



Registration Decision

Application name	Bernard Richard Charlie & Ors on behalf of the Northern Peninsula Sea Claim Group v State of Queensland (Northern Peninsula Sea Claim)
Name of applicant	Bernard Richard Charlie, Trevor Henry Lifu, Tracey Lee Ludwick, Beverley Tamwoy, Reginald Williams
Federal Court of Australia No.	QUD114/2017
NNTT No.	QC2017/002
Date of Decision	14 February 2023

Claim not accepted for registration

I have decided that the claim in the Northern Peninsula Sea Claim application does not satisfy all of the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).¹ Therefore the claim must not be accepted for registration.

For the purposes of s 190D(3), my opinion is that the claim does not satisfy the conditions in ss 190B(5), (6) and (7) and in ss 190C(3) and (4).

Daniel Deibler

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*)
Bell v Native Title Registrar [2021] FCA 229 (*Bell*)
Corunna v Native Title Registrar [2013] FCA 372 (*Corunna*)
David on behalf of the Torres Strait Regional Seas Claim v State of Queensland [2022] FCA 1430 (*David*)
Evans v Native Title Registrar [2004] FCA 1070 (*Evans*)
Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People [2019] FCAFC 177 (*Warrie*)
Gudjala People #2 v Native Title Registrar [2007] FCA 1167 (*Gudjala 2007*)
Gudjala People # 2 v Native Title Registrar [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*)
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*)
McLennan v State of Queensland [2019] FCA 1969 (*McLennan*)
Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58 (*Yorta Yorta*)
Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group [2005] FCAFC 135 (*Alyawarr*)
Northern Territory of Australia v Doepel [2003] FCA 1384 (*Doepel*)
Risk v National Native Title Tribunal [2000] FCA 1589 (*Risk*)
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*)
Western Australia v Native Title Registrar [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] This is an amended application filed on behalf of the Northern Peninsula Sea Claim native title claim group (claim group). It covers land and waters of about 3,264 sq km off the coast of Cape York extending from the Skardon River north to Injinoo.
- [2] The original application was filed on 27 February 2017. On 25 May 2017 a delegate of the Native Title Registrar (the Registrar) did not accept the claim for registration.
- [3] On 25 October 2022 an amended application was filed with the Federal Court (the Court) and the Registrar of the Court gave a copy of the amended application and accompanying affidavits to the Registrar on 26 October 2022 pursuant to s 64(4) of the Act. This has triggered

the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A.²

Registration conditions

- [4] Sections 190A(1A), (6), (6A), (6B) set out the decisions available to the Registrar under s 190A. Section 190A(1A) provides for exemption from the registration test for certain amended applications and s 190A(6A) provides that the Registrar must accept a claim (in an amended application) when it meets certain conditions. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (which deals mainly with the merits of the claim) and s 190C (which deals with procedural and other matters). Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B–190C.
- [5] I am satisfied that neither s 190A(1A) nor s 190A(6A) apply to the claim made in this amended application. The granting of leave by the Court to amend the application was not made pursuant to s 87A, and thus the circumstance described in s 190A(1A) does not arise. Moreover, the original application was never accepted for registration by the Registrar and the application does therefore not meet the requirements of s 190(6A).
- [6] I have decided that the claim in the application must not be accepted for registration and this document sets out my reasons for that decision. Attachment A contains a summary of the registration test result.

Procedural fairness

- [7] As a delegate of the Registrar, I am bound by the principles of administrative law, including the rules of procedural fairness, when making a registration decision.³ 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.⁴ When applying the registration test and making my registration decision I have followed the case law regarding procedural fairness requirements⁵ and note that the following steps were undertaken to ensure procedural fairness has been accorded:
- On 28 October 2022 the applicant and the State of Queensland (the State) were informed by letter that a delegate of the Registrar was considering whether ss 190A(1A) or (6A) applied to the amended application. The State was given seven days to make a submission about the applicability of these provisions. By email of the same date the State informed the Tribunal's senior officer for this matter that they would not be making submissions.
 - On 8 November 2022 the senior officer sent a letter to the State informing the State that the delegate of the Registrar had formed the view that the circumstances

² Section 190A(1).

³ *WA v NTR* [37].

⁴ *Hazelbane* [25].

⁵ See, for instance, *WA v NTR* [21] – [38]; *Hazelbane* [23] – [31]; *Bell* [73] – [84].

described in s 190A(1A) and s 190A(6A) were not applicable, that the delegate would proceed to consider whether the claim met the conditions set out in ss 190B–190C and that any submission in relation to the registration of this claim should be provided by 22 November 2022. No submissions from the State were received.

- The senior officer, also on 8 November 2022, wrote to inform the applicant that the delegate of the Registrar had formed the view that the circumstances described in s 190A(1A) and s 190A(6A) were not applicable, that the delegate would proceed to consider whether the claim met the conditions set out in ss 190B–190C and that any information additional to the application should be provided by 22 November 2022. No additional information from the applicant was received.

[8] This concluded the procedural fairness process.

Information considered

[9] Section 190A(3) sets out the information to which the Registrar must have regard in considering a claim under s 190A and provides that the Registrar ‘may have regard to such other information as he or she considers appropriate’.

[10] I have had regard to information in the application.⁶

[11] I note there is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers.⁷

[12] The State has not provided any submissions in relation to the application of the registration test.⁸

[13] I have also considered information contained in a geospatial assessment and overlap analysis prepared by the Tribunal’s Geospatial Services in relation to the area covered by the application, dated 27 October 2022 (the geospatial report) and the information in an updated geospatial assessment and overlap analysis, dated 21 December 2022 (the updated geospatial report).

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

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

[14] I have examined the application and I am satisfied that it contains the prescribed information and is accompanied by the prescribed documents.

[15] To meet s 190C(2), the Registrar must be satisfied that the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other

⁶ Section 190A(3)(a).

⁷ Section 190A(3)(b).

⁸ Section 190A(3)(c).

document, required by ss 61–2. This condition does not require any merit or qualitative assessment of the material to be undertaken.⁹

Section 61

[16] The application contains the details specified in s 61.

Section	Details	Form 1	Result
s 61(1)	Native title claim group	Schedule A	Met
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Schedule A	Met

Section 62

[17] The application contains the details specified in s 62.

Section	Details	Form 1	Result
s 62(1)(a)	Affidavits in prescribed form	Attachment R2	Met
s 62(2)(a)	Information about the boundaries of the area	Schedule B, Attachment B	Met
s 62(2)(b)	Map of external boundaries of the area	Attachment C	Met
s 62(2)(c)	Searches	Schedule D	Met
s 62(2)(d)	Description of native title rights and interests	Schedule E	Met
s 62(2)(e)	Description of factual basis:	Schedule F, G and M	Met
s 62(2)(f)	Activities	Schedule F, G and M	Met
s 62(2)(g)	Other applications	Schedule H	Met
s 62(2)(ga)	Notices under s 24MD(6B)(c)	Schedule HA	Met
s 62(2)(h)	Notices under s 29	Schedule I	Met

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

[18] I am not satisfied that no person is included in the native title claim group for this application that was a member of the native title claim group for any previous overlapping application.

[19] Section 190C(3) reads:

The Registrar must be satisfied that no person included in the native title claim group for the application (the **current application**) was a member of the native title claim group for any previous application, if:

- (a) the previous application covered the whole or part of the area covered by the current application; and
- (b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made; and

⁹ *Doepel* [16], [35] – [39].

(c) the entry was made, or not removed, as a result of consideration of the previous application under section 190A.¹⁰

[20] The explanatory memorandum that accompanied the *Native Title Amendment Bill 1997* provides that the ‘Registrar must be satisfied that no member of the claim group for the application ... is a member of the claim group for a registered claim which was made before the claim under consideration, which is overlapped by the claim under consideration and which itself has passed the registration test’.¹¹

[21] I note that I am permitted to have regard to information, which does not form part of the application, when assessing the requirements of s 190C(3).¹²

[22] According to Schedule H and the geospatial report the Kaurareg People #2 (QUD267/2008, QC2008/007) and Kaurareg People #3(QUD362/2010, QC2010/003) applications overlap the current application. In my view both applications meet the condition specified under subsection (a).

[23] 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 27 February 2017, when the original application was filed in the Court. I have undertaken a search of the Register and this revealed that the Kaurareg People #2 application was accepted for registration and an entry for the claim in the application was added to the Register on 13 February 2009. The Kaurareg People #3 application was also accepted for registration and an entry for the claim in the application was added to the Register on 3 December 2010. I am satisfied that both applications meet the condition identified in subsection (b).

[24] The condition at subsection (c) is 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.

[25] My search of the Register showed that the Court determined that native title exists in parts of the application area for both applications on 30 November 2022.¹³ The applications remain on the Register only to the extent that it relates to the undetermined area. The updated geospatial report advises that no registered native title determination application falls within the external boundary of the current application. In light of this and my own searches of the Tribunal’s geospatial database, it is my view that both applications have been removed from the register to the extent they overlapped with the current application. However, I also note that they have been removed from the Register because of a native title determination by the Court and not as a result of being considered under s 190A. Accordingly, in my view, these applications still meet the requirements of subsection (c).

[26] As the Kaurareg People #2 and Kaurareg People #3 applications meet all of the criteria for a ‘previous application’ stipulated by s 190C(3), I am required to consider whether there are any

¹⁰ Emphasis in original.

¹¹ Explanatory Memorandum 29.25.

¹² *Doepel* [16].

¹³ *David*.

members of the claim group for the previous application in common with the claim group for the current application.

[27] I consider my task not to be one of finding in all respects the real facts on the balance of probabilities, or on some other basis. My role is not 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.¹⁴

[28] I note that the application states in Schedule O:

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

[29] Following this statement, Schedule O names the Kaurareg People #2 and Kaurareg People #3 applications.

[30] On this basis, I cannot be satisfied that no person is included in the native title claim group for this application that was a member of the native title claim group for any previous overlapping application. I therefore consider the condition of s 190C(3) not to be met.

Identity of claimed native title holders – s 190C(4): condition not met

[31] For the reasons set out below, I am not satisfied that the requirements set out in s 190C(4)(a) or s 190C(4)(b) are met.

What is required to meet this condition?

[32] 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.

[33] According to Part A, Item 2 of the application, the applicant was authorised on 21 May 2015, and therefore before the amendments to the Native Title Act came into effect on 25 March 2021. Item 24 of the Replacement Revised Explanatory Memorandum to the *Native Title Legislation Amendment Bill 2020* provides:

The effect of this item is that where a claim group authorises an applicant or an ILUA under sections 251A or 251B prior to the commencement of this item on Proclamation, the current registration provisions for the claim or agreement would continue to apply to that agreement or claim, even after the item commences. Where the authorisation of an applicant does not occur until after the commencement of this item, the new provisions would apply (provided the relevant claimant or compensation application, or native title agreement occurs after commencement).

[34] It is therefore my view that I must assess the application's compliance with the version of s 190C as it stood before 25 March 2021 and not with the current version of the provision.

[35] Section 190C(4) of the Act, as it stood before 25 March 2021, reads:

The Registrar must be satisfied that either of the following is the case:

¹⁴ *Doepel* [16].

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

[36] Schedule R, Item 1 indicates that the application is not certified by a representative Aboriginal/Torres Strait Islander body. I must therefore consider whether the requirements of s 190C(4)(b) are met.

[37] 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).

[38] 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)?

[39] Section 190C(5) of the Act, as it stood before 25 March 2021, requires that the application

- (a) includes a statement to the effect that the requirements set out in paragraph (4)(b) have been met; and
- (b) briefly sets out the grounds on which the Registrar should consider that they have been met.

[40] I am satisfied that Part A, Item 2, Schedule R, Item 2 and Attachment R2 include statements to the effect that the requirements in s 190C(4)(b) have been met and contain an outline of the grounds on which the applicant considers the Registrar should be satisfied in this regard.

[41] I will 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)?

[42] It is my understanding 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

¹⁵ *Doepel* [78].

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

- 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 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?

[43] Part A, Item 2 reads:

The applicant is entitled to make this Application as the persons authorised by the Native Title claim group to make the Native Title Determination Application. The Applicant was so authorised at meetings held at Injinoo on 21 May 2015, in accordance with an agreed decision making process.

[44] Statements to the same effect are included in Schedule R, Item 2 and the s 62 affidavits in Attachment R2. The s 62 affidavits also contain statements that the members of the applicant are members of the claim group.

Consideration

[45] As mentioned above, in order for the condition of s 190C(4)(b), as it stood before 25 March 2021, to be met, I have to be satisfied that the applicant is a member of the native title claim group and that the applicant is authorised by all the other persons in the native title claim group.

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

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

[47] The s 62 affidavits indicate that the persons comprising the applicant are members of the native title claim group.¹⁹ I have not been provided with any material that contradicts these statements. 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?

[48] Regarding the second limb of s 190C(4)(b), 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.²⁰

¹⁷ *Strickland* [57].

¹⁸ *Harrington-Smith* [1230]; *Evans* [7].

¹⁹ Attachment R2 [4].

²⁰ *Doepel* [78]; *Wiri People* [21], [29], [35].

What decision-making process has been identified?

[49] Section 251B stipulates two distinct decision-making processes, namely

- a process that is mandated by traditional laws and customs; and
- a process that has been agreed to and adopted by the native title claim group.

[50] According to Part A, Item 2, Schedule R, Item 2 and Attachment R2 an agreed decision-making process was used for authorisation.

[51] I note, however, that a claim group is not permitted to choose between the two decision-making processes and must follow a traditionally mandated process if there is one. Only if there is no traditionally mandated process, may the claim group utilise an agreed and adopted decision-making process.²¹

[52] Without any information about whether a traditional decision-making process existed, I am unable to be satisfied that the applicant was authorised by the required decision-making process.

[53] Despite this lack of information, I will nonetheless consider whether the applicant has been authorised under the agreed and adopted decision-making processes outlined in s 251B(b).

How has the decision-making process been applied?

[54] The requirements of s 251B(b) were discussed by Stone J in *Lawson* where her Honour observed that the 'effect of the section is to give the word "all" a more limited meaning than it might otherwise have'.²² Her Honour held that:

the subsection does not require that "all" the members of the relevant claim Group must be involved in making the decision. Still less does it require that the vote be a unanimous vote of every member. Adopting that approach would enable an individual member or members to veto any decision and may make it extremely difficult if not impossible for a claimant group to progress a claim. In my opinion the Act does not require such a technical and pedantic approach. 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.²³

[55] Whilst considering whether a reasonable opportunity to participate was given, Stone J was prepared to accept, in the absence of contrary evidence, that those who did not participate chose not to be involved in the decision-making process.²⁴

[56] Further consideration has to be given to the conduct at the authorisation meeting and the process of authorisation of the application. In *Ward*, O'Loughlin J identified deficiencies in the information provided in that matter regarding the authorisation process and listed a number of questions, which in substance were required to be addressed. The questions identified by

²¹ *Harrington-Smith* [1230]; *Evans* [7].

²² *Lawson* [25].

²³ *Ibid.*

²⁴ *Ibid* [27].

O’Loughlin J, which do not need to be answered in any formal way, but the substance of which must be addressed,²⁵ are:

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?²⁶

[57] I note that, besides the date and the location, I have no further information before me about the authorisation meeting. I also have no information about the resolutions passed or the notification of such a meeting. I therefore consider that the substance of the questions outlined in *Ward* has not been addressed.

[58] In light of the above, I am not satisfied that the applicant is authorised under s 251B(b) to make the application and to deal with matters arising in relation to it.

Decision

[59] I consider that the material before me does not sufficiently outline that the applicant was authorised by all the other members of the claim group to make the application and to deal with matters arising in relation to it. It follows that I am not satisfied that the condition of s 190C(4)(b) is met.

Merits of the claim (s 190B) – Conditions not met

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

[60] I am satisfied the claim meets the requirements of s 190B(2). The information provided about the external boundary and internally excluded areas, are sufficient to identify with reasonable certainty the particular land or waters over which native title rights and interests are claimed.

[61] Schedule B refers to Attachment B. Attachment B (Identification of Boundaries) describes the application area by metes and bounds, referencing the boundaries of the High Water Mark of the mainland, a 30 kilometre buffer seaward of the High Water Mark and coordinate points. Schedule B lists general and Attachment B specific exclusions.

[62] Schedule C refers to Attachment C. Attachment C contains a map, titled ‘Northern Peninsula Claim QUD114/2017’, dated 18 October 2022 and includes:

- The application area depicted by a bold blue outline and identified in the legend as ‘Application Area’;
- Topographic background;

²⁵ *Ward* [25].

²⁶ *Ibid* [24], cited with approval in *Lawson* [26].

- Scalebar, northpoint, graticule and locality diagram and
- Notes relating to the source, currency and datum of data used to prepare the map

[63] The updated geospatial report concludes that the description and map are consistent and identify the application area with reasonable certainty. I agree with this assessment and am therefore 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

[64] For the reasons below, I am satisfied the claim meets the requirements of s 190B(3).

[65] Section 190B(3) stipulates that the Registrar must be satisfied that:

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

[66] It is my understanding that, when assessing the requirements of this provision:

- I am required to address only the content of the application;²⁷
- Section 190B(3) ‘requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification’;²⁸
- The focus ‘is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the identified native title claim group can be ascertained. It, too, does not require any examination of whether all the named or described persons do in fact qualify as members of the native title claim group’;²⁹
- 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’;³⁰
- To determine whether the conditions (or rules) specified in the application has 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’.³¹

²⁷ *Doepel* [16], [51].

²⁸ *Gudjala 2007* [33].

²⁹ *Doepel* [37].

³⁰ *Gudjala 2007* [34].

³¹ *WA v NTR* [67].

[67] Schedule A provides that native title group is made up of all persons descended by birth or adoption from 25 named apical ancestors.

[68] I note that the description in Schedule A does not entail a list of the names of all of the persons in the native title claim group. I therefore consider s 190B(3)(b) to be applicable.

Descent

[69] I understand that the claim group are the descendants – either by birth or by adoption – from the named apical ancestors.

[70] I consider that requiring a person to show descent from a specific ancestor provides an objective criterion about whether a person is a member of the claim group and has been accepted by the Courts previously.³² I consider that factual enquiries would lead to the identification of the people who meet this criterion.

Decision

[71] I am satisfied that the application describes the persons in the claim group sufficiently clearly such that it can be ascertained whether any particular person is a member of the group. Therefore, only focusing upon the adequacy of the description of the claim group, I consider the requirements of s 190B(3) to be met.

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

[72] To meet the requirements of s 190B(4), the Registrar must be satisfied that the description contained in the application is sufficient to allow the claimed native title rights and interests to be readily identified. It is my understanding that the description must be understandable and have meaning.³³ However, this does not mean that rights broadly described cannot readily be identified within the meaning of s 190B(4).³⁴

[73] 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’.

[74] When assessing whether the claimed native title rights and interests are readily identified I am confined to the material contained in the application itself.³⁵ Moreover, I will not consider whether the claimed rights and interests are ‘native title rights and interests’, as defined in s 223, as in my view that question is part of the task at s 190B(6), where I must decide whether each of the claimed rights is established as a native title right on a prima facie basis.

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

³² *Ibid.*

³³ *Doepel* [99], [123].

³⁴ *Strickland* [60].

³⁵ *Doepel* [16].

meaning and is sufficient to identify the claimed rights and interests. I consider s 190B(4) to be met.

Factual basis for claimed native title – s 190B(5) condition not met

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

[77] I understand that, when assessing the requirements of s 190B(5), I am not confined to the information contained in the application but can also have regard to additional information pursuant to s 190A(3).³⁶ Moreover, I must treat the asserted facts as true.³⁷

[78] I consider my task to be assessing whether the asserted facts can support the existence of the claimed native title rights and interests.³⁸ To do so 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.³⁹ In my view, the factual basis must provide sufficient detail to enable a 'genuine assessment' of whether the three assertions outlined in s 190B(5) are supported by the claimants' factual basis material.⁴⁰ I note that the factual basis material is contained in Schedules F, G and M.

Factual basis for s 190B(5)(a)

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

[79] As summarised in *McLennan*, in order to satisfy the condition in s 190B(5)(a), it will be sufficient if the applicant demonstrates that:⁴¹

- (a) the claim group presently has an association with the area, and the claim group's predecessors have had an association with the area since sovereignty or European settlement;⁴²

³⁶ *Ibid*; *Strickland* [62] approved in *Strickland FC* [88], [89].

³⁷ *Doepel* [17]; *Gudjala FC* [57], [83].

³⁸ *Ibid*.

³⁹ *Gudjala 2009* [28], [29]; *Anderson* [43], [48].

⁴⁰ *Gudjala FC* [92].

⁴¹ *McLennan* [28].

⁴² *Gudjala 2007* [52].

- (b) there is an association between the whole group and the area, although not all members must have such association at all times;⁴³ and
- (c) there is an association with the entire area claimed, rather than an association with only part of it or ‘very broad statements’, which have no ‘geographical particularity’.⁴⁴

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

[80] The following relevant information has been provided regarding s 190B(5)(a):

- The predecessors of the members of the claim group held the claimed native title rights and interests in relation to the application area in accordance with the original laws and customs. The predecessors did not all hold all rights equally in all parts of the application area;⁴⁵
- Based on the traditional laws and customs the claimants and their predecessors are the ‘right’ people for, or the customary ‘owners’ of the application area;⁴⁶
- The claimants and their predecessors have at all times since sovereignty had an association with the application area by reference to their traditional laws and customs;⁴⁷
- Archaeological records suggests substantial human habitation in parts of the Cape York Peninsula (CYP) for at least 37,000 years;⁴⁸
- Reports from as early as 1606 show that the application area was inhabited by Aboriginal People before and after sovereignty in 1788;⁴⁹
- At sovereignty predecessors of the claim group inhabited and occupied the lands and waters in and around the application area and shared a system of laws and customs, which extended to all of the apical ancestors and may also have extended to other Indigenous people from neighbouring areas;⁵⁰
- Effective sovereignty of the application area took place around 1860 with the establishment of towns, stations and a telegraph line as well as beche-de-mer fishing off the coast;⁵¹
- The apical ancestors are descended from the Indigenous people inhabiting and occupying the application area at sovereignty and are known to be from the application area at or about effective sovereignty;⁵²

⁴³ Ibid.

⁴⁴ *Martin* [26]; *Corunna* [39].

⁴⁵ Schedule F [2].

⁴⁶ Ibid [19].

⁴⁷ Ibid [3].

⁴⁸ Ibid [5].

⁴⁹ Ibid [6] – [7].

⁵⁰ Ibid [20] – [21].

⁵¹ Ibid [8] – [9].

- From effective sovereignty to the present day claimants and their predecessors have continued their connection and association with the application area by, for example, being present in the area, erecting shelter, using the resources and controlling access;⁵³
- Since 1872, the predecessors of the claim group have and members of the claim group continue to participate in marine industries involving cash sales or marine resources from the application area;⁵⁴
- Many claimants and predecessors were born in and around the application area and live or have lived in communities or campgrounds such as New Mapoon, Old Mapoon, Umagico, Bamaga, Injinoo, Seisia, Captain Billy Landing, Second Beach Camp, Umayngulunu/Virilya Point, Top Jardine Crossing and Ussher Point;⁵⁵
- Many predecessors of the claimants, including many of the apical ancestors, have been buried in and around the application area;⁵⁶
- All members of the claim group have been recognised as holding native title rights and interests in areas immediately adjoining the application area;⁵⁷
- The current society is a marine oriented society and the current laws and customs, the occupation, inhabitation and use of the application area by the claim group is characterised by, amongst others, intensive and extensive exploitation of the marine environment and resources; a well-developed adaptation to exploitation, utilisation and management of the marine environment and resources; a reliance on the marine environment and resources commercially, nutritionally and symbolically; long distance voyaging by sea; recognition and use of a multitude of named places and places otherwise of importance in the sea across the Torres Strait including the application area; recognition and use of a multitude of sea habitats and biota; frequent and regular participation in marine resource fishing, hunting and gathering activities; a day to day life which revolves around the sea and work involved in procuring marine resources;⁵⁸
- The current laws and customs include the principal that to inhabit a particular island or coastal territory is to inhabit a marine territory associated with that island or coastal territory;⁵⁹
- Members of the claim group hold beliefs about ancestral beings, including that they are responsible for the existence and form of the land, seas and waters across the

⁵² Ibid [22].

⁵³ Ibid [12] – [13].

⁵⁴ Ibid [54] – [56].

⁵⁵ Ibid [14] – [16].

⁵⁶ Ibid [17].

⁵⁷ Ibid [18].

⁵⁸ Ibid [26].

⁵⁹ Ibid [27a].

application area; that they are responsible for the existence of the Law and that their creative travels established current social, territorial and ritual relationships across the entire society; and that they continue to be present and influence the land, seas and waters;⁶⁰

- Particular mythologies concerning for example Woboiyum/Waubin/Woboiame and Kwoiyam/Chevri/Shiveri who both travelled from the northern CYP to the Torres Strait;⁶¹
- Country is believed to be protected and ‘policed’ by the spirits of the predecessors of the claim group, which are believed to still reside there. There are spiritually dangerous places and forces in the application area, which are seen as benign to those with a recognised right to belong to that particular area, but dangerous to strangers, unless properly introduced to country;⁶²
- Members of the claim group believe that language identities were imparted by the travelling ancestral beings to country across the application area and subsequently to their predecessors who emerged from that country;⁶³
- The members of the claim group are biologically and socially recognised descendants of the apical ancestors and of their predecessors at sovereignty;⁶⁴
- The members of the claim group and their predecessors have at all times since sovereignty substantially maintained a connection with the land and waters of the application area;⁶⁵
- The Aboriginal people of the CYP share and have always shared the environment;⁶⁶
- The laws and customs acknowledged and observed today are either the same laws and customs as were acknowledged and observed at sovereignty or rooted in and derived from the laws and customs as they were acknowledged and observed at sovereignty.⁶⁷

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

[81] Based on the information provided I am not satisfied that the claim group and its predecessors have had an association with the entire application area since sovereignty or European settlement.

⁶⁰ Ibid [62].

⁶¹ Ibid [64].

⁶² Ibid [65].

⁶³ Ibid [72].

⁶⁴ Ibid [78].

⁶⁵ Ibid [81].

⁶⁶ Ibid [28] – [29].

⁶⁷ Ibid [83].

[82] At the outset, I note that the factual basis information consists largely of generalised facts that lack a level of specificity or geographical particularity to enable a genuine assessment of the assertion.

[83] In regard to the association of the predecessors of the claim group with the application area at sovereignty, or European settlement, I note that the material provides only for general non-specific statements, such as, for example:

The members of the native title claim group and their predecessors have at all times since sovereignty had an association with the Claim Area by reference to their traditional laws and customs.⁶⁸

[84] There is no specific information before me about the association of the named apical ancestors of the group with particular places within the application area. While there are some references to specific places on the coastline of CYP, communities on CYP, and camps in the vicinity of the application area, I note that the application area primarily covers waters, rather than land. I further note that there is some information that according to current laws and customs, to inhabit a particular coastal territory is to inhabit a marine territory associated with that coastal territory. Nonetheless, none of the named places fall within the boundary of the application area and in some cases concern places on the east coast of CYP.

[85] The material also does not provide sufficient detail about the association particular members of the claim group currently have with the area. While there are, as mentioned above, some geographical references to birth places, camping grounds as well as places of residence, these lie outside of the application area. Moreover, there is some information about the marine orientation of the current claim group. However, this information lacks any geographical particularity and therefore does not allow an assessment of the association of members of the claim group with particular areas in the application area. The material does not provide examples describing the association of particular named individuals or families of the claim group with certain places within the application area.

[86] Lastly, I note that the material provides some information about mythological beliefs of the current claim group and the travels of ancestral beings. However, the highest level of geographical detail provided is that two ancestral beings travelled from the northern CYP to the Torres Strait.

Decision

[87] In sum, given the information before me, I consider the factual basis provided is not sufficient to support the assertion described by s 190B(5)(a) that the native title claim group have, and the predecessors of those persons had, an association with the area.

⁶⁸ Ibid [3].

Factual basis for s 190B(5)(b)

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

[88] To meet s 190B(5)(b), the factual basis must be sufficient to support an assertion that there exist traditional laws acknowledged and traditional customs observed by the claim group that give rise to the claim to native title rights and interests. 'Native title rights and interests' is defined in s 223(1)(a) as those rights and interests 'possessed under the traditional laws acknowledged, and traditional customs observed,' by the native title holders. I therefore consider it appropriate to apply case law regarding s 223(1)(a) to s 190B(5)(b).

[89] Based on the observations made by the High Court in *Yorta Yorta* I understand that a 'traditional' law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice.⁶⁹ In the context of the Act, 'traditional' carries, however, two other elements in its meaning, namely:⁷⁰

...it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are "traditional" laws and customs [and]

...the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist.⁷¹

[90] 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'.⁷²

[91] Finally, further guidance for my assessment of the factual basis can be gained from *Gudjala 2009*, in which Dowsett J required:

- 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;⁷³
- that 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;⁷⁴ and

⁶⁹ *Yorta Yorta* [46].

⁷⁰ *Ibid.*

⁷¹ *Ibid* [46] - [47].

⁷² *Warrie* [107]; *Alyawarr* [78].

⁷³ *Gudjala 2009* [37], [52].

⁷⁴ *Ibid* [40].

- that 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).⁷⁵

[92] Dowsett J further commented that although ‘apical ancestors are used only to define the claim group’, the applicant ‘at some point ... must explain the link between the claim group and the claim area’ and ‘[t]hat process will certainly involve the identification of some link between the apical ancestors and any society existing at sovereignty’.⁷⁶

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

- a link between the pre-sovereignty society, the predecessors and the claim group in the application area; and
- the continued observance of normative rules by the successive generations of the claim group, such that the normative rules can be described as ‘traditional laws and customs’.

What information has been provided in support of s 190B(5)(b)

[94] In addition to the information outlined in regard to s 190B(5)(a), the following information is included in the application:

- The members of the claim group and their predecessors were and are members of a single society;⁷⁷
- Social relationships, such as marriage, descent, relations of co-production, clans and totemic affiliations are regulated by laws and customs;⁷⁸
- The boundaries of and access to marine territory is regulated by current laws and customs;⁷⁹
- The traditional laws and customs observed by the claim group include rules governing the rights and interests in relation to land and waters, which is based on a body of socio-territorial principles;⁸⁰
- The rights and interests possessed under traditional laws and customs are the rights to speak for land and waters; control the access to and use of land and waters by others; have access to, remain on and use the land and waters; access and take the resources

⁷⁵ Ibid [29], [54], [69].

⁷⁶ *Gudjala 2007* [66].

⁷⁷ Schedule F [23].

⁷⁸ Ibid [24].

⁷⁹ Ibid [26].

⁸⁰ Ibid [31] – [32].

of the land and waters; protect places, areas and things of traditional significance on the land and waters; erect shelters and other structures on the area;⁸¹

- Prior to the acquisition of effective sovereignty the predecessors of the claim group engaged in trade and exchange, to redistribute items abundant in one place to places where they were relatively scarce;⁸²
- Trading and exchange of material and non-material items through networks of relationships remain significant elements of the economy of the current society and are regulated by current laws and customs;⁸³
- Older persons are seen as carriers and custodians of knowledge about ancestral beings and younger people will defer to them;⁸⁴
- Members of the claim group conduct different ceremonies, for example to mark the coming of age of young men, inducting strangers into country, or aimed at the reproduction of cultural continuity;⁸⁵
- Senior men preside over issues that are business of men and senior women over issues that are business of women;⁸⁶
- Traditional laws and customs are given normative force through spiritual or mythological beliefs; kinship relationships; by respect for the authority and guidance of elders; by social pressure, a fear of being ostracised or otherwise by punishment by elders or spiritual or mythological forces for breach of laws or customs; by association of the actions of story people and/or respected ancestral figures; by necessity, in order to survive and prosper; by fear of sorcery;⁸⁷
- The members of the claim group and their predecessors have at all times since sovereignty acknowledged and observed without substantial interruption the traditional laws and customs. These laws and customs have been handed down generation by generation to the claim group by word of mouth and common practise of their ancestors;⁸⁸
- At sovereignty, the local group may generally have privileged patrilineal inheritance more strongly than it does today. Membership of the local group by descendant from a male member remains the ideal today, though descent from either parent is considered to confer full membership of the group;⁸⁹

⁸¹ Ibid [35] – the rights and interests are further specifically described: right to speak [43]; control and regulation of access [44] – [49]; protecting and looking after country [50] – [51]; trade and exchange [52] – [58]; other [59] – [61]; cosmology [62] – [65]; kinship and marriage [66] – [69]; child adoption [70].

⁸² Ibid [52].

⁸³ Ibid [57].

⁸⁴ Ibid [63].

⁸⁵ Ibid [71].

⁸⁶ Ibid [76].

⁸⁷ Ibid [77].

⁸⁸ Ibid [80].

⁸⁹ Ibid [84].

- The claim group members carry out, and their predecessors carried out, on the application area activities of: accessing, using and remaining in the area, erecting shelters and other structures, controlling the access and use of the area, accessing and taking the resources of the area, protecting the land and waters and resources. These activities are carried out to exercise the claimed rights and interests and to acknowledge and observe the traditional laws and customs.⁹⁰

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

[95] Based on the information provided I am not satisfied that there exist traditional laws acknowledged and traditional customs observed by the claim group that give rise to the claim to native title rights and interests.

[96] I note that while the factual basis material outlines the laws and customs in detail, it does not address how those laws and customs are acknowledged and observed by members of the claim group today in relation to the particular area covered by the application. In relation to the acknowledgement and observance of law and customs the material only contains general statements, such as for example:

The members of the native title claim group and their predecessors have at all times since sovereignty acknowledged and observed without substantial interruption the traditional laws and customs⁹¹.

[97] I consider this and similar statements in the application to constitute only assertions at a high level of generality, which lack the required detail to enable a genuine assessment of the assertion outlined in s 190B(5)(b).

[98] A similar level of generality is provided in regard to the transfer of knowledge from generation to generation. I note that traditional laws and customs are only those that have been passed down through the generations to the members of the native title claim group.⁹² While the material contains some information about the role seniority or senior persons hold in the claim group, for example regarding decision-making processes and keeping knowledge about ancestral beings, the actual generational transfer of knowledge and of law and customs is only expressed in a general statement:

These laws and customs have been handed down generation by generation to the claim group by word of mouth and common practise of their ancestors.⁹³

[99] The material does not specifically address the way in which this transfer of knowledge has occurred or provide any example.

[100] Lastly, I note that the material must also include information about the pre-sovereignty society, identify the persons who acknowledged and observed the laws and customs of the pre-sovereignty society and demonstrate some relationship between ancestral persons and

⁹⁰ Schedule G [1].

⁹¹ Schedule F [80].

⁹² *Yorta Yorta* [46]; *Gudjala 2009* [52] – [53].

⁹³ Schedule F [80].

the pre-sovereignty society from which the laws and customs are derived. The material addresses these issues again only in general terms, stating that the predecessors of the claim group comprised of a 'single society' who 'shared laws and customs', and who 'inhabited and occupied the lands and waters in and around the application area' at sovereignty. The apical ancestors are described as the descendants from the Indigenous people inhabiting and occupying the application area at sovereignty and are known to be from the application area at or about effective sovereignty. I consider this information insufficient in identifying a sufficient link between the apical ancestors and the society existing at sovereignty.

Decision

[101] In light of the above I consider the factual basis provided is not sufficient to support the assertion described by s 190B(5)(b).

Factual basis for s 190B(5)(c)

[102] 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.

[103] In *Martin*, French J held that:

[u]nder s. 190B(5)(c) the delegate had to be satisfied that there was a factual basis supporting the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs. This is plainly a reference to the traditional laws and customs which answer the description set out in par (b) of s 190B(5).⁹⁴

[104] Accordingly, satisfying 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. 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.

[105] As mentioned above, the applicant has not provided sufficient factual basis material explaining that traditional laws acknowledged and customs observed by the identified claim group existed. Accordingly, the factual basis also does not sufficiently support the assertion of transmission and continuity of the native title rights and interests in accordance with traditional laws and customs and therefore can not satisfy 190B(5)(c).

[106] I am not satisfied that the factual basis provided is sufficient to support the assertion described by s 190B(5)(c).

Conclusion

[107] The application does not satisfy the condition of s 190B(5) because the factual basis provided is not sufficient to support each of the particularised assertions in s 190B(5).

⁹⁴ *Martin* [29].

Prima facie case – s 190B(6): condition not met

[108] To meet s 190B(6), the Registrar must consider that, prima facie, at least some of the native title rights and interests claimed can be established. If a claim is arguable on its face, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis.⁹⁵ The assessment requires, however, some weighing of the factual basis and imposes a more onerous test to be applied to the individual rights and interests claimed than s 190B(5).⁹⁶

[109] I understand that, when assessing the requirements of s 190B(6), I am permitted to consider material beyond the application.⁹⁷

[110] I note 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.⁹⁸

[111] I also understand the ‘critical threshold question’ for recognition of a native title right or interest under the Act to be ‘whether it is a right or interest “in relation to” land or waters’.⁹⁹ The phrase ‘in relation to’ is however ‘of wide import’.¹⁰⁰

[112] Taking into account the definition of ‘native title rights and interests’ in s 223(1),¹⁰¹ it is my view that under s 190B(6) I must 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.

[113] Only those rights and interests that I consider to be established prima facie will be entered on the Register.¹⁰²

[114] Accordingly, the condition at s 190B(6) cannot be met in the absence of a sufficient factual basis to support the assertion that there exist traditional laws acknowledged and traditional customs observed by the claim group, which give rise to the claimed native title rights and interests. As noted above, my view is that the factual information supporting the assertions at s 190B(5) is insufficient.

⁹⁵ *Doepel* [135].

⁹⁶ *Ibid* [127], [132].

⁹⁷ *Ibid* [16].

⁹⁸ *Yorta Yorta* [86]; *Gudjala 2007* [86].

⁹⁹ *Ward HC* [577].

¹⁰⁰ *Alyawarr* [93].

¹⁰¹ *Gudjala 2007* [85].

¹⁰² Section 186(1)(g).

[115] As I consider that the conditions in s 190B(5) have not been met, I cannot therefore be satisfied that, prima facie, at least some of the claimed native title rights and interests can be established.

[116] In light of the above I consider that the application does not satisfy the condition of s 190B(6).

Physical connection – s 190B(7): condition not met

[117] For the application to meet the requirements of s 190B(7) 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. It is my understanding that the physical connection must be in accordance with the traditional laws and customs of the claim group and that ‘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.¹⁰³

[118] It is therefore my understanding that there must be sufficient factual material to satisfy the conditions of s 190B(5) before the Registrar can be satisfied that the requirement of s 190B(7) is met.

[119] Given the application does not contain a sufficient factual basis supporting the assertion that there exist traditional laws acknowledged and traditional customs observed by the claimants that give rise to the claimed native title rights and interests, I am unable to be satisfied that at least one member of the claim group currently has or previously had a traditional physical connection with any land or waters within the application area.

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

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

[121] In my view the application does not offend the provisions of ss 61A(1)-(3) and therefore the application does satisfy the condition of s 190B(8):

Section 61A(1)

[122] Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title.

[123] According to the updated geospatial report and my own searches of the Tribunal’s geospatial database the application overlaps with an approved determination of native title, namely Torres Strait Regional Seas Claim (QCD2022/013; QUD27/2019, QUD26/2019, QUD10/2019, QUD24/2019, QUD114/2017, QUD115/2017, QUD227/2022).

[124] I note, however, that the information in Schedule B identifying areas excluded from the application includes in paragraph 5 ‘[a]ny area for which there is an approved determination of native title.’

¹⁰³ *Gudjala 2009* [84]; *Yorta Yorta* [86].

[125] I am therefore satisfied that the requirements of s 61A(1) are met.

Section 61A(2)

[126] Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply. The information in Schedule B identifying areas excluded from the application includes in paragraphs 2 and 3 '[a]ny area in relation to which a previous exclusive possession act [...] was done in relation to the area'.

Section 61A(3)

[127] Section 61A(3) provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done, unless the circumstances described in s 61A(4) apply. The description of the native title rights and interests in Schedule E clarifies at paragraph 1(a) that exclusive native title rights and interests are only claimed 'where there has been no extinguishment to any extent of native title rights and interests or where any such extinguishment is required to be disregarded'.

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

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

[129] 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 (a) to (c).

Section 190B(9)(a)

[130] Schedule Q indicates that no claim is made to ownership of any minerals, petroleum or gas wholly owned by the Crown.

Section 190B(9)(b)

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

Section 190B(9)(c)

[132] The information in Schedule B identifying areas excluded from the application includes in paragraph 4 '[a]ny area where native title rights and interests have otherwise been wholly extinguished'. I am therefore satisfied that the application meets the requirements of s 190B(9)(c).

End of reasons

Attachment A

Summary of registration test result

Application name	Northern Peninsula Sea Claim
NNTT No.	QC2017/002
Federal Court of Australia No.	QUD114/2017
Date of decision	14 February 2023

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)		not met
	Section 190B(5)(a)	not met
	Section 190B(5)(b)	not met
	Section 190B(5)(c)	not met
Section 190B(6)		not met
Section 190B(7)		not met
Section 190B(8)		met
Section 190B(9)		met

Section 190C conditions

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