim in the Kaurareg People #3 application, and not the North Eastern Peninsula Sea Claim Group application, was on the Register. I am satisfied that the Kaurareg People #3 application meets the condition identified in subsection (b).

- [33] The condition at subsection (c) is only met where the application has been entered on the Register and has not been removed, as a result of being considered for registration pursuant to s 190A, at the time the registration testing of the current application takes place. My search of the Register revealed that the Kaurareg People #3 application was entered on the Register and has not been removed from it at the time of applying the registration test to the current claim. Accordingly, in my view this application meets the requirements of subsection (c).
- [34] As the Kaurareg People #3 application meets all of the criteria for a ‘previous application’ stipulated by s 190C(3), I am therefore required to consider whether there are any members of the claim group for the previous application in common with the claim group for the current application.¹³
- [35] I have accessed from the Register, a description of the native title claim group for the previous application. The description for the Kaurareg People #3 application provides that the application is made on behalf of the Kaurareg Aboriginal People who are the descendants of a number of apical ancestors.
- [36] The claim group description in the current application provides that the claim group comprises members of island communities and indicates that this membership was subject to the determination of native title in QUD6040/2001 Torres Strait Islanders of the Regional Sea Claim Group (TSRSC Part A determination).
- [37] I have compared the claim group description in the Kaurareg People #3 application with the orders in the TSRSC Part A determination that are relevant to the claim group description in the current application. While there are no obvious similarities in the names in the descriptions, Schedule O provides that the applicant is aware that members of the current claim group are also members of the Kaurareg People #3 claim group. I note the applicant’s representative also wrote to the Registrar confirming the applicant is aware that there are members in common with the Kaurareg People claim group and that the current application will not meet the condition of s 190C(3).¹⁴
- [38] For this reason, I am not satisfied that no person included in the native title claim group for the current application was a member of the native title claim group for any previous application for the purposes of s 190C(3).

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

- [39] For the reasons set out below, I am satisfied that the condition of s 190C(4) is met.

What is required to meet this condition?

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

¹³ *Strickland FC* [9].

¹⁴ DBL email.

[41] Schedule R indicates the application has not been certified. I must therefore consider whether the requirements of s 190C(4)(b) are met. That subsection provides that the Registrar must be satisfied that the following requirements, which are mentioned in subsection (4AA), are met:

- the applicant is a member of the native title claim group;
- 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; and
- if there are any conditions under s 251BA on the authority that relate to the making of the application, then those conditions must be satisfied.

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

[43] I will, therefore, consider s 190C(5) before turning to the requirements in s 190C(4)(b).

Does the application contain the information specified in s 190C(5)?

[44] Section 190C(5) provides that the application must include a statement to the effect that the requirements set out in s 190C(4AA) have been met and briefly set out the grounds on which the Registrar should consider that those requirements have been met.

[45] In my view, Schedule R includes statements to the effect that the requirements in s 190C(4AA) have been met and Attachment R contains an outline of the grounds on which the applicant considers the Registrar should be satisfied in this regard. I assess whether the material provided addresses those requirements below.

Have the requirements of s 190C(4)(b) been met?

What is required to meet the condition at s 190C(4)(b)?

[46] I understand that s 190C(4)(b):

- requires the Registrar to be satisfied that the applicant has been authorised by all members of the native title claim group, which ‘clearly ... involves some inquiry through the material available ... to see if the necessary authorisation has been given’;¹⁵
- requires the Registrar to be satisfied as to the identity of the claimed native title holders, including the applicant, and that the applicant needs to be authorised by all the other persons in the native title claim group;¹⁶
- is not ‘to be met by formulaic statements in or in support of applications’;¹⁷
- does not permit a claim group to choose between the two decision making processes described in s 251B, and therefore if there is a traditionally mandated process, then that process must be followed to authorise the applicant otherwise the process utilised for

¹⁵ *Doepel* [78].

¹⁶ *Wiri People* [21], [29] and [35]; *Risk* [60].

¹⁷ *Strickland* [57].

authorisation must be one that has been agreed to and adopted by the native title claim group.¹⁸

What information has been provided in support of this condition?

[47] Attachment R of the application provides the following information:

- Information about the proposed TSRSC Part C application was distributed in the May 2022 edition of the *Northern Cape and Torres Strait United Newsletter*, directing readers to the Torres Strait Regional Authority (TSRA) and Cape York Land Council (CYLC) websites and Facebook pages for information regarding information sessions and the authorisation meeting to be held on 18 June 2022.¹⁹
- The newsletter was sent to QUD6040/2001 Torres Strait Regional Seas Claim (Part B) (TSRSC Part B) applicant, TSRA native title office, Gur Baradharaw Kod Torres Strait Sea and Land Council (GBK), registered native title bodies corporate for the island communities (PBCs), and the Torres Strait Island Regional Council (TSIRC) offices for the relevant island communities.²⁰ A copy of the newsletter was also available to download on the TSRA website.
- A schedule of the information sessions (schedule), which included the date, time and venue of the information sessions and details of the authorisation meeting, were published on the TSRA website and Facebook page.²¹ The schedule for some of the information sessions was also published on the CYLC Facebook page.²² The schedule was also provided to the TSRSC Part B applicant, TSRA, GBK, and PBCs.²³
- Public notices for each information session and the authorisation meeting were sent to the TSRSC Part B applicant, TSRA, GBK, PBCs, and the TSIRC offices for the relevant island communities to place on island community notice boards.²⁴ Public notices for the information sessions scheduled for Cairns, Townsville and Brisbane were sent to the TSRA native title office and public notices for ‘mainland information sessions’ were sent to the TSRSC Part B applicant and GBK for wider distribution to the TSRSC group.²⁵
- In May and June 2022, 16 information sessions were held, with each session focussing on a different island community or persons, to provide TSRSC group members with information and materials regarding the authorisation process and the decisions to be considered by the group at the authorisation meeting.²⁶
- Also, in May and June 2022, notices of the authorisation meeting were distributed and advertised in the Cairns Post, The Courier Mail, Townsville Bulletin, Torres News and

¹⁸ *Harrington-Smith (No 9)* [1230]; *Evans* [7].

¹⁹ Attachment R [1].

²⁰ *Ibid* [2].

²¹ *Ibid* [3] – [4] and [13].

²² *Ibid* [3].

²³ *Ibid* [4].

²⁴ *Ibid* [5] – [7].

²⁵ *Ibid* [7].

²⁶ *Ibid* [8] – [9].

online edition of the Koori Mail, inviting the TSRSC group to attend and advising of the matters to be considered, including whether to make the current application.²⁷

- Radio advertisements for the authorisation meeting were broadcast on 14 occasions.²⁸
- The TSRA arranged for public notices of the authorisation meeting to be:
 - placed on island community notice boards through island council offices;
 - distributed by the Land and Sea Ranger program for placement at other notice boards, IBIS stores, schools, and be shared with contacts; and
 - placed at local businesses on Waiben (Thursday Island).²⁹
- The public notice of the authorisation meeting was also provided to other members of the TSRSC group members for wider community distribution.³⁰
- The authorisation meeting was held on Waiben and was attended by members of the sea claim group.³¹ Each member who attended was provided a copy of the map of the proposed TSRSC Part C application area, with larger maps of those areas hung on walls of the meeting room.³²
- At the meeting, the members of the sea claim group who attended resolved:
 - they did not have a process of decision making that was traditionally mandated and agreed and adopted a decision making process;
 - only members of the TSRSC group were in attendance, there had been sufficient notice of the meeting and sufficient opportunity for discussion, and the meeting was sufficiently representative of the TSRSC group to make authoritative decisions;
 - to authorise the making of the TSRSC Part C application in relation to each of the areas shown on the map tabled at the meeting;
 - to authorise the applicant to make the TSRSC Part C application and deal with matters arising in relation to it; and
 - the authority of the persons authorised to be the applicant be subject to certain conditions.³³

[48] The DBL affidavit confirms the information provided in Attachment R and includes the following additional information relevant to authorisation:

²⁷ Ibid [10] – [11].

²⁸ Ibid [12].

²⁹ Ibid [14].

³⁰ Ibid.

³¹ Ibid [15] – [16].

³² Ibid [17].

³³ Ibid [18].

- The notice of the authorisation meeting included the date, time, venue and purpose of the meeting, invited members of the TSCRC group and included a map of the TSCRC Parts A, B and proposed C areas.³⁴
- The authorisation meeting was facilitated by the lead applicant of the TSRSC Part B application due to the inability of the CYLC or Aboriginal and Torres Strait Islander Studies to facilitate the meeting as intended.³⁵
- The authorisation meeting was attended by legal representatives and anthropologists for the current applicant and TSRA support staff.³⁶
- Members of the sea claim group completed a registration attendance with their names, personal details and island communities, which was then considered by anthropologists to ensure those in attendance were members of the TSRSC group.³⁷ 54 members of the sea claim group signed the attendance register.³⁸
- The minutes indicate that following the registration process, the meeting included:
 - introduction where the purpose and structure of the meeting were discussed;
 - provision of information about the Torres Strait proceedings, including about the TSRSC Part A determination, the overlapping applications, and proposed TSRSC Part C claim, and there were opportunities for discussion, questions and answers;
 - following lunch, decisions were made in relation to each resolution, including to agree and adopt the following decision making process to use at the meeting:
 1. *a decision which is proposed to be made will be put in the form of a clearly worded resolution;*
 2. *the proposed resolution will be presented to the meeting;*
 3. *the resolution must be moved and seconded before it is considered;*
 4. *anybody who will be affected by a decision has a right to be informed about the matter and a right to express an opinion on it;*
 5. *some people may have more authority within their island community than others, which relates to status as either elder or descendant of a particular person who themselves was a leader of their group, or both;*
 6. *decisions should be made on the basis of general consensus but this means a significant majority, not 100% agreement is required;*
 7. *the decision will be respected by everyone;*
the Chairperson will ensure that the meeting has a reasonable opportunity to discuss and consider a proposed resolution and determine whether a significant majority is in favour of it, which will be recorded in the minutes; and

³⁴ DBL affidavit Annexure 'JMD-7'.

³⁵ Ibid [27].

³⁶ Ibid [28].

³⁷ Ibid [30].

³⁸ Ibid Annexures 'JMD-8' and 'JMD-9' [12].

8. *each island community may determine the manner in which they participate in making decisions about the business of the meeting, including whether they will participate by island community or cluster group.*

- Each resolution was explained before being moved, seconded and then carried, some were noted as being carried unanimously including the applicant making the current application and dealing with matters arising in relation to it.³⁹
- A statement by the anthropologists who attended the authorisation meeting provides that the anthropologists were of the opinion that the person who attended had the authority under traditional law and custom to make the decisions at the meeting.⁴⁰

Consideration

[49] As mentioned above, in order to be satisfied that the condition of s 190C(4)(b) has been met, the requirements of s 190C(4AA) must be met.

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

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

[51] Schedule R of the application indicates that the persons comprising the applicant are members of the native title claim group. I have not been provided with any material that contradicts this statement. It follows that I am satisfied that the persons who comprise the applicant are members of the native title claim group.

Is the applicant authorised by all the other members of the claim group?

[52] In respect of the second limb of s 190C(4AA), namely that the persons who jointly comprise the applicant are authorised by all the other members of the claim group to make the application and to deal with matters arising in relation to it, the material must identify the decision making process utilised at the authorisation meeting and I must consider how that process was applied.⁴¹

What decision making process has been identified?

[53] Section 251B identifies two distinct decision making processes, namely a process that is mandated by traditional laws and customs and one that has been agreed to and adopted by the native title claim group. Attachment R and the DBL affidavit provide that there is no mandatory decision making process in accordance with laws and customs, and therefore an agreed and adopted decision making process was used during the authorisation meeting.⁴² Given this information, I have considered the applicant's material in light of the requirements of s 251B(b).

³⁹ Ibid Annexure 'JMB-8'.

⁴⁰ Ibid Annexure 'JMD-9' [13] and [18].

⁴¹ *Doepel* [78]; *Wiri People* [21], [29] and [35].

⁴² Attachment R [18]; DBL affidavit [32] and Annexure 'JMD-8'.

How has the decision making process been applied?

- [54] I understand that one of the principles from the case law regarding s 251B is that the ‘effect of the section is to give the word “all” [in s 190C(4AA)(a)] a more limited meaning than it might otherwise have’ and that it ‘is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process’.⁴³
- [55] In *Weribone*, Rares J held that ‘[t]he notice must be sufficient to enable the persons to whom it is addressed ... to judge for themselves whether to attend the meeting and vote for a proposal’ and that ‘fair notice of the business to be dealt with at the meeting’ must be given.⁴⁴
- [56] *Burragubba* involved an application under s 66B to replace members of the authorised applicant. Justice Reeves commented that ‘it is necessary that all members be offered a reasonable opportunity to decide whether to attend’.⁴⁵ His Honour found the notice of the meeting before him to be defective because the purpose of the meeting described did not give fair notice of the business, namely to replace members of the applicant, or offer a reasonable opportunity to decide whether to attend the meeting and participate in its deliberation.⁴⁶
- [57] I also understand that the following questions are required to be addressed about the authorisation process, although it is not required they be answered in any formal way as long as the substance of these questions is addressed:

Who convened it and why was it convened? To whom was notice given and why was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded?⁴⁷

- [58] In my view, the substance of those questions has been addressed in the material provided. The information reveals the reasons for the authorisation meeting and who it was convened by. It indicates that steps were taken to inform members of the native title claim group about the information sessions and the authorisation meeting, which included by public notice, newsletter, website and Facebook pages, community noticeboards, and radio advertisement. The material indicates that the persons who attended the authorisation meeting signed an attendance register which was reviewed by anthropologists who confirmed their eligibility.
- [59] The information provides that the persons who were present were given a reasonable opportunity to participate in the decision making process at each meeting. In my view, the conduct of each meeting is such that those present agreed to use the adopted decision making process, and the actual process is indicative that it was inclusive allowing those

⁴³ *Lawson* [25].

⁴⁴ *Weribone* [40] and [41].

⁴⁵ *Burragubba* [31].

⁴⁶ *Ibid* [33] – [35] and [37] – [38].

⁴⁷ *Ward* [24], cited in *Lawson* [26].

present an opportunity to participate and have their votes counted. For instance, the claim group members who were present were able to receive information, ask questions, have discussions and vote on the resolutions, with resolutions being moved, seconded and carried by general consensus being a significant majority. The resolutions were carried at the meeting including to authorise the persons comprising the applicant to make the current application and to deal with matters arising in relation to it.

[60] In light of the above, I am satisfied that the applicant is authorised under s 251B(a) to make the application and to deal with matters arising in relation to it.

Have any conditions been satisfied?

[61] The last limb of s 190C(4AA) requires that if there are any conditions under s 251BA on the authority that relate to the making of the application, they have been satisfied.

[62] Attachment IA provides that there are conditions under s 251BA on the authority of the applicant to make the application and to deal with matters arising in relation to it. The DBL affidavit provides that each of the persons comprising the applicant have agreed that their authority is subject to the conditions set out in a document titled 'Torres Strait Regional Sea Claim Applicants' Protocol'.⁴⁸ This document appears to be the same as Attachment IA but does not include the signatures of the applicant which appear in the Protocol. The conditions placed on the authority of the applicant relate to how the members of the applicant will cease to be authorised as a member of the applicant, how decisions in relation to parts of the application area can be made, and how the claim can be progressed, such as in relation to consenting to the terms of a determination or entering into an agreement in relation to extinguishment. In my view, the conditions placed on the authority of the applicant concern future events that have not yet occurred and do not relate to the making of this application. Rather, they appear to be dealing with matters arising in relation to the application. I note Schedule R and the s 62 affidavits provide there are no conditions that relate to the making of the application.⁴⁹ As subsection 190C(4AA) requires that any conditions under s 251BA on the authority that relate to the making of the application be satisfied, not the conditions that relate to the dealing of matters arising in relation to it, I am of the view that there are no conditions that I need to consider were satisfied.

Merits of the claim (s 190B) – Conditions met

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

[63] For the reasons set out below, the application satisfies the condition of s 190B(2).

What is needed to meet this condition?

[64] For the purposes of s 190B(2), I must be satisfied that 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.

⁴⁸ DBL affidavit Annexure 'JMD-10'.

⁴⁹ Ibid Annexure 'JMD-10', s 62 affidavits [6].

What information has been provided about the boundaries of the application area?

[65] Attachment B describes the application area by metes and bounds and refers to the Torres Shire Council and Cook Shire Council boundaries, coordinate points, and areas above the high water mark identified by feature name and either lot on plan or approximate coordinate points. Schedule B includes general exclusions.

[66] Attachment C contains a copy of a map titled ‘Torres Regional Sea Claim Part C’ and dated 14 June 2022. It includes:

- the application area depicted by a bold blue outline and parts of the claim labelled with name and/or lot on plan;
- topographic features;
- commencement point, scalebar, locality map, coordinate grid; and
- notes relating to the source, currency and datum of data used to prepare the map.

Consideration

[67] The geospatial assessment concludes that the description and map are consistent and identify the application area with reasonable certainty. I agree with this assessment.

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

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

[69] For the reasons set out below, the application satisfies the condition of s 190B(3).

What is needed to meet this condition?

[70] I must be satisfied that either the persons in the native title claim group are named in the application (s 190B(3)(a)) or described sufficiently clearly so that it can be ascertained whether any particular person is in that group (s 190B(3)(b)).

[71] When assessing the requirements of this provision, I understand that:

- I am required to address only the content of the application;⁵⁰
- ‘only ... the members of the claim group [are required to] be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification’;⁵¹
- where a claim group description contains a number of paragraphs, the paragraphs should be read ‘as part of one discrete passage, and in such a way as to secure consistency between them, if such an approach is reasonably open’;⁵²

⁵⁰ *Doepel* [51]; *Gudjala 2007* [30].

⁵¹ *Gudjala 2007* [33].

⁵² *Ibid* [34].

- to determine whether the conditions (or rules) specified in the application have a sufficiently clear description of the native title claim group, '[i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described'.⁵³

Does the description of the persons in the native title claim group meet this condition?

- [72] Schedule A and Attachment A describe the sea claim group as comprising members of the Meriam, Erubam Le, Ugarem Le, Masigalgal, Porumalgal, Warraberalgal, lamalgal, Badulgal, and Mualgal island communities, each of whom is a Torres Strait Islander.⁵⁴ Schedule A further provides that the members of the sea claim group are the biological and socially recognised members of their respective island communities.⁵⁵ Schedule A also states that the ancestors of the sea claim group and their deceased descendants are shown in genealogies, however because of the nature and extent of adoptions within the sea claim group, it is impracticable to identify and show all relevant biological and adoptive connections of each member nor all socially relevant connection between the persons shown in the genealogies.⁵⁶
- [73] It follows from the description that the condition of s 190B(3)(b) is applicable to this assessment. Thus, I am required to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.
- [74] Although there are a number of elements to the claim group description, I am of the view that this description is to be read as a discrete whole.⁵⁷
- [75] While Schedule A indicates that the membership of the island communities comprising the sea claim group were identified as some of the native title holders in the TSRSC Part A determination, I must still be satisfied that the description is described sufficiently.⁵⁸ I will therefore discuss each criterion below before deciding whether I am satisfied that the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Descent

- [76] I understand this part of the description to include those persons who are the biological descendants of the members of the island communities, with the apical ancestors identified in particular orders of the TSRSC Part A determination. The claim group description also provides for adoption, although the nature and extent of the adoptions are not specified.
- [77] I note that the Court has accepted the approach of identifying members of the native title claim group by descendants, including by adoption, of named people without any qualification

⁵³ *WA v NTR* [67].

⁵⁴ Schedule A [13], Attachment A.

⁵⁵ Schedule A [14].

⁵⁶ *Ibid* [15] – [17]. I note a copy of the genealogies does not accompany the application but the definition in the application provide these were accepted as evidence in the QUD6040/2001 Torres Strait Regional Seas Claim proceeding and were restricted pursuant to Court orders made 4 April 2008.

⁵⁷ *Gudjala 2007* [34].

⁵⁸ Schedule A [14A].

indicating whether the method of adoption of persons was according to traditional laws and customs.⁵⁹

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

[79] I am of the view that with some factual inquiry it will be possible to identify the persons who fit this part of the description of the native title claim group.

Social recognition

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

[81] The case law demonstrates that membership of a claim group is based on group acceptance and indicates that it is the claim group that must determine its own composition.⁶⁰ In *Aplin*, the Court noted that '[i]t is not necessary that all of the members of the claim group be identified in the application', however it is 'necessary that such identification be possible at any future point in time'.⁶¹ The High Court in *Yorta Yorta* found that the existence of a society depended upon mutual recognition within the group.⁶² In *Sampi FC*, the Full Court noted that 'in determining whether a group constitutes a society in the *Yorta Yorta* sense is the internal view of the members of the group ... [t]he unity among members of the group required by *Yorta Yorta* means that they must identify as people together who are bound by the one set of laws and customs or normative system'.⁶³

[82] Having regard to the information contained in Schedule F, it is my view that identification as a member of the sea claim group is linked to their descent from an apical ancestor and their connection to country. Specifically, Schedule F says that there 'is an intrinsic linking of people and place by the laws acknowledged and customs observed ... That linking mirrors the social relationship of people and the laws and customs that govern those relationships'.⁶⁴

[83] In light of this, I am satisfied this part of the description is described sufficiently clearly in order to ascertain whether any particular person is a member of the group.

Decision

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

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

⁵⁹ *WA v NTR* [67].

⁶⁰ *Aplin* [256] and [260].

⁶¹ *Ibid* [256].

⁶² *Yorta Yorta* [108].

⁶³ *Sampi FC* [45].

⁶⁴ Schedule F [156].

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

[86] For the reasons set out below, the application satisfies the condition of s 190B(4).

What is needed to meet this condition?

[87] The task at s 190B(4) is to assess whether the description of the native title rights and interests claimed is sufficient to allow the rights and interests to be readily identified. In my opinion, that description must be understandable and have meaning.⁶⁵

[88] The description referred to in s 190B(4), and as required by s 62(2)(d) is ‘a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law’.

[89] I will consider whether the claimed rights and interests can be prima facie established as native title rights and interests, as defined in s 223, when considering the claim under s 190B(6) of the Act. For the purposes of s 190B(4), I will focus only on whether the rights and interests as claimed are ‘readily identifiable’. While undertaking this task, I consider that a description of a native title right and interest that is broadly asserted ‘does not mean that the rights broadly described cannot readily be identified within the meaning of s 190B(4)’.⁶⁶

[90] I understand that in order to assess the requirements of this provision, I am confined to the material contained in the application itself.⁶⁷

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

[91] Schedule E contains a description of the claimed native title rights and interests. Having considered the description, I am satisfied that it is understandable and has meaning.

[92] I have considered the description of the native title rights and interests claimed, as described in Schedule E, and find that each right and interest is sufficient to fall within the scope of s 223 and is readily identifiable as a native title right and interest.

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

[93] For the reasons set out below, the application does satisfy the condition of s 190B(5).

[94] Section 190B(5) provides that the Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:

- (a) that the native title claim group have, and the predecessors of those persons had, an association with the area; and
- (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interest; and

⁶⁵ *Doepel* [91] – [92], [95], [98] – [101] and [123].

⁶⁶ *Strickland* [60]; *Strickland FC* [80] – [87].

⁶⁷ *Doepel* [16].

- (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

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

What is needed to meet this condition?

[96] While assessing the requirements of this provision, I understand that I must treat the asserted facts as true and consider whether those facts can support the existence of the native title rights and interests that have been identified.⁶⁸

[97] Although the facts asserted are not required to be proven by the applicant, I consider the factual basis must provide sufficient detail to enable a ‘genuine assessment’ of whether the particularised assertions outlined in subsections (a), (b) and (c) are supported by the claimants’ factual basis material.⁶⁹

[98] I also understand that the applicant’s material must be ‘more than assertions at a high level of generality’ and must not merely restate or be an alternate way of expressing the claim.⁷⁰

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

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

[101] I proceed with my assessment of the sufficiency of this material by addressing each assertion set out in s 190B(5) below. I note that I will discuss only those aspects of the material that in my view are most relevant to my consideration without referring to all the relevant information.

What is needed to provide a sufficient factual basis for s 190B(5)(a)?

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

- that there is ‘an association between the whole group and the area’, although not ‘all members must have such association at all times’;⁷¹
- that the predecessors of the group were associated with the area over the period since sovereignty;⁷² and
- that there is an association with the entire claim area, rather than an association with part of it or ‘very broad statements’, which for instance have no ‘geographical particularity’.⁷³

⁶⁸ *Doepel* [17]; *Gudjala FC* [57], [83] and [91]; *Bell* [94] and [96].

⁶⁹ *Gudjala FC* [92].

⁷⁰ *Gudjala 2009* [28] and [29]; *Anderson* [43] and [48].

⁷¹ *Gudjala 2007* [52]; *Bell* [41].

⁷² *Ibid* [52].

⁷³ *Martin* [26]; *Corunna* [39] and [45].

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

[103] The factual basis contains the following relevant information about the association of members of the native title claim group, and that of their predecessors, with the application area:

- The application area is located in the Torres Strait, comprising of several island communities and sea which dominates the physical environment. The islands are small and relatively infertile, with the reefs large in comparison and marine resources abundant. The places and elements within the application area include ‘straits, bodies of water, currents, tides, winds, rains, stars, reefs, lagoons, shoals, sandbanks, mud banks, rocks and the marine resources [which] are extensively named by the predecessors of the sea claim group’.⁷⁴
- The Torres Strait region was inhabited from at least several millennia before sovereignty. Prior to 1872 when the Crown first asserted sovereignty in the application area, the predecessors of the sea claim group and the persons determined to hold native title in the TSRSC Part A determination (TSRSC native title holders) lived on more than 25 islands in the region, including the island communities within the application area, and regularly visited, inhabited and used other islands in the region.⁷⁵
- The Torres Strait Islanders engaged in trading activities among themselves, between island communities and with neighbouring Papuans and Aboriginal people, long before the arrival of Europeans in the region.⁷⁶
- Settlement and continued occupation of the Torres Strait were the result of marine technology, the predecessor’s knowledge and ability to exploit and trade marine resources with the use of sea-going canoes, the way in which they engaged with the marine environment, and their knowledge of the underwater realm which was gained through their experience of diving. This was recognised by the first Europeans who encountered them and was observed by others prior to sovereignty.⁷⁷
- From at least 1792, interactions with the Europeans, such as in relation to trade, commenced and became frequent occurrence by the 1840s.⁷⁸
- By the mid-1860s, interactions between Torres Strait Islanders and foreigners increased substantially when foreigners came and stayed to exploit marine resources of the Torres Strait in the beche-de-mer and pearl shell industries.⁷⁹
- Before 1872 and 1879, Christian missionisation and the escalation of marine industry and government activity influenced the circumstances of the pre-sovereignty society.⁸⁰

⁷⁴ Schedule F [86] and [157].

⁷⁵ Ibid [84] and [151] – [152].

⁷⁶ Ibid [139].

⁷⁷ Ibid [93] and [136] – [138].

⁷⁸ Ibid [140].

⁷⁹ Ibid [141].

⁸⁰ Ibid [142].

- Many of the ancestors and predecessors of the sea claim group were born in and lived all or much of their lives in, and are buried within, the region.⁸¹
- Prior to sovereignty, Torres Strait Islanders made economic use of the region, including the application area. The region, including the application area, continues to be used extensively and intensively by Torres Strait Islander hunters, fishers, divers and collectors for economic purposes, using sea-going vessels, in accordance with laws and customs.⁸²
- Members of the sea claim group and their predecessors have at all times occupied, inhabited and used the application area, and are considered under laws and customs to be the ‘proper’ people in relation to the application area.⁸³ The claimants and predecessors considered the application area as ‘theirs’, namely being ‘owned’ by them as a consequence of having been occupied, inhabited and used by their ancestors.⁸⁴
- The claimants and their predecessors have knowledge of, hold and own mythological stories associated with actions of story people and various places of the region and these ‘stories enrich the areas in which the story people lived or continue to be a presence or influence’.⁸⁵ Mythological paths of travelling story people criss-cross the Torres Strait and play a role in its cultural consolidation as a region, with some story people associated with the application area.⁸⁶
- Members of the sea claim group are associated with the application area by their laws and customs, whereby the claimants carry on activities to exercise their claimed rights and interests and to acknowledge and observe laws and customs, with those activities required for the sustenance of their human and social life.⁸⁷
- Like their predecessors, the claimants were born in and lived for all or much of their lives in the application area and continue to do so. There are presently 14 permanent residential communities in the region, many of which are adjacent to the application area and are inhabited by members of the sea claim group in islands near the northern boundary. Permanent residential communities have also existed in a number of other islands proximate to the claim area. Claimants frequently travel to, inhabit and use those and other islands.⁸⁸
- The persons living in the region comprise predominantly of the claimants and the TSRSC native title holders.⁸⁹

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

[104] For the purposes of this condition, I understand that the Registrar is required ‘to address the relationship which all members claim to have in common in connection with the relevant

⁸¹ Ibid [148] – [149].

⁸² Ibid [60] and [153].

⁸³ Ibid [152] and [154].

⁸⁴ Ibid [155].

⁸⁵ Ibid [158].

⁸⁶ Ibid [69].

⁸⁷ Ibid [84], [143] – [145].

⁸⁸ Ibid [146].

⁸⁹ Ibid [147].

land'⁹⁰. In my view, this criterion relates to the 'alleged facts [supporting] the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)'.⁹¹ I consider that these principles are relevant in assessing the sufficiency of the claimant's factual basis for the purpose of the assertion at s 190B(5)(a) as they elicit the need for the factual basis material to provide information pertaining to the identity of the native title claim group, the predecessors of the group and the nature of the association with the area covered by the application. In that regard, I consider that the factual basis material clearly identifies the native title claim group, being the sea claim group, and acknowledges the relationship the group has with their country, which is both of a physical and spiritual nature. The factual basis reflects the knowledge members have of their traditional island communities, their marine environment and the mythological stories and associated sites.

[105] There is also, in my view, a factual basis that goes to showing the history of the association that members of the claim group have, and that their predecessors had, with the application area.⁹² The factual basis indicates that the predecessors of the sea claim group lived in or near the island communities within the application area, and regularly inhabited and used nearby islands, prior to sovereignty. The predecessors engaged in trading activities between island communities and neighbouring Papuans and Aboriginal people well before the arrival of Europeans. They subsequently commenced trading with Europeans around the early 1790s and then participated in activities to exploit the marine resources with them in the mid-1860s, prior to Christian missionisation and the escalation of marine industry and government activity in the 1870s. Subsequent generations of the sea claim group have continued to live, inhabit, visit and/or use the island communities in the application area, which is still extensively and intensively used by claimant hunters, fishers, divers and collectors for economic purposes in accordance with their laws and customs. The factual basis also indicates a spiritual association with the application area where the claimant and the predecessors believed in, held and owned mythological stories associated with the actions of story people and places of the region.

[106] For the purposes of s 190B(5)(a), I must also be satisfied that there is sufficient factual material to support the assertion of an association between the group and the whole area. The application area comprises of island communities but primarily covers a large body of waters. The factual basis indicates that the islands within the application area are small and relatively infertile, while the reefs are large and marine resources abundant. While the factual basis does not provide specific information where activities occur, the facts indicate that the claimants fully exploited the marine environment through hunting, fishing, diving and collecting marine resources within the application area, with the use of sea-going canoes by the predecessors and now sea-going vessels by current claimants. The asserted facts indicate that the claimants and their predecessors occupied and/or used the islands in the application area and I understand these are located in the eastern and southeastern areas covered by the application and some islands in the northern area. The factual basis refers to trading activities

⁹⁰ *Gudjala 2007* [40].

⁹¹ *Ibid* [39].

⁹² *Ibid* [51].

occurring with other island communities as well as neighbouring Aboriginal communities and the Papuans, which in my view would involve travelling throughout the application area, including the western and southern areas covered by the application. The mythological paths of travelling story people are also said to criss-cross the region with some story people associated with the application area.

[107] From the above information, I consider that the factual basis is sufficient to support the assertion of an association, both physical and spiritual, ‘between the whole group and the area’.⁹³ In my view, the factual basis material provides sufficient examples and facts of the necessary geographical particularity to support the assertion of an association between the whole group and the whole area.

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

What is needed to provide a sufficient factual basis for s 190B(5)(b)?

[109] The definition of ‘native title rights and interests’ in s 223(1)(a) provides that those rights and interests must be ‘possessed under the traditional laws acknowledged, and traditional customs observed,’ by the native title holders. Noting the similar wording between this provision and the assertion at s 190B(5)(b), I consider that it is appropriate to apply s 190B(5)(b) in light of the case law regarding the definition of ‘native title rights and interests’ in s 223(1). In that regard, I have taken into consideration the observations of the High Court in *Yorta Yorta* about the meaning of the word ‘traditional’.⁹⁴

[110] In light of *Yorta Yorta*, I consider that a law or custom is ‘traditional’ where:

- ‘the origins of the content of the law or custom concerned are to be found in the normative rules’ of a society that existed prior to sovereignty, where the society consists of a body of persons united in and by its acknowledgement and observance of a body of law and customs;⁹⁵
- 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’;⁹⁶
- the law or custom has been passed from generation to generation of a society, but not merely by word of mouth;⁹⁷
- those laws and customs have been acknowledged and observed without substantial interruption since sovereignty, having been passed down the generations to the claim group.⁹⁸

⁹³ Ibid [52].

⁹⁴ Ibid [26] and [62] – [66].

⁹⁵ *Yorta Yorta* [46] and [49].

⁹⁶ Ibid [47].

⁹⁷ Ibid [46] and [79].

⁹⁸ Ibid [87].

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

- the factual basis demonstrates the existence of a pre-sovereignty society and identifies the persons who acknowledged and observed the laws and customs of the pre-sovereignty society;⁹⁹
- if descent from named ancestors is the basis of membership to the group, the factual basis demonstrates some relationship between those ancestral persons and the pre-sovereignty society from which the laws and customs are derived;¹⁰⁰ and
- the factual basis contains an explanation as to how the current laws and customs of the claim group are traditional (that is, laws and customs of a pre-sovereignty society relating to rights and interests in land and waters). Further, the mere assertion that current laws and customs of a native title claim group are traditional because they derive from a pre-sovereignty society from which the claim group is said to be descended, is not a sufficient factual basis for the purposes of s 190B(5)(b).¹⁰¹

[112] In *Warrie*, the Full Federal Court observed that while ‘a claim group must establish that the traditional law and custom which gives rise to their rights and interests in that land and waters stems from rules that have a normative character’, the Act does not ‘require establishment of some overarching “society” that can only be described in one way and with which members of a claim group are forever fixed in relation to any other land and waters over which they assert native title’.¹⁰²

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

[113] I consider the following asserted facts to be relevant to my consideration of whether the factual basis is sufficient to support the existence of a pre-sovereignty society or a society that existed prior to settlement of the application, and the traditional laws and customs of the native title claim group:

Society

- The members of the sea claim group, currently and at sovereignty, are a member of a society comprising of:
 - Torres Strait Islanders;
 - a broader regional group inclusive at its outer geographical and social limits of some indigenous persons of the southern coast of Papua New Guinea (being some Coastal Kiwai, Estuarine Kiwai and Trans-Fly groups) and/or some indigenous persons of the northern Cape York Peninsula (being some or all of Gudang, Yadhaykenu, Ankamuthi and Wuthathi People) (alternative larger societies).¹⁰³

⁹⁹ *Gudjala 2009* [37] and [52].

¹⁰⁰ *Ibid* [40].

¹⁰¹ *Ibid* [29], [54] and [69].

¹⁰² *Warrie* [107]; *Alyawarr* [78].

¹⁰³ Schedule F [33] – [34], [36] – [37], [39] – [40] and [42].

- The original society comprised of ancestors or biological or socially recognised descendants as were living at sovereignty, with any other persons without descendants.¹⁰⁴
- Current members of the society are the biological and socially recognised descendants of the members of the original society and the ancestors.¹⁰⁵
- The current society is relevantly continuous with the original society.¹⁰⁶ The original society at sovereignty was, and the current society today continues to be, a vital society.¹⁰⁷

Traditional laws and customs

- The laws and customs acknowledged and observed by the pre-sovereignty society included:
 - Territorial and social organisation: the pre-sovereignty society was a stateless society with no intrinsic boundaries, symbolic centre or centre of political authority, with small family groups independent in much of their daily life, yet interdependent for survival and vitality through intermarriage and material sustenance by trade.¹⁰⁸ The predecessors observed a classificatory kinship system; membership of local lineages, totemic claims or cult groups involved descent (including adoption) through male lines; marriage rules; relationship rules between descent groups such as maternal uncles teaching nephews how to hunt marine animals and acting as a mentor and protector; exchange of material and non-material items between descent groups; daily activities including near-shore fishing by small family groups; offshore fishing, warfare, inter-island and other trading and some ceremonial activities in larger groups; and no hereditary positions of authority.¹⁰⁹ Similarly, the current society is stateless and is organised by membership of territorial groupings recruited by descent; reciprocity and exchange including rights and obligations arising from particular relationships; emplacement of social identity by original occupation and subsequent inheritance; territorial control and right to livelihood.¹¹⁰
 - Marine orientation: the predecessors were dependent upon the sea for some part of their nutrition as survival on land-based resources alone was impossible. They used the marine resources since they first arrived on the Torres Strait islands.¹¹¹ The occupation, inhabitation and use of the application area by the current claimants are characterised by a well-developed adaptation to exploitation, utilisation and management of the marine environment and resources. They significantly rely on the marine environment and resources commercially, nutritionally and symbolically, and have sophisticated seafaring and resource exploitation skills and technologies and

¹⁰⁴ Ibid [39].

¹⁰⁵ Ibid [43] – [44].

¹⁰⁶ Ibid [45].

¹⁰⁷ Ibid [46].

¹⁰⁸ Ibid [81] and [84].

¹⁰⁹ Ibid [82] – [83].

¹¹⁰ Ibid [47] – [53].

¹¹¹ Ibid [86] – [87].

associated navigational knowledge and maritime lore, which is enshrined in songs and myths. They conduct long distance voyaging by sea, have marine imagery permeating culture including religion, mythology, totems, art, song, dance, storytelling and personal identity, and believe in dugong and turtle hunting magic. They use named places and places of significance, some deriving from myths, in the seas of the application area, and regularly participate in marine resource fishing, hunting and gathering activities. They also believe island groups are connected by sea.¹¹²

- Holding and exercising rights: members of ‘societal sub-groups’ had access to marine territory associated with that sub-group by hereditary right and sanctions were available against intruders unless they were accompanied by a local sponsor or had a kinsman or a legitimate purpose.¹¹³ Currently there are 13 permanent residential island communities within the region, each occupied by descendants of the ancestors, and the claimants frequently travel to, inhabit and use many other islands in the application area.¹¹⁴ Ownership of a place is vested in the biological and socially recognised descendants of the ancestors.¹¹⁵ While marine territories are frequently associated with island communities, a territory may be associated with a descent group, a sub-group of a descent group, or with two or more communities or descent groups. Rights and interests in relation to the sea and relationships between people are congruent, with descendants of the ancestors and those with a sufficiently close relationship to a claimant having unrestricted access to a marine territory while others may need to seek permission or inform the group of their intention to access the territory and its resources. Therefore, the persons associated with a marine territory can use, enjoy, access and take its resources as of right, they may also regulate access to it and its resources by other Torres Strait Islanders, and may control access to or defend it and its resources against others including imposing sanctions for wrongful presence or use. The naming of places and associated stories is regarded as evidence of prior occupation, inhabitation and use, and therefore ownership of places.
- Trade and exchange, economy and commerce: the predecessors traded and exchanged items that were abundant in one place to another where the resource was relatively scarce in order to survive.¹¹⁶ Marine resources were exploited and trade was carried out through the use of sea-going canoes traded with or purchased from people from New Guinea with other sea-going vessels exchanged for resources or labour.¹¹⁷ Participation in the marine industries allowed the predecessors to acquire boats and engage in pearling and trepanging with community crews, and be independent producers such as in the trade of turtle shell.¹¹⁸ The exploitation and use

¹¹² Ibid [55].

¹¹³ Ibid [90].

¹¹⁴ Ibid [57].

¹¹⁵ Ibid [56].

¹¹⁶ Ibid [91] – [92].

¹¹⁷ Ibid [93] – [94].

¹¹⁸ Ibid [95] – [96].

of marine resources were regulated by laws and customs.¹¹⁹ Current claimants now use sea-going vessels to efficiently exploit the marine resources.¹²⁰ Trade and exchange of material and non-material items through networks of relationships remain significant.¹²¹ The laws and customs also provide for and regulate the exploitation and use of marine resources by the claimants.¹²²

- Receptiveness to innovation and change: in and prior to 1872, the Torres Strait Islanders were engaged in intensive interactions with foreigners and the laws and customs and ecological and other imperatives inclined them to be receptive to innovation and change through engagement with others and open up new trading relations.¹²³ Similarly, the current claimants remain receptive to innovation and change through engagement with others. For example, new technologies introduced to the claimants have been readily adopted, sometimes with adaptations, by the claimants for their own purposes.¹²⁴
- Language: at sovereignty, the predecessors spoke the Eastern Torres Strait language and the Western Torres Strait language, which had four speech variations.¹²⁵ The languages had many words that were the same or similar, and in the central islands a high degree of mutual intelligibility developed between the languages as a function of sustained and intensive social relationships.¹²⁶ Many people were also bilingual.¹²⁷ The claimants continue to use both languages, and Torres Strait Creole came into common usage by some Torres Strait Islanders in the late 19th century which spread throughout the Torres Strait by the early 20th century.¹²⁸
- Cosmology, mythology and religion: while communities or parts of a community at sovereignty did not have a single or common set of religious practices, there were common themes of fertility, reproduction and death.¹²⁹ The cults were believed to have been introduced by story people from outside the Torres Strait, who travelled to different island communities.¹³⁰ The cosmology included totemistic beliefs by which groups were believed to have an intrinsic relationship with particular species of animals, plants and other objects such as constellations of stars and wind direction, which was related to the structure of kin groups.¹³¹ The predecessors believed in the continuity of a person's spirits after death and performed rituals to send the spirit to the spirit world.¹³² They also used magic to assist in fishing, hunting, gardening and

¹¹⁹ Ibid [99].

¹²⁰ Ibid [60].

¹²¹ Ibid [61].

¹²² Ibid [62].

¹²³ Ibid [101] – [103].

¹²⁴ Ibid [63] – [64].

¹²⁵ Ibid [65] and [104].

¹²⁶ Ibid [107].

¹²⁷ Ibid [108].

¹²⁸ Ibid [65] – [66].

¹²⁹ Ibid [109].

¹³⁰ Ibid [109] – [110].

¹³¹ Ibid [112].

¹³² Ibid [113].

healing and practiced inter-island ceremonial activities.¹³³ Today mythological stories and associated sites and story people are part of the cultural property of the claimants and play a role in validating their relationships to their land and waters. Some mythological paths of story people play a role in its cultural consolidation as a region. There are several story people associated with the application area that are widely known and of importance today.¹³⁴ In their cosmology, physical objects such as plants, animals, tides, celestial objects, and the entire landscape and seascape are intricately integrated with their social world.¹³⁵

- Other laws and customs: the predecessors also acknowledged and observed, and the current claimants continue to acknowledge and observe, other laws and customs including identification, acknowledgement and respect for people who are senior and knowledgeable, and for the authority of such senior people; respect for instruction of younger people by elders; use of and property in stories, songs, dances, costumes and dress design, and cultural knowledge and practice; manufacture of equipment and artefacts; construction of structures; hunting, fishing, gathering, cultivation, preparation, distribution and consumption of food, medicinal and other resources; sharing with families, kin and communities; and prohibitions or taboos on certain activities or foods such as the partner of a pregnant woman participating in dugong or turtle hunting.¹³⁶
- The laws and customs have been handed down to members of the sea claim group by word of mouth and common practice by their ancestors.¹³⁷
- The normative system that exists in relation to the application area today is substantially continuous with that which existed at sovereignty and the laws and customs acknowledged and observed by the claimants continue to sustain the same rights and interests that existed at sovereignty.¹³⁸ In particular, the laws and customs mentioned above have substantially continued throughout the generations since sovereignty.¹³⁹

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

Is the factual basis sufficient for the assertion of s 190B(5)(b)?

[115] My understanding of the factual basis material is that the pre-sovereignty society comprised of members of the claim group who were Torres Strait Islanders and part of a broader regional group, who spoke the same language and had common laws and customs involving, among others, territorial and social organisation, marine environment, holding and exercising of rights, trade and exchange, receptiveness to innovation and change, and mythological and religious beliefs. The factual basis reveals that the laws and customs currently observed and

¹³³ Ibid [114] and [116].

¹³⁴ Ibid [69].

¹³⁵ Ibid [70] – [71].

¹³⁶ Ibid [71] and [118].

¹³⁷ Ibid [123].

¹³⁸ Ibid [121] – [122].

¹³⁹ Ibid [124] – [133].

acknowledged by the claim group are similar to the laws and customs of the pre-sovereignty society with some adaptation. The content of the traditional laws and customs is said to have been passed down to the current members of the claim group through the preceding generations.

[116] In my view, the factual basis demonstrates that the ancestors occupied, or were among the generation born to those or who were socially recognised descendants of those who occupied, the application area prior to sovereignty. From the factual basis, I understand the current claim members are the descendants of these ancestors.

[117] I am of the view that there is information contained within the factual basis material from which the current laws and customs can be compared with those that are asserted to have existed at sovereignty. The native title claim group observe a land holding system where rights and interests to land are acquired and owned by the biological and socially recognised descendants of the ancestors. Marine territories are associated with island communities, descent groups, a sub-group of a descent group, or with two or more communities or descent groups. The descendants of ancestors or those with sufficiently close relationships to claimants have unrestricted access to a territory and can control access to it and its resources including imposing sanctions for wrongful presence or use.

[118] The factual basis contains references to current observance and acknowledgement of laws and customs of a spiritual nature. The claimants have knowledge of the mythological stories and associated sites and story people and say they are a part of their cultural property and play a role in validating their relationships to country. They also perform magic while hunting and perform traditional burial rites.

[119] The asserted facts contain information about the way the members of the claim group continue to speak language, observe prohibitions or taboos on certain activities and food, and use their country like their predecessors, such as to exploit the marine environment to hunt, fish and gather resources for food and medicine as well as trade and exchange with each other, other island communities and outsiders. This, in my view, demonstrates that the laws and customs currently observed are relatively unchanged from those acknowledged and observed by their predecessors, and that they have been passed down the generations to the claimants today.

[120] The factual basis, in my view, is sufficient to support the assertion that the relevant laws and customs, acknowledged and observed, have been passed down through the generations, by word of mouth and common practice, to the current members, and have been acknowledged by them without substantial interruption, although with some adaptation. I understand that the current claimants learn from their predecessors such as maternal uncles teaching their nephews how to hunt marine animals. Given sovereignty occurred in 1872 and there have only been a few generations between the ancestors and the claimants, I infer the apical ancestors would have also practiced these modes of teachings. It follows, in my view, that the laws and customs currently observed and acknowledged are 'traditional' in the *Yorta Yorta* sense as they derive from a society that existed at the time of sovereignty.

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

What is needed to provide a sufficient factual basis for s 190B(5)(c)?

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

[123] 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.¹⁴⁰ In my view, this assertion relates to the continued holding of native title through the continued observance of the traditional laws and customs of the group.

[124] I also understand that if the factual basis relied upon the drawing of inferences, that '[c]lear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs may justify an inference of continuity'.¹⁴¹

Is the factual basis sufficient for the assertion of s 190B(5)(c)?

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

[126] The factual basis indicates that members of the native title claim group learn from their immediate predecessors about their laws and customs through word of mouth and common practice. For instance, maternal uncles teach their nephews how to hunt marine animals and the asserted facts indicate the claimants continue to know about mythological stories and how to exploit the marine environment and resources like their predecessors.

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

- the relevant pre-sovereignty society has been identified and some facts in relation to that society have been set out;
- there is some information pertaining to the acknowledgement and observance of laws and customs by previous generations of the native title claim group in relation to the application area;
- examples of the claim group's current acknowledgement and observance of laws and customs in relation to the application area have been provided.

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

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

[129] As set out below, I consider that some of the claimed rights and interests have been established on a prima facie basis. Therefore, the claim satisfies the condition of s 190B(6).

¹⁴⁰ *Martin* [29].

¹⁴¹ *Gudjala 2009* [33].

What is needed to meet this condition?

[130] The requirements of this section are concerned with whether the native title rights and interests, identified and claimed in this application, can be prima facie established. Thus, ‘if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis’.¹⁴² Nonetheless, it does involve some ‘measure’ and ‘weighing’ of the factual basis and imposes ‘a more onerous test to be applied to the individual rights and interests claimed’.¹⁴³

[131] I note that this section is one that permits consideration of material that is beyond the parameters of the application.¹⁴⁴

[132] I understand that the requirements of s 190B(6) are to be considered in light of the definition of ‘native title rights and interests’ at s 223(1).¹⁴⁵ I must, therefore, consider whether, prima facie, the individual rights and interests claimed:

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

[133] I also understand that a claimed native title right or interest can be prima facie established if the factual basis is sufficient to demonstrate that it is possessed pursuant to the traditional laws and customs of the native title claim group.¹⁴⁶

[134] I note that the ‘critical threshold question’ for recognition of a native title right or interest under the Act ‘is whether it is a right or interest “in relation to” land or waters’.¹⁴⁷ I also note that the phrase ‘in relation to’ is ‘of wide import’.¹⁴⁸ Having examined the native title rights and interests set out in Schedule E of the application, they are, prima facie, rights or interests ‘in relation to land or waters.’

[135] I also note that I consider that paragraph 21 of Schedule B of the application sufficiently addresses any issue of extinguishment, for the purpose of the test at s 190B(6).

[136] Paragraphs 26 and 26A of Schedule E include the claimed native title rights and interests, with paragraph 26 setting out the rights and interests that are claimed below the high water mark and paragraph 26A listing the rights and interests claimed above the high water mark. Before I consider the rights and interests claimed, I note that my reasons at s 190B(6) should be considered in conjunction with, and in addition to, my reasons and the material outlined at s 190B(5).

¹⁴² *Doepel* [135].

¹⁴³ *Ibid* [126], [127] and [132].

¹⁴⁴ *Ibid* [16].

¹⁴⁵ *Gudjala* 2007 [85].

¹⁴⁶ *Yorta Yorta* [86]; *Gudjala* 2007 [86]

¹⁴⁷ *Ward HC* [577].

¹⁴⁸ *Alyawarr* [93].

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

26A. *Where exclusive native title can be recognised:*

(a) other than in relation to Water, the right to possession, occupation, use and enjoyment of the area to the exclusion of all others

[137] The majority of the High Court in *Ward HC* considered that ‘[t]he expression “possession, occupation, use and enjoyment ... to the exclusion of all others” is a composite expression directed to describing a particular measure of *control over access to land*’.¹⁴⁹ The High Court further noted that the expression, collectively, conveys ‘the assertion of rights of control over the land’, which necessarily flow ‘from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country’.¹⁵⁰

[138] In *Griffiths*, the Full Court, while exploring the relevant requirements to proving that such exclusive rights are vested in a native title claim group, stated that:

the question whether the native title rights of a given native title claim group include the right to exclude others from the land the subject of their application does not depend upon any formal classification of such rights as usufructuary or proprietary. *It depends rather on the consideration of what the evidence discloses about their content under traditional law and custom.*¹⁵¹

[139] I also note the Full Court’s observations in relation to control of access to country that:

[i]f control of access to country flows from spiritual necessity because of the harm that “the country” will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive. The relationship to country is essentially a “spiritual affair”. It is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people. The question of exclusivity depends upon the ability of the [native title holders] effectively to exclude from their country people not of their community. If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have ... an exclusive right of possession, use and occupation.¹⁵²

[140] In examining whether the factual material prima facie establishes its existence, I am of the view that this right materialises from traditional laws and customs that permit the native title claim group to exhibit control over all others in relation to access to the land and waters.

[141] The factual basis provides that members of the claim group follow a land holding system where ownership of a place is vested in, and rights and interests are passed on to biological and socially recognised descendants.¹⁵³ Marine territories are associated with either island communities, a descent group, a sub-group of a descent group, or with two or more communities or descent groups. Descendants of the ancestors and those with a sufficiently

¹⁴⁹ *Ward HC* [93], emphasis added.

¹⁵⁰ *Ibid* [93].

¹⁵¹ *Griffiths* [71], emphasis added.

¹⁵² *Ibid* [127].

¹⁵³ Schedule F [56].

close relationship to a claimant having unrestricted access to a marine territory while others may need to seek permission or inform the group of their intention to access the territory and its resources. The persons associated with a marine territory can regulate access to it and its resources by other Torres Strait Islanders, and control access to or defend it and its resources against outsiders including by imposing sanctions for wrongful presence or use. The members of the sea claim group believe the mythological stories and associated sites and story people play a role in validating their relationship to their land and waters.¹⁵⁴

[142] I am of the view that the factual basis material asserts that current members of the claim group maintain knowledge of their country. The knowledge of the laws and customs of the current members elicits that they have a ‘spiritual affair’ with their country where their spiritual beliefs play a role in their relationship to country. The factual basis indicates that the claimants can control access to country and defend it from outsiders, such that outsiders are required to seek permission to access country and its resources and the claim members can impose sanctions for unauthorised access. In my view, such control flows from a right to speak for country and a spiritual necessity to protect country from harm and injury. I understand this symbolic ownership encompasses the right to speak for country and the right to exclude.

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

26(a) to access, to remain in and to use the area;

(b) to access resources and to take for any purpose resources in the area;

26A(b) Where non-exclusive native title rights and interests can be recognised:

The non-exclusive rights to:

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

(b) live and camp on the area and for those purposes to erect shelters and other structures on the area;

(c) hunt, fish and gather on the land and waters of the area;

(d) take the Natural Resources from the land and waters of the area;

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

[144] The factual basis indicates that, like their predecessors did, claimants access the application area to inhabit, travel across on sea-faring vessels, hunt, fish, take and exploit the marine resources for food, medicine, trade and exchange.¹⁵⁵

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

26(c) to maintain places and/or areas of importance, or significance, to the members of the sea claim group under their traditional laws and customs on the area and protect those places and/or areas from harm;

26A The non-exclusive rights to:

(f) be buried and to bury members of the sea claim group within the area;

¹⁵⁴ Ibid [69].

¹⁵⁵ See for instance Schedule F [93], [136] – [138], [147], [151] – [152] and [154].

(g) maintain places and/or areas of importance, or significance, to the members of the sea claim group under their traditional laws and customs on the area and protect those places and/or areas from harm;

(j) conduct ceremonies on the area

[146] The factual basis states that the ancestors are buried within the application region and that current claimants also participate in burial rites.¹⁵⁶ The asserted facts also indicate the persons who own a marine territory are able to defend or protect it.¹⁵⁷

[147] I consider the factual basis material prima facie establishes that these rights are possessed under the traditional laws and customs of the native title claim group.

Which rights cannot be prima facie established?

26(d) be accompanied on to the area by those persons who, though not members of the sea claim group, are:

(i) spouses of members of the sea claim group;

(ii) people who are members of the immediate family of a spouse of a member of the sea claim group; or

(iii) people reasonably required by the members of the sea claim group under traditional law and custom for the performance of ceremonies or cultural activities on the area.

26A The non-exclusive rights to:

(h) teach on the area the physical and spiritual attributes of the area and the traditional laws and customs of the members of the sea claim group or persons otherwise entitled to access the area;

(i) hold meetings on the area;

(k) light controlled and contained fires on the area; and

(l) be accompanied on to the area by those persons who, though not members of the sea claim group, are:

(i) spouses of members of the sea claim group;

(ii) people who are members of the immediate family of a spouse of a member of the sea claim group; or

(iii) people reasonably required by the members of the sea claim group under traditional law and custom for the performance of ceremonies or cultural activities on the area

[148] I consider that the factual basis does not contain sufficient examples of observance of these rights by the predecessors and/or current members of the claim group. For example, while there is a reference to the predecessors observing the right at 26(d) and 26A(l), with a non-community member being able to visit a marine territory with a 'local sponsor', I do not consider there to be sufficient information regarding the current observance of this right.¹⁵⁸

[149] In my view, the factual basis material is not sufficient to indicate that these rights are held under the laws and customs passed down through the generations to the claimants. I am therefore unable to be satisfied that these rights are prima facie established.

¹⁵⁶ Ibid [132] and [149].

¹⁵⁷ Ibid [56].

¹⁵⁸ Schedule F [90].

Physical connection – s 190B(7): condition met

[150] For the reasons set out below, the application satisfies the condition of s 190B(7).

What is needed to meet this condition?

[151] This condition requires that I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters, but for certain things done.

[152] The Courts have observed that it ‘seems likely that [the traditional physical] connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs’.¹⁵⁹ In interpreting connection in the ‘traditional’ sense as required by s 223 of the Act, the members of the joint judgment in *Yorta Yorta* felt that ‘the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs ... “traditional” in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty’.¹⁶⁰

[153] I consider that for the purposes of s 190B(7), I must be satisfied of a particular fact or facts, from the material provided, that at least one member of the claim group has or had the necessary traditional *physical* association with the application area.¹⁶¹

Is there evidence that a member of the claim group has or had a traditional physical connection?

[154] I refer to the information above in relation to s 190B(5) of these reasons, which provides a sufficient factual basis supporting the assertion that the native title claim group acknowledges and observes the traditional laws and customs of the pre-sovereignty society.

[155] The factual basis contains relevant information that describes a traditional physical association of members of the claim group with the application area, including claimants travelling over with the use of sea-going vessels, occupying, hunting, fishing, gathering marine resources and performing other traditional practices within the application area.¹⁶²

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

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

[157] As set out in my reasons below, in my view the application does not offend the provisions of ss 61A(1) and therefore the application does satisfy the condition of s 190B(8).

¹⁵⁹ *Gudjala 2009* [84].

¹⁶⁰ *Yorta Yorta* [86].

¹⁶¹ *Doepel* [18].

¹⁶² See for instance Schedule F [93], [136] – [138], [147], [151] – [152] and [154].

What is required to meet this condition?

[158] Section 190B(8) requires that the application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s 61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

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

Does the application, accompanying documents or other information disclose that the application should not have been made?

Application not made over an approved determination of native title: s 61A(1)

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

Application does not cover previous exclusive possession act areas: s 61A(2)

[161] Paragraph 21 of Schedule B provides that any area in relation to which a previous exclusive possession act is done is excluded from the application, except where required to be disregarded by ss 47A or 47B.

Application does not claim exclusive rights and interests in previous non-exclusive possession act areas: s 61A(3)

[162] Schedule E provides that exclusive rights and interests are claimed in areas where it can be recognised and specifically excludes a claim in relation to water.¹⁶³ Schedule B provide that the application excludes any areas where native title rights and interests have been extinguished except where required to be disregarded pursuant to ss 47A or 47B.¹⁶⁴

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

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

What is required to meet this condition?

[164] Section 190B(9) provides that the application and accompanying documents must not disclose, and the Registrar must not be aware of, the matters set out in paragraphs (a) to (c).

¹⁶³ Schedule E [26A].

¹⁶⁴ Schedule B [21].

Does the application, accompanying documents or other information disclose the matters set out in 190B(9)?

Claim not made of ownership of minerals, petroleum or gas wholly owned by the Crown: s 190B(9)(a)

[165] Schedule Q provides that the applicant makes no claim to any minerals, petroleum or gas wholly owned by the Crown.

Exclusive possession not claimed over all or part of waters in an offshore place: s 190B(9)(b)

[166] Schedule P provides that the claimed rights do not include a right to exclusive possession in the sea.

Native title rights and interests in the application area otherwise not extinguished: s 190B(9)(c)

[167] Paragraph 21 of Schedule B provides that the application does not cover any area where native title rights and interests have otherwise been wholly extinguished, except where any extinguishment is required by ss 47A or 47B of the Act to be disregarded.

End of reasons

Attachment A

Summary of registration test result

Application name	TSRSC Part C
NNTT No.	QC2022/001
Federal Court of Australia No.	QUD227/2022
Date of decision	25 July 2022

Section 190B conditions

Test condition	Sub-condition/requirement	Result
Section 190B(2)		met
Section 190B(3)	Section 190B(3)(b)	met
Section 190B(4)		met
Section 190B(5)	Subsections 190B(5)(a) – (c)	met
Section 190B(6)		met
Section 190B(7)		met
Section 190B(8)		met
Section 190B(9)		met

Section 190C conditions

Test condition	Sub-condition/requirement	Result
Section 190C(2)	Sections 61 - 62	met
Section 190C(3)		not met
Section 190C(4)	Section 190C(4)(b)	met
Section 190C(5)		met

End of document