National Native Title Tribunal

Registration test decision

Application name	Barada Barna People
Name of applicant	Frank Budby, Les Budby, Cecil Brown Jnr
State/territory/region	Queensland
NNTT file no.	QC08/11
Federal Court of Australia file no.	QUD380/08
Date application made	12 November 2008
Date application last amended	3 March 2009

Name of delegate Susan Walsh

I have considered this claim for registration against each of the conditions contained in ss. 190B and 190C of the *Native Title Act 1993* (Cwlth).

For the reasons attached, I am satisfied that each of the conditions contained in ss. 190B and C are met. I accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

For the purposes of s.190D(3), my opinion is that the claim satisfies all of the conditions in s. 190B.

Date of decision: 9 October 2009

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Susan Walsh

Delegate of the Native Title Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D of the ***Native Title Act 1993*** (Cwlth)[1]

[1] Instrument of delegation dated 6 March 2009 pursuant to s. 99 of the Act.

Reasons for decision

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Introduction

The Barada Barna application was filed in the Federal Court on 12 November 2008 and then amended with the leave of the Court on 24 February 2009. On 3 March 2009, the applicant filed an amended application, pursuant to that leave, and the Court gave a copy to the Native Title Registrar (the Registrar) pursuant to s. 64(4) of the Act. The filing of the original application and its later amendment has triggered the requirement in s. 190A for the Registrar to consider the claim in the amended application and decide whether or not to accept it for registration (the 'registration test'). This document sets out my reasons, as the Registrar's delegate, for the decision to accept the application for registration pursuant to s. 190A of the Act.

Note: All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cwlth) which I shall call 'the Act', as in force today, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

Summary of the decision

The statutory scheme for the registration test is found in ss. 190A to 190F. The combined effect of ss. 190A(6) and (6B) is that:

- I must accept the claim for registration if the claim satisfies all of the registration test conditions outlined ss. 190B and 190C; and
- I must not accept the application for registration if the claim does not satisfy any one or more of the conditions in ss. 190B and 190C.

I note that neither s. 190A(1A) nor 190A(6A) apply to the claim in the amended application as the application has never before been considered for registration and is not on the Register of Native Title Claims.

Section 190B sets out conditions that test particular merits of the claim made in the application and s. 190C sets out conditions about 'procedural and other matters'. The procedural condition is found in s. 190C(2) and it requires me to be satisfied that the application contains certain specified details and other information and be accompanied by any prescribed documents (outlined in ss. 61 and 62). Some of these details etc. are then relevant to my consideration of the authorisation condition in s. 190C(4) (where the application has not been certified) and to my consideration of the merit conditions in s. 190B. I propose therefore to consider the s. 190C(2) procedural condition first, in order to assess whether the application contains the requisite details etc. *before* turning to questions regarding the merits of those details etc. at other parts of the registration test.

It is my decision that the claim in the application must be accepted for registration because it does satisfy all of the conditions in ss. 190B and 190C. A summary of the result for each condition is provided at attachment A to these reasons.

Information considered when making the decision

Subsection 190A(3) directs me to have regard to certain information when testing an application for registration; there is certain information that I *must* have regard to, but I *may* have regard to other information, as I consider appropriate. Of the kinds of material that I must have regard to, I have before me the information in the application itself and in other documents provided by the applicant, and as directed by s. 190A(3), I have considered the same in the course of making this decision. I have also considered information provided to me from other sources that is relevant to my consideration of the application against some of the registration test decisions, as detailed in my reasons below.

In making this decision, I have had regard to the application, the amended application and to the other documents filed by the applicant with the application. I have also had regard to the documents contained in the Tribunal's case management/delegates file QC08/11 (also described as 2008/02830). Where I have had particular regard to information in documents within that file, I have identified them in this statement of reasons. I have particularly considered the following further documents provided by persons who oppose the new claim and to the applicant's response to this information, namely:

- E-mail from Person 1 – name deleted dated 21 September 2008
- E-mail from Person 2 – name deleted dated 26 September 2008
- E-mails from Person 3 – name deleted dated 26 September 2008, 7 October 2008, 30 November 2008, 9 December 2008, 1 April 2009 (3), 27 May 2009, 23 June 2009 (2), 13 July 2009
- Letters from Person 4 – name deleted received 20 October 2008 and 14 November 2008
- Letters from North Queensland Land Council dated 24 November 2008 and 2 April 2009
- Affidavit by Applicant 1 – name deleted dated 1 December 2008
- Letter from Legal representative – name deleted dated 11 December 2008 and copy of statement by Person 5 – name deleted dated 24 September 2008
- Submissions and information in response from the applicant dated 23 April 2009 and 30 July 2009.

I have not considered any information that may have been provided to the Tribunal in the course of:

- The Tribunal providing assistance under ss. 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK, without the prior written consent of the person who provided the Tribunal with that information, either in relation to this claimant application or any other claimant application or any other type of application, as required of me under the Act.
- The Tribunal's mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice' (see s. 136A of the Act). Further, mediation is private as between the parties and is also generally confidential (see also ss. 136E and 136F).

Procedural and other conditions: s. 190C

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

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

For the reasons that follow, I am **satisfied** that the application meets the procedural condition in s. 190C(2) because of my finding that the application contains the details and other information required by ss. 61 and 62.

I address each of the requirements 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 in the reasons that follow.

I note that I do not consider the requirements of s. 61(2), as it imposes no obligations of this nature in relation to the application.

I am also of the view that I do not need to consider the requirements of s. 61(5). The matters in ss. 61(5)(a), (b) and (d) relating to the Court's prescribed form, filing in the Court and payment of fees, in my view, are matters for the Court. They do not in my view require any separate consideration by the Registrar. Section 61(5)(c), which requires that the application contain such information as is prescribed, does not need to be considered by me under s. 190C(2), as I already test these things under s. 190C(2) where required by those parts of ss. 61 and 62 which actually identify the details/other information that must be in the application and the accompanying prescribed affidavit/documents.

Attorney General of Northern Territory v Doepel (2003) 133 FCR 112 (*Doepel*) is authority, in my view, that my consideration of the requirements of ss. 61 and 62 pursuant to s. 190C(2) 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 and does not require me to undertake any merit or qualitative assessment of the material for the purposes of s. 190C(2)—*Doepel* at [16] and also at [35]–[39]. In other words, does the application contain the prescribed details and other information?

I turn then to each of the various parts of ss. 61 and 62 which require that the application contain details and other information and be accompanied by any affidavit or other document.

Native title claim group: s. 61(1)

> The application must be made by a person or persons authorised by all of the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group.

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

As I discuss in my analysis of *Doepel* above, I am of the view that the Registrar's task under s. 190C(2) is procedural only. When it comes to s. 61(1), I am of the view that all s. 190C(2) requires is for me to consider whether the application sets out the native title claim group in the terms required by s. 61(1). It is only if the description of the native title claim group in the application indicated that not all persons in the native title group were included, or that it was in fact a subgroup of the native title group, that the requirements of s. 190C(2) would not be met and the claim could not be accepted for registration—*Doepel* at [36].

A description of the persons in the native title claim group is found in schedule A of the application and this is replicated in my reasons for the merit condition in s. 190B(3) below.

For the reasons above, I am satisfied that the description of the persons in the native title claim group meets the requirement in s. 61(1) for the purposes of s. 190C(2).

Name and address for service: s. 61(3)

> The application must state the name and address for service of the person who is, or persons who are, the applicant.

The application **contains** all details and other information required by s. 61(3). The names of the three persons jointly comprising the applicant and their address for service are found on pp. 2 and 12 of the application respectively.

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

> The application must:
> (a) name the persons in the native title claim group, or
> (b) otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

The application **contains** all details and other information required by s. 61(4). A description of the persons in the native title claim group is found in schedule A of the application.

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

> The application must be accompanied by an affidavit sworn by the applicant that:
> (i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and
> (ii) the applicant believes that none of the area covered by the application is also covered by an approved determination of native title, and
> (iii) the applicant believes all of the statements made in the application are true, and
> (iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and
>
> Note: Section 251B states what it means for the applicant to be ***authorised*** by all the persons in the native title claim group.
>
> (v) setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it.

The application **is accompanied** by the affidavit required by s. 62(1)(a).

Each of the three persons comprising the applicant (Applicant 1, Applicant 2 and Applicant 3) has made an affidavit pursuant to s. 62(1)(a). These affidavits were filed in the Court with the original application on 12 November 2008. In my view, there has been compliance with this section because all three affidavits contain the statements required by subparagraphs (i) to (v).

The note above subparagraph (v) indicates that the affidavit must identify how the authorisation decision complies with either of the two decision-making processes in s. 251B—a process mandated by traditional law and custom or a process agreed and adopted by the native title claim group. In my view, the details required by subparagraph (v) are contained in the affidavits where each deponent provides details of the agreed and adopted decision-making process complied with when authorising the applicant—see Applicant 3 at [7]–[9], Applicant 2 at [8]–[10] and Applicant 1 at [8]–[10]. I do not undertake any assessment of the merits of that information when considering whether the application is accompanied by an affidavit for the purposes of s. 190C(2). Whether I am satisfied that the applicant is authorised is the task at s. 190C(4)(b)—see *Doepel* at [87].

Application contains details required by s. 62(2): s. 62(1)(b)

> The application must contain the details specified in s. 62(2).

The application **contains** all details and other information required by s. 62(1)(b). It contains the details specified in ss. 62(2)(a) to (h), as identified in the reasons below.

I note again my view that *Doepel* is authority that the consideration of s. 190C(2) does not involve going beyond the application, and in particular does not require some form of merit assessment of the material in determining whether the requirements of s. 190C(2) are met.

Information about the boundaries of the area: s. 62(2)(a)

> The application must contain information, whether by physical description or otherwise, that enables the following boundaries to be identified:
> (i) the area covered by the application, and
> (ii) any areas within those boundaries that are not covered by the application.

The application **contains** all details and other information required by s. 62(2)(a). It contains a written description and a map of the area covered by the application and a written description of areas within the external boundary that are ot covered by the application (see attachments B and C). It also contains a written description of the areas not covered by the application in schedule B.

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

> The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

The application **contains** all details and other information required by s. 62(2)(b). It contains a map showing the external boundaries of the application area in attachment C.

Searches: s. 62(2)(c)

> The application must contain the details and results of all searches carried out by or on behalf of the native title claim group to determine the existence of any non-native title rights and interests in relation to the land and waters in the area covered by the application.

The application **contains** all details and other information required by s. 62(2)(c). Schedule D states that no searches have been carried out.

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

> The application must contain a description of native title rights and interests claimed in relation to particular lands and 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.

The application **contains** all details and other information required by s. 62(2)(d). The description of the claimed native title rights and interests is found in schedule E. In my view, the description does not merely consist 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.

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

> The application must contain a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist, and in particular that:
> (i) the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (ii) there exist traditional laws and customs that give rise to the claimed native title, and
> (iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The application **contains** all details and other information required by s. 62(2)(e).

Schedule F refers to an anthropological report by Anthropologist 1 – name deleted and Anthropologist 2 – name deleted (the anthropological report) and to affidavits by a number of claim group members filed with the application for the general description of the factual basis. It may be argued that this information is not *in* the application. However, I am satisfied that the application contains the details and other information required by the section because it is found in documents referred to in the application and filed in the Court at the same time that the application was filed. The documents were provided to the Registrar by the Court pursuant to s. 63 and then again under s. 64(4) when the application was amended. It is my view that the anthropological report and the affidavits collectively amount to the details and information required by s. 62(2)(e). I summarise the information in these documents in my reasons below when I consider the sufficiency of the material, as required by s. 190B(5).

Activities: s. 62(2)(f)

> If the native title claim group currently carries out any activities in relation to the area claimed, the application must contain details of those activities.

The application **contains** all details and other information required by s. 62(2)(f). Schedule G refers to the anthropological report for details of activities carried out by the native title claim group. The anthropological report does contain details of activities currently carried out by the native title claim group in relation to the application area.

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

> The application must contain details of any other applications to the High Court, Federal Court or a recognised state/territory body of which the applicant is aware, that have been made in relation to the whole or part of the area covered by the application and that seek a determination of native title or of compensation in relation to native title.

The application **contains** all details and other information required by s. 62(2)(g). Schedule H provides details of the single application that had been made in relation to the whole or part of the area of which the applicant was aware at the time the application was amended—Wiri People #2, QUD6251/98.

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

> The application must contain details of any notification under s. 24MD(6B)(c) of which the applicant is aware, that have been given and that relate to the whole or part of the area covered by the application.

The application **contains** all details and other information required by s. 62(2)(ga). Schedule HA states that the applicant is not aware of any s. 24MD(6B)(c) notifications.

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

> The application must contain details of any notices given under s. 29 (or under a corresponding provision of a law of a state or territory) of which the applicant is aware that relate to the whole or a part of the area covered by the application.

The application **contains** all details and other information required by s. 62(2)(h). The details of s. 29 notices of which the applicant is aware are found in attachment I.

Subsection 190C(3)
No common claimants in previous overlapping applications

> The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:
> (a) the previous application covered the whole or part of the area covered by the current application, and
> (b) the previous application was on the Register of Native Title Claims when the current application was made, and
> (c) the entry was made, or not removed, as a result of the previous application being considered for registration under s. 190A.

The application **satisfies** the condition of s. 190C(3).

A search of the application area against the Register of Native Title Claims (the Register) reveals that all previous overlapping applications were either not on the Register when the current application was made or, if they were, have since been dismissed in the Federal Court and are no longer on the Register, such that those previous applications do not meet the criteria in either or both of subparagraphs 190C(3)(b) and 190C(3)(c).

Subsection 190C(4) Authorisation/certification

Under s. 190C(4) the Registrar/delegate must be satisfied either that:

(a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or

(b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

Note: The word ***authorise*** is defined in section 251B.

Section 251B provides that for the purposes of this Act, all the persons in a native title claim group or a compensation claim group ***authorise*** a person or persons to make a native title determination application or a compensation application, and to deal with matters arising in relation to it, if:

a) where there is a process of decision–making that, under the traditional laws and customs of the persons in the native title claim group or compensation claim group, must be complied with in relation to authorising things of that kind—the persons in the native title claim group or compensation claim group authorise the person or persons to make the application and to deal with the matters in accordance with that process; or

b) where there is no such process—the persons in the native title claim group or compensation claim group authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision–making agreed to and adopted, by the persons in the native title claim group or compensation claim group, in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.

Under s. 190C(5), if the application has not been certified as mentioned in s. 190C 4(a), the Registrar cannot be satisfied that the condition in s. 190C(4) has been satisfied unless the application:

(a) includes a statement to the effect that the requirement in s. 190C(4)(b) above has been met; and

(b) briefly sets out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

For the reasons that follow, I am **satisfied** that the condition in s. 190C(4) is met.

The general requirements of s. 190C(4)

The application has not been not certified under Part 11 by any representative body that could certify the application and cannot meet the condition in s. 190C(4)(a). It is therefore necessary that I consider the application against the requirements of s. 190C(4)(b). I cannot be satisfied that the requirements of s. 190C(4)(b) are met, unless the application contains the information required by s. 190C(5).

The application contains the statement and brief setting out of the grounds in relation to authorisation required by s. 190C(5) in schedule R of the application and in the s. 62(1)(a) affidavits by the three applicant persons filed on 12 November 2008. Although my view is that the application contains the information required by s. 190C(5), it is still necessary for me to

consider the substantive condition in s. 190C(4)(b)—*Doepel* at [78]. I am not limited to the information in the application or accompanying s. 62(1)(a) affidavits when considering this condition—see *Strickland v Native Title Registrar* (1999) 168 ALR 242 at pp. 259-60, approved on appeal to the Full Court in *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 at [78]. See also *Doepel* at [78] that 'the interactions of s 190C(4)(b) and s 190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given.'

The Registrar has received adverse information about the authorisation from:

- Person 1, Person 3 and Person 2, who are part of the native title claim group and dispute the applicant's authority;
- North Queensland Land Council (NQLC), a representative body for the northern part of the application area. The NQLC has informed the Registrar that it acts for the Wiri Core applicant (QUD372/06) and is instructed that the application intrudes onto land belonging to the Wiri People and cannot therefore have been properly authorised;
- Person 4 (another Wiri person) has also provided information directly to the Registrar that the application encroaches on Wiri country.

Section 190A(3) provides that the Registrar, in considering a claim for registration, 'may have regard to other information as he or she considers appropriate'. These communications from a number of persons who dispute the applicant's authority is in my view relevant to the issue I must decide under s. 190C(4)(b) and it is therefore appropriate that I have regard to it.

In the interests of procedural fairness, I provided all of this material to the applicant and the applicant has responded with submissions and further material. I have also provided procedural fairness to the State of Queensland in relation to the applicant's further information, as required by law.[2] The State has not commented in relation to any of this material.

I note that both the State and the two representative bodies for the area covered by the application received a copy of the application and other documents filed in the Court pursuant to s. 66(2) and (2A) respectively.

It is my view that a common law duty of procedural fairness to persons such as Person 1, Person 3, Person 2 and to a competing claim group like the Wiri People is limited or curtailed by the statutory scheme governing the Registrar's consideration of applications pursuant to s. 190A and her notification functions under s. 66, including subparagraph (6) which expressly provides that notice of the application is only to be given to a range of persons (including any person/s who the Registrar considers should be notified because their interests may be affected by a determination in relation to the application) after the registration test decision is made.[3] The Tribunal wrote to the persons who had provided information to the Registrar informing them that if they disagree with the claim, they may join as a respondent party in the Federal Court during the public notification of the claim.[4] Similarly, the Tribunal wrote to the North Queensland Land Council informing it of my view that an appropriate course for a competing native title claim group, such

[2] *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 at [21] to [38].
[3] This was discussed by Mansfield J in *Hazelbane v Doepel* [2008] FCA 290 at [23] to [31].
[4] See letters from the Tribunal to Person 3, Person 1, Person 2 and Person 4 dated 8 April 2009.

as the Wiri People, is to join as a respondent party in the Federal Court during the public notification of the claim and that another course would be to make a claimant application over the area in respect of which they claim to hold native title.[5]

Turning then to what is required by s. 190C(4)(b), I must be satisfied, firstly, that the applicant is a member of the native title claim group and, secondly, that the applicant is authorised by all the other persons in the native title claim group. I turn now to consider the two limbs of the authorisation condition in s. 190C(4)(b).

First limb of s. 190C(4)(b) – the applicant is a member of the native title claim group

In response to the requirement in s. 190C(4)(b) that the applicant must be a member of the native title claim group, each applicant states in their s. 62(1)(a) affidavits that they are members through their descent from an apical ancestor or ancestors named in schedule A. Schedule A describes the native title claim group in the following terms:

> This application is made on behalf of the Barada Barna People being the descendants of the following apical ancestors:
> 1.Bob Lotus
> 2.Lizzy Payne
> 3.Daisy (wife of Booyah McDonald)
> 4.Maggie (wife of Toby Barker & Peter Darwin & Michael Angus)
> 5."Polly" Mary (wife of Robert Noble & Bert Fox)
> 6.Robert Noble
> 7.Lizzie (wife of Paddy Flynn)
> 8.Polly (wife of Thomas Mitchell)
> 9.Lucy Ross

There are three persons comprising the applicant. Applicant 2 says that he is a member of the claim group through his descent from the ancestor Lizzy Payne. Applicant 3 says he is a member through his descent from the ancestor Maggie (wife of Toby Barker & Peter Darwin & Michael Angus). Applicant 1 says that he is a member through his descent from the ancestors Robert Noble and "Polly" Mary. The adverse information does not raise any issues about these persons being members of the native title claim group and on the basis of the information in their affidavits, I am satisfied that they are all members of the native title claim group.

Second limb of s. 190C(4)(b) – the applicant is authorised by all the other persons in the native title claim group

Applicant's authorisation information

In response to the requirement in s. 190C(4)(b) that the applicant is authorised by all the other persons in the native title claim group, Applicant 1, Applicant 2 and Applicant 3 state in their s. 62(1)(a) affidavits that they are authorised as a result of the persons in the native title claim group agreeing and adopting a decision-making process at a meeting to which the Barada Barna people were invited by public notice and then proceeding at that meeting to authorise them to make the application and deal with matters arising in accordance with that process, it being the case that there are no traditional laws and customs which mandate a particular process of decision-making by the Barada Barna people. The applicant says that the authorisation meeting took place in

[5] See Tribunal letter to North Queensland Land Council dated 8 April 2009.

Rockhampton on 20 September 2008 and that it was preceded by a process of consultation with senior members of their claim group. The process of consultation that took place before the authorisation meeting with the group's elders and senior members is described in additional information provided by the applicant, particularly in a further affidavit by Applicant 2 dated 5 August 2009.

The asserted agreed and adopted decision-making process is that the Barada Barna People could make decisions at the meeting to authorise persons to be the applicant for their new native title claim by way of a majority vote on a clearly worded resolution read out to the meeting to be moved and seconded and then voted on by those at the meeting by a show of hands.

Information is provided to show that the meeting was publicised in the national, state-wide and regional print media, including two regional newspapers circulating in Mackay and Rockhampton, in the two to three weeks leading up to the meeting and over the radio in Brisbane and Rockhampton in the week before the meeting. The copy of the newspaper notice provided at 'FB2' of Applicant 1's s. 62(1)(a) affidavit shows that the public notice invited the Barada Barna people to an authorisation meeting so as to authorise a native title claim on their behalf. The notice included a diagram showing the boundaries of the new application with reference to some key towns along that boundary. The notice also identified that the Barada Barna people are the descendants of the nine apical ancestors subsequently named in schedule A (see above). Each apical ancestor is clearly named in the notice.

A copy of a document claiming to be the minutes and resolutions of the authorisation meeting is produced by Applicant 1 at 'FB1' of his s. 62(1)(a) affidavit filed 12 November 2008 to show what transpired at the authorisation meeting. (I shall refer to this document as the 'meeting minutes'.) A later copy of the meeting minutes provided by the applicant's legal representative on 23 April 2009 is shown to have been signed on 17 October 2008 by the minute taker (Person 6 – name deleted) and the chairman (Person 7 – name deleted), both of whom are shown in the meeting minutes to have been present.

The applicant says that a series of resolutions, including a resolution that dealt with the decision-making process to be used to authorise an applicant, are documented in the meeting minutes. The meeting minutes show that ten resolutions were voted on and passed at the meeting with more than the requisite majority. The applicant claims that the efforts made before the meeting to consult widely with and to notify the members of the native title claim group of the forthcoming meeting, together with the subsequent voting at the meeting, is the source of their authority from the rest of the native title claim group to make and deal with the application.

The meeting minutes refer to the meeting being opened by the chairman, Person 7. This is followed by advice from a lawyer, Legal representative. The chairman is said to have stated that the purpose of the meeting is to authorise a native title claim on behalf of the Barada Barna people and as such he asked those present if there was anybody in the meeting room who should not be there and if there was anybody outside who should be allowed to enter the meeting. The meeting minutes state that no persons were identified in response to these questions from the chairman, although Person 1 is shown to have said that she is attending to 'better understand the details of the proposed claim to decide whether she was a member of the group'.

Following these comments, the lawyer is stated to have given a 'comprehensive overview of the legal issues'. The lawyer tells of orders by Justice Dowsett at the 1 May 2008 directions hearing

'which required that the BBKY applicants show cause why the existing claims should not be struck out.' The lawyer is recorded as having 'informed the meeting of the anthropological advice received from Anthropologist 3 – name deleted and Anthropologist 4 – name deleted to the effect that there should be two new claims instead of one consolidated claim.' The lawyer is also recorded to say that 'Anthropologist 2 and Anthropologist 1 had conducted anthropological research over the last three months to be able to recommend what should be done to protect the rights of the claim group. Their advice was that a new native title claim should be authorized for the Barada Barna People.' The lawyer is also recorded to say that 'further detailed research will be conducted in the future by Anthropologist 2 and Anthropologist 1 to prepare a connection report for the State of Queensland.'

Finally in relation to the need for authorisation of a new application, the lawyer 'emphasized the importance of the group authorizing a new native title claim as it seemed that Justice Dowsett would not allow the existing BBKY claims to remain for much longer.' (I understand 'existing BBKY claims' refers to the Barada Barna Kabalbara and Yetimarla (QUD6224/98), Barada Barna Kabalbara and Yetimarla #3 (QUD6011/01) and Barada Barna Kabalbara and Yetimarla #4 (QUD6023/01) applications. These three applications were current at the time of the meeting on 20 September 2008 but were later dismissed by the Federal Court on 23 December 2008. I adopt the shorthand reference used by the applicant and refer to them hereafter as the BBKY applications.)

The lawyer is then stated in the meeting minutes to have provided advice as to the ways an applicant may be authorised under the Native Title Act, the anthropological recommendations as to the new claim group description based on apical ancestors, the role of the applicant and required attributes, the number and selection of the persons to be the applicant and the legal process for lodging a new claim.

This presentation by the lawyer was followed by the proposed resolutions being put to the meeting and a short break to allow informal discussion on the matters tabled and the proposed resolutions. The meeting reconvened and proceeded to consider and vote on a series of resolutions:

- resolution 1—the content of the 'majority vote' decision-making process agreed to and adopted by the meeting attendees, after first resolving that there is no traditionally mandated decision-making process;
- resolution 2—the proposed description of the native title claim group as the Barada Barna people who are the descendants of the nine apical ancestors named in the public notice (and replicated in schedule A—see above for the details of these apical ancestors);
- resolution 3—selection of persons as the applicant along the group's five family lines of Family 1 – name deleted, Family 2 – name deleted, Family 3 – name deleted, Family 4 – name deleted and Family 5 – name deleted;
- resolution 4—authorising the lodgement of a native title claim on behalf of the Barada Barna claim group and the boundaries of that claim, as shown in the public notice and in a map presented to the meeting;
- resolution 5—what would happen if someone was not willing or able to act as part of the applicant;
- resolution 5(a)—what would happen if an applicant was not able to attend meetings;

- resolution 6—appointing the lawyer at the meeting to lodge the new claim and act as legal representative for the Barada Barna people;
- resolution 7—the proposed description of the native title rights and interests in the new Barada Barna application;
- resolution 8—where each family present at the meeting (four of the five families were present with the Family 4 absent) selected their nominated applicant;
- resolution 9—nominating Cultural Heritage Body – name deleted (currently the nominated cultural heritage body for BBKY) as the cultural heritage body for the Barada Barna claim group.

The meeting minutes record the voting on the ten resolutions, including the identity of the person/s who moved and seconded each resolution and abstained from voting and the numbers for and against the resolution, but not the identity of the voting persons.

A signed attendance sheet is said to have been prepared showing who attended the meeting but it is not produced. However, the meeting minutes show that 29 persons voted or abstained and I infer that there were 29 persons present at the meeting. The meeting minutes show that:

- 25 persons voted for resolutions 1–4 and 9, with 4 named individuals abstaining from the vote;
- resolutions 5–8 received an unanimous vote;
- resolution 5(a) received a vote of 28 for; 1 against and was accordingly carried. (The identity of the person dissenting is not shown.)

The four persons said to have abstained from voting on resolutions 1–4 and 9 are named in the minutes—Person 1, Person 8 – name deleted, Person 9 – name deleted and Person 3. (Both Person 1 and Person 3 wrote to the Tribunal case manager soon after the meeting saying that they do not agree with the new claim.) I understand that these four persons belong to the Family 2. They are shown to have voted in favour of resolution 8 nominating Person 3 as the applicant for their family group. The minutes also show them to have voted in favour of resolution 5, 6 and 7 (identified as having been passed unanimously.) It is not clear if they voted for resolution 5(a) although presumably some or all of them may have, because the minutes record only one dissenting vote. The proceedings in relation to resolution 8 also show that the Family 4 were not present and it was therefore decided that it was not appropriate to nominate a Family 4 member as part of the applicant in their absence.

The meeting minutes record discussion surrounding the resolutions from which the four Family 2 family members are said to have abstained from voting, but the content of that discussion is not elaborated upon in the minutes.

The applicant relies on the meeting minutes as evidence that the resolutions passed at the meeting enjoyed support overall from the agreed and adopted process of a majority vote.

The applicant refers to Person 3's subsequent unwillingness to take on the role of applicant and to sign the required s. 62(1)(a) affidavit[6] and argues that resolution 5, passed unanimously at the meeting, covered an event such as this. This is because the vote in favour of resolution 5 shows that the claim group agreed that if any person is unable or unwilling to act as part of the applicant group, the decisions and functions of the applicant are to be made and performed by

[6] Applicant 1 and Applicant 2 at [8] respectively and Applicant 3 at [7].

the remainder. Therefore, it is argued, Person 3's refusal after the meeting to take up the role of applicant does not affect the authority extended by the native title claim group to the other three persons.

In a further affidavit dated 1 December 2008, Applicant 1 tells of Person 3's stated position after the meeting that he had met with his family and would not agree to be an applicant unless the claim included land further to the south of the Barada Barna claim area. (This is the land covered by the Southern Barada and Kabalbara claim (QUD6004/00), also known as the SBK claim, which adjoined but did not overlap the Barada Barna application in the south, until its dismissal by the Federal Court on 20 February 2009. I adopt the applicant's shorthand reference and hereafter refer to the Southern Barada and Kabalbara application as the SBK application, noting that it is not part of the BBKY group of applications referred to above.)

Applicant 1 provides the following further information in relation to the circumstances surrounding Person 3's refusal to act as a Barada Barna applicant:

- Person 3 is a member of the Family 2, who are part of the SBK claim group and are also included in the Barada Barna native title claim group;
- there were about five meetings held with the SBK People in 2007 and early 2008 to consider whether the SBK area could be included in a new claim with all or most of the existing BBKY claim areas but the effect of the anthropological advice from Anthropologist 3, Anthropologist 4, Anthropologist 1 and Anthropologist 2, was that the SBK application area could not properly be covered by the Barada Barna application. This was discussed again at the authorisation meeting, with the same result. Person 3 and the Family 2 have never accepted this decision and still want the SBK claim area included in the Barada Barna claim area and Person 3 has said that until this is done he will not sign as a Barada Barna applicant;
- Person 3 is a Barada person; however, he disputes that Ancestor 1 – name deleted is his Barada apical ancestor.

On 11 December 2008 the applicant's legal representative provided additional information in relation to the Family 4, including a short statement by the family elder said to speak for the Family 4 (Person 5) dated 24 September 2008 to the effect that Person 5 could not attend the authorisation meeting for family reasons and ill health prevented her from attending an earlier meeting in Brisbane on 15 September 2008. Person 5 states, however, that she supports the new Barada Barna claim.

Adverse information from persons in the native title claim group who dispute the applicant's authority

This information is from three individuals—Person 1, Person 3 and Person 2. Person 1 and Person 3 are members of the Family 2. Person 2 is a member of the Family 4. It is accepted by all that the Family 2, including Person 1 and Person 3, belong to the native title claim group.

Although Person 2 expresses the view that his family (Family 4) have been wrongfully excluded, this is not borne out by the information in the application and accompanying anthropological report, which identifies that their apical ancestor, Ancestor 2 – name deleted, is the third of the nine apical ancestors for the Barada Barna people. The anthropological report refers to current members of the Family 4 as belonging to the Barada Barna people (see, for example, the discussion on p. 4 about Ancestor 3 – name deleted and his granddaughter, Person 5). The

descendants of Ancestor 2, including Person 2, would appear to be included in the native title claim group. The potential issue raised is whether their absence from the authorisation meeting means that the applicant is not authorised as a result of the decisions taken that day.

The meeting minutes provided by the applicant show that the Family 2 and Family 4 families were identified in the third resolution as two of the five family lines who needed to participate in the authorisation of an applicant for the new Barada Barna application, with the other three family lines being the Family 1, Family 3 and Family 5 families.

Person 1 and Person 3 were at the meeting, along with another two members of the Family 2 family, Person 8 and Person 9. Person 2 states that he could not attend the meeting and it is accepted by all that there were no Family 4 family members at the meeting.

Person 1's account of the meeting (found in an email to the Tribunal case manager dated 21 September 2008) generally accords with what is found in the meeting minutes, although she does refer to some argument and discussion that is not contained in the minutes. It is clear from Person 1's information that she and the other three members of the Family 2 at the meeting do not support the Barada Barna application and did not vote for it at the meeting, although they did vote for Person 3 to be their representative as part of the persons comprising the applicant.

That the four Family 2 members present at the meeting did not support the new application or vote for it is also clear from the meeting minutes, which record that they abstained from voting on a number of the resolutions put to the meeting to give effect to the applicant's authority overall to make and deal with this application. The meeting minutes identify that the Family 2 did vote in favour of the eighth resolution which saw the authorisation of a number of persons as the applicant, including their family representative, Person 3. I do not understand Person 1 or Person 3 to say that they did not vote for the eighth resolution as to the appointment of the applicant for the new claim. It appears that their overriding concern in voting in favour of the eighth resolution was that if they did not nominate someone from their family as part of the applicant, their family would not have any say in relation to the conduct of the new application. It appears that the Family 2 were the only ones at the meeting who did not support the application.

Person 1 says that she found it strange that the QSNTS had previously talked about this new claim being mainly for BBKY #3 but that her family group was named on the day. She tells how the lawyer read from a piece of paper where Anthropologist 3 and Anthropologist 4 had said that there appeared to be two distinct Barada groups; one in the north and one in the south. But then they said that the Anthropologist 2 report had indicated that the majority of Barada and Barna were inside the mapped area in the new claim.

Person 1 states, 'We felt that we were pressured into having a rep from the Family 2 on this new claim or they would have dropped us off like the Family 4and it would have been just the Family 5 and Family 3 in there again.' Person 1 relates telling the lawyers at the meeting that she intended to lodge an objection to the new claim with the NNTT over the apical ancestor 1and they asked her to reconsider. Person 1 states that her family spoke to the two legal people and the anthropologist about the fact that Ancestor 1 had been identified as a Barada Barna apical ancestor, yet she was on their current claim as a Kabalbara woman. (I understand Person 1 to

refer to the fact that Ancestor 1 is identified as a Kabalbara woman in the SBK application.) Person 1 states her view that she would like to see all people who claim descent from Barada, Barna, Kabalbara and Jetimarala apical ancestors to come together for '1 big claim for that area in which we all have interests'.

Person 3 has written to the Tribunal on numerous occasions saying that the Family 2 do not support the new application and he has therefore refused to act as an applicant. Most of this correspondence has been sent by e-mail to the applicant and their legal representative, with the Tribunal included as one of the addressees to those e-mails. To summarise the salient points of Person 3's information, he objects to the claim because:

- the new claim incorrectly identifies the Family 2 apical ancestor to be Ancestor 1. Person 3 asserts that the Family 2 Barada ancestor is Ancestor 4. He says, if Ancestor 1 is anything, she is their Kabalbara ancestor from their father's side, whereas their Barada identity comes from their mother's side and they always intended to claim from their mother's Barada side in this new application;
- the boundaries of any new claim should encompass the larger area of the Barada Barna Kabalbara and Yetimarala #4 application (QUD6023/01) and the Southern Barada and Kabalbara People application (QUD6004/00);
- the Barada Barna application extends into Kabalbara country in its southern reaches yet purports to be a claim for the Barada Barna people only.
- Two of the families included in the new Barada Barna claim (the Family 3 and Family 5) do not have traditional links to the southern reaches of the application area;
- the authorisation meeting was flawed as the decision making process favoured the Family 3 and Family 5 groups in comparison to the whole of the BBKY claim group makeup.

I infer from the final point that Person 3 is of the view that the Family 3 and Family 5 groups had the numbers on the day to secure a majority vote in favour of the new application. Person 1 is not quite so forthcoming, but it appears that she, too, feels that the meeting was unfairly weighted in favour of the Family 5 and Family 3 families.

In more recent times, Person 3 has provided information[7] to the effect that he supports one large claim involving the Barada, Kabalbara, Koinjamal and Yetamarala tribal groups and that these groups established a steering committee following a publicly notified information/authorisation meeting convened by QSNTS in May and June 2009. Person 3 states that it was acknowledged at the meeting that the Barada, Kabalbara, Koinjamal and Yetamarala tribal groups had 'similar or the same apical ancestors as the Barada/Barna proposed claim, so it makes sense to look at bringing 2 separate claims with the same tribal groups and families into 1 whole of community clam'.

Person 2 provided information to the Tribunal by email dated 24 September 2008 saying that he was not able to attend the authorisation meeting, due to a relation's funeral on Palm Island. Person 2 also says that his sister (Person 5) is looking after their father who is critically ill and was also unable to attend the meeting. Person 2 says he has been told that the Family 4 ancestor,

[7] See email dated 27 May 2009 to the Barada Barna applicant and others, including the Tribunal case manager.

Ancestor 2, was not included as an apical ancestor and his family are thus wrongfully excluded from the native title claim group, because there were no Family 2 family members at the meeting to look after their interests. Person 2 also objects to the inclusion of the apical ancestor Ancestor 1. He says that she has previously been identified as a Kabalbara woman.

Applicant's response to the information from persons in the native title claim group who dispute the applicant's authority

The applicant's response to this adverse information is that those who oppose the new application are nonetheless bound by the group's agreed and adopted decision-making process which allowed for decisions to be made by those present at the meeting on 20 September 2008, provided a majority voted for those decisions. The applicant contends that:

> The meeting was well advertised and attended. There was explanation and discussion in relation to all resolutions put to the meeting. The decision to lodge a new claim was authorised by the affirmative vote of all persons present at the meeting who voted. There were no objections to the resolutions but there were four abstentions.[8]

In more recent times the applicant has provided an affidavit by one of the anthropologists who has worked on the new claim (Anthropologist 1, 10 August 2009). Anthropologist 1 states the following in relation to her experience in the native title industry, the steps that were taken prior to the meeting to notify as many people as possible and the numbers in attendance at the meeting:

- She has worked as an anthropologist in native title for the past eight years, including three years as an in-house anthropologist, two years as the native title manager and one year as the Director of Research with the QSNTS representative body.
- Her experience with QSNTS is that notifying native title claimants about upcoming authorisation meetings by mail-outs or other personal communications was not an effective tool because of problems creating and retaining a reliable database of addresses for claimants.
- The Barada Barna authorisation meeting was advertised and arranged in a way that is consistent with at least 20 other authorisation meetings in which she had been involved whilst at QSNTS.
- This included publishing 12 notices in newspapers circulating in the region which listed the group's apical ancestors and invited descendants to attend the authorisation meeting and also involved extensive coverage over Murri radio of the forthcoming meeting in the week before the meeting.
- She also describes the extensive consultation that she and the applicant Applicant 2 undertook prior to the meeting with a number of Elders and senior representatives of the families within the claim group in late July and August 2009. She states her opinion that between them they met with a majority of the Elders of all family groups in the Barada Barna claim group. She says that they explained to the Elders that the new claim being formulated for the Barada Barna people was based on the anthropological research and advice by her and Anthropologist 2, which concurred with the opinions that had been earlier expressed by Anthropologist 3 and Anthropologist 4 that there were separate northern and southern claim groups for the area covered by their research.

[8] Barada Barna's Legal representative letter dated 23 April 2009 at p. 9.

- The Elders that they met agreed with their advice, namely, that the new Barada Barna claim would cover the northern part of the area covered by the old BBKY claims and would not include the remaining areas of those claims or any part of the Southern Kabalbara and Yetimarala area. These meetings with elders before the authorisation meeting, coupled with the extensive public notices, were intended to facilitate the authorisation process by ensuring that the families were aware of the nature of the native title claim and to ensure that the native title claim group had notice of, and a reasonable opportunity to attend, the authorisation meeting should they wish to do so.
- They also told the Elders that there would be an authorisation meeting in Rockhampton in the coming weeks and to look out for a notice in the newspapers that circulate in the region and to inform other members of their families of the upcoming meeting.
- It is the responsibility of senior people under Aboriginal tradition to inform the members of their families about important issues that affect the family and this is a very effective way to bring authorisation meetings to the attentions of native title claimants.
- This does not mean that all family members will attend and it is not usual to have large turnouts at authorisation meetings unless there are controversial issues. Normally only a small number of members of each family attend the authorisation meeting. Those who do attend do so as representatives for their families who can speak for their family at the meetings.
- In her opinion, the numbers at the authorisation meeting were what she would have expected for an authorisation meeting where there was general agreement on the desirability of a new native title application being made.

I note that Applicant 2 has also made a further affidavit[9] in which he describes the extensive efforts that he and Anthropologist 1 made prior to the meeting to meet with elders and senior representatives from all of the families who are descended from the nine apical ancestors to explain the new claim to them, including its boundaries and the make-up of the claim group, and to tell them about the forthcoming authorisation meeting, including that they should look out for a public notice for it, as it would take place in Rockhampton sometime in September 2008.

Applicant 2 says[10] that he and the anthropologist, Anthropologist 1, travelled to Townsville, Charters Towers, Mackay, Rockhampton and Sarina in late July 2008 telling the Elders about the proposed application. Applicant 2 states that he and Anthropologist 1 told the Elders about the basis of the claim, the anthropological evidence supporting the claim and gave the Elders an opportunity to raise any issues. Applicant 2 states that they had maps to show the likely claim boundaries. Applicant 2 notes that a number of the Elders had previously been involved in discussions in relation to the proposed new claim so they already had some familiarity with the issues. He states that they told the Elders that the new claim would be called the Barada Barna claim and it would be a claim over the northern part of the area covered by the old BBKY claims, this being consistent with the anthropological advice of Anthropologist 3 and Anthropologist 4. He states that Anthropologist 1 told the Elders that she and Anthropologist 2 agreed with this advice.[11]

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[9] Applicant 2, 5 August 2009.
[10] Applicant 2, 5 August 2009, [6].
[11] Ditto.

Applicant 2 tells[12] how he also visited four senior members of the Family 4 on Palm Island in July 2008, together with another 14 members of that family. Applicant 2 says that the purpose of his visit was to explain to the Family 4 elders the new claim by the Barada Barna people and that he told them of the anthropological research which was being carried out, the likely make-up of the claim group and the area it would cover, including a map to show them the proposed boundaries. Applicant 2 states that the Family 4 elders told him that they supported the proposal for the new claim and that they would discuss it with members of their family who were not there that day.

Applicant 2 says that he told the Family 4 members that there would be an authorisation meeting in Rockhampton sometime in September 2008 and that they should check for the date of the meeting in the public notices sections of the *Courier Mail*, the *Rockhampton Bulletin* and the *Koori Mail*. The other Elders visited by Applicant 2 and Anthropologist 1 were also told to look out for a public notice in these newspapers for an authorisation meeting in Rockhampton sometime in September 2008.

Applicant 2 states that he has been actively involved in the BBKY claims for over 10 years and he has become very well aware of the identity of the Elders for the various families. This knowledge meant that he knew which persons he should meet with on behalf of the families that were to be included in the Barada Barna claim.[13]

Anthropologist 1 affidavit supports the information in Applicant 2's affidavit that they undertook significant consultations with claim group before the authorisation meeting, although she did not travel to Palm Island with Applicant 1 to consult with the Family 4 .[14] Anthropologist 1 states her opinion that between them, she and Applicant 1 met with a majority of the Elders of all family groups in the Barada Barna claim group.[15]

Applicant 1 tells of meetings that were held with SBK people in 2007 and early 2008 to consider whether the SBK area could included in the BBKY claim areas.[16] The applicant's legal representative has also provided further information about four meetings in 2007 and early 2008 with the Family 2[17] to show that there was extensive consultation with that family about the formulation of a new claim and whether it could legitimately cover the old SBK area and Yetimarla country. The applicant's legal representative states that when it became apparent that the Barada Barna people would be pursuing a claim in the northern part of the old BBKY area, there was significant opposition from Person 3 and Person 1, who wish to include the SBK area. The applicant argues that the Smith family have always opposed any new application which leaves out their SBK application area, however including this area is not supported by the weight of the anthropological research that has been undertaken in the region covered by the old BBKY and SBK applications.

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[12] Applicant 2, 5 August 2009, [3]–[4].
[13] Applicant 2, 5 August 2009, [5].
[14] Anthropologist 1, 10 August 2009, [6]–[8].
[15] Anthropologist 1, 10 August 2009, [6].
[16] Applicant 1, 1 December 2008, [3].
[17] Letter from Barada Barna People legal representative dated 28 July 2009.

The applicant's legal representative states that the anthropological research, including that in relation to the Family 2 family ancestor, Ancestor 1, was again discussed with the four Family 2 members at the authorisation meeting.

It is contended that the Family 2, who clearly knew about the meeting to authorise a new claim as four members of their family were in attendence, were legitimately out-voted by the rest of the native title claim group at the authorisation meeting.

The applicant notes that the four Family 2 members, although they abstained from voting on some of the resolutions, nonetheless voted in favour of their nominated applicant, Person 3, in the course of passing the eighth resolution. They also voted in favour of the fifth resolution as to what would happen if a person nominated as an applicant was unable or unwilling to act. In relation to Person 3's refusal to become an applicant, it is submitted that this does not affect the authority of the remaining three persons due to the unanimous passing of the fifth resolution whereby the group decided that such an event would not affect the authority of the remaining persons.

The applicant has also provided a signed statement dated 24 September 2008 from Person 2's sister, Person 5, indicating support overall from the Family 4 for the new Barada Barna application. The applicant's legal representative informs me that Person 5 is an applicant on the BBKY #4 application, a Family 4 elder and speaks for the Family 4 in relation to that claim. I note that Person 2 identifies that his sister Person 5 has received a lot of traditional knowledge from their grandfather, Ancestor 3. It appears from all of the information before me that Person 5 is an acknowledged Family 4 Elder and an appropriate person to indicate the views of the Family 4 in relation to the Barada Barna application. The applicant also responds that the Family 4's apical ancestor, Ancestor 2), is the third of the nine Barada Barna apical ancestors and thus, her descendants (including Person 2) are included as part of the Barada Barna native title claim group.

Person 5 says in her statement that she knew about the meeting in Rockhampton but could not attend for family reasons and was unable to attend an earlier meeting five days previously in Brisbane due to ill-health. Person 5 states that she supports the new Barada Barna claim and agrees to be the representative of the Family 4 if appointed.

In relation to the absence of the Family 4 from the meeting, the applicant contends that Person 2 and others clearly knew about the meeting and point to the steps taken beforehand to ensure it was widely publicised, including Applicant 2's meeting with four senior members of the Family 4 on Palm Island in July 2008. It is contended that at that meeting there were about 14 other members of the Family 4 present and during which the Family 4 elders told him that they supported the new claim. [18]

The applicant argues that the consultation with the Family 4 before the authorisation meeting and the signed statement from Person 5 after the meeting shows that the Family 4 in fact support the new application, such that their absence from the authorisation meeting is immaterial, particularly in light of the extensive consultation undertaken in the weeks leading up to the meeting. That consultation included Applicant 2 travelling to Palm Island to meet with elders

[18] Affidavit by Applicant 2 dated 5 August 2009, [3].

from that family to provide information about the details of the new claim, who indicated their general agreement with it.

I understand the applicant to contend that every reasonable opportunity was extended to the Family 4 to participate in the authorisation process and their absence from the meeting should not de-rail an otherwise valid authorisation of the applicant, particularly as:

- Person 2's original complaint was based on an erroneous view that the Family 4 are excluded entirely from the native title claim group;
- the Family 4 were extensively consulted and indicated their agreement with the new claim before the meeting; and
- their Elder has come forward since the authorisation meeting attesting to her support for the new claim.

The applicant contends that the Family 2 have likewise been extended every reasonable opportunity to participate in the authorisation process and their minority dissent cannot stand in the face of the group's validly executed agreed and adopted 'majority vote' decision-making process.

The applicant also argues that the position taken by the Family 2 that Ancestor 1 is not a Barada Barna ancestor and that any new application should cover a greater area and include other tribal groups is not supported by expert anthropological opinion.

In relation to the identification of Ancestor 1 as a Barada ancestor, I am told that Anthropologist 2 and Anthropologist 1 spent a considerable amount of time with Person 1 and other members of the Family 2 prior to the commencement of the meeting and during breaks discussing their genealogy and that Anthropologist 1 also spent considerable time with the Family 2 during the preparation of the anthropological report. I am referred to the anthropological report by Anthropologist 2 and Anthropologist 1 dated September 2008[19] to support that Ancestor 1 is properly identified as an apical ancestor for the Barada Barna native title claim group.

I have looked to the anthropological report—it refers to Ancestor 1 as a Barada Barna apical ancestor and to the Family 2 as her direct descendants.[20] The anthropological report refers to the Family 2 matriarch, 5, who was born at Lotus Creek[21] in 1893 and their patriarch, Person 10, singing out to the old people when going out on country and passing traditional knowledge onto their children. Both Anthropologist 2 and Anthropologist 1 have sworn affidavits to the effect that Ancestor 1 has been properly identified as one of the nine apical ancestors for the Barada Barna native title claim group.[22]

The applicant argues that the proposal by Person 1 and Person 3 that any new claim should cover a much wider area and should include other tribal groups (such as the Kabalbara and the Jetimarala/Yetamarala and the Koinjamal[23]) is not supported by the weight of the anthropological research and evidence, including that undertaken most recently by Anthropologist 2 and

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[19] This is the anthropological report filed with the original application on 12 November 2008.

[20] See p. 16 of the report.

[21] I see that Lotus Creek runs along part of the south-eastern boundary of the application area—see map in attachment C filed 3 March 2009.

[22] See Anthropologist 1, 10 August 2009, at [2] and Anthropologist 2, 21 July 2009, at [4].

[23] Person 3 refers to the Koinjamal in his e-mail dated 27 May 2009.

Anthropologist 1 and earlier research by the anthropologists, Anthropologist 3 and Anthropologist 4. I am provided with an affidavit by Anthropologist 3 in which he tells of his research work and resulting opinion (shared by Anthropologist 4) that:

> it appeared that there should be two claim groups, one in relation to the northern part of the areas covered by the BBKY #1, #3 and #4 claims and another for the southern area that included some of the BBKY claim area, the SBK claim together with that area claimed by the Powder family, as part of the Jetimarala (Yetimarala) people.[24]

My decision in relation to the information from those within the native title claim group who dispute the applicant's authority

Having regard to all of the information before me, I have decided that the applicant is authorised to make the application and to deal with matters arising in relation to it by all the other persons in the native title claim group, notwithstanding the information from certain claim group members that they did not or do not support the decision taken at the authorisation meeting.

In considering whether the applicant is authorised, I must give the term 'authorise' the meaning found in s. 251B (see commencement of this section of my reasons for the text of this section). Section 251B provides that a person or persons may be authorised by all the persons in the native title claim group if the group so decide, following either a traditionally mandated decision-making process or, in the absence of traditional laws and customs governing how the decision is to be made, by a process of decision-making agreed to and adopted by the persons in the native title claim group.

The following legal principles govern my consideration of whether the applicant is authorised by all the other persons in the native title claim group:

- The requirement that 'all' the other persons in the native title claim group authorise the applicant does not literally require that every person in the native title claim group must individually participate in or affirmatively agree to the applicant being authorised.
- Unanimous decision–making is not mandated.
- In those cases where there is no relevant traditional decision–making process, s. 251B does not mandate any one particular decision–making process, only that it be one that is agreed to and adopted by the persons in the native title claim group.
- Agreement to a particular process may be proved by the conduct of the parties even in the absence of proof of a formal agreement.
- Authorisation by a majority of those who comprise a 'native title claim group' following an agreed and adopted process is possible. In other words, the requirement that 'all' the persons in the native title claim group authorise an applicant does not mean that a single dissentient or non–participant will invariably have an ability to veto authorisation.
- 'Agreed to an adopted by' imports the giving to all of those in the native title claim group, whose whereabouts are known and have capacity to authorise, every reasonable opportunity to participate in the adoption of a particular process and the making of decisions pursuant to that process.
- In considering whether authorisation flows from the 'native title claim group', I must give that term the meaning found in s. 61(1):

[24] Anthropologist 3, 30 April 2008, [10].

> . . . all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed . . . [25]

With these principles in mind, it is my view that the four Family 2 members present at the meeting could have been legitimately out-voted at the authorisation meeting by a native title claim group which was following a validly agreed and adopted 'majority vote' decision-making process. Further, the absence of Family 4 members at the authorisation meeting does not necessarily vitiate the decisions made that day, provided a reasonable opportunity was extended to them to participate in the authorisation process.

Finally, in my view, Person 3's subsequent refusal to take up the role of applicant is not necessarily fatal to the authority of the remaining three persons. I refer to *Doolan v Native Title Registrar* (2007) 158 FCR 56, [2007] FCA 192 (Spender J) where the Court found that a group of persons authorised to be the 'applicant' refers to 'all of the persons authorised by the native title claim group who, at any particular time, were willing and able to act', such that it was wrong of the Registrar's delegate to find that she was not satisfied about the applicant's authority where two of the 18 persons authorised withdrew following the authorisation meeting.

More recently in *Coyne v WA* [2009] FCA 533 Siopis J decided that the death of two of the seven persons authorised as the applicant following the authorisation meeting did not affect the authority of the remaining five persons. Siopis J commented at [54] that it was 'significant' that the resolution passed at the meeting authorised the named persons 'or such of them as are eligible to act as an applicant and who remain willing and able to act in respect of the application in the future' to make and deal with matters arising in relation to the application. Siopis J referred to the similar wording used for the authorisation of the applicant in an application before French J in *Anderson v Western Australia* [2007] FCA 1733. In that case, French J was satisfied that each individual person's authorisation was subject to that person continuing to be willing to, and capable of, acting.

In the application before me, it would appear that the native title claim group expressly discussed and agreed what would happen if someone was not willing to take on the role of applicant when they unanimously passed the fifth resolution that the remaining persons who had been authorised would perform the role of applicant.

Having regard to the task at s. 190C(4)(b), it is also my view that the dispute within the group as to what area should be encompassed by this application or how the persons in the native title claim group should be described is not relevant to my decision, except in the following limited circumstance. That is, where the dispute raises concerns for me that the persons who have participated in the authorisation of the applicant are a subgroup or something less than the entire 'native title claim group', as that term is defined in s. 61(1).

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[25] *Fesl v Delegate of the Native Title Registrar* [2008] FCA 1469 (*Fesl*) at [26] and [71]–[72] (Logan J) recently distilled these principles from earlier case law on the requirements of s. 251B. See also *Lawson v Minister for Land and Water Conservation (NSW)* [2002] FCA 1517 (*Lawson*) at [25], Stone J; *Wharton on behalf of the Kooma People v State of Queensland* [2003] FCA 790 (*Wharton*) at [34], Emmett J; *Noble v Mundraby* [2005] FCAFC 212 at [18] and *Noble v Murgha* [2005] FCAFC 211 at [34], North, Weinberg and Greenwood JJ; and *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31 at [1265], Lindgren J. For the final principle, see *Risk v National Native Title Tribunal* [2000] FCA 1589 and *Wiri People v Native Title Registrar* [2008] FCA 574.

My decision is that the information from the Family 2 disputing the inclusion of Ancestor 1 as their apical ancestor or as an apical ancestor generally for the native title claim group does not indicate the existence of a subgroup or something less than the entire native title claim group having participated in the authorisation process. It is also my decision that the anthropological information provided by the applicant does not indicate that the native title claim group described in schedule A as the Barada Barna people, who are the descendants of the nine identified apical ancestors, is merely a subgroup or something less than the entire native title claim group. I note that there is information provided by the application to show that one large claim group covering several separate tribal groups over the wider area of the BBKY and SBK claims is not supported by the weight of the anthropological opinion and research that has been conducted in these areas over the course of some years.

This then leaves me to consider whether the decision made to authorise an applicant at the meeting of the native title claim group in Rockhampton on 20 September 2008 can validly stand in the face of opposition from the four Family 2 members and in the absence of any Family 4 members at the actual meeting. In making this decision, I must first decide which of the two decision-making processes identified in s. 251B must be followed by the members of the native title claim group when authorising the applicant.

The applicant's evidence is that there are no traditional laws and customs mandating the decision-making process to be followed when authorising the applicant or when making decisions of this kind.

In my view it is not seriously contended by Person 3, or by Person 1 and Person 2, that there are traditional laws and customs which must be followed when authorising the applicant. Although Person 3 says in his email dated 26 September 2008 that 'traditional customary decision-making processes were not followed' at the authorisation meeting, I do not find this persuasive as to the existence of any traditionally mandated decision-making process that must be followed. In saying this, I note that Person 3 does not elaborate on the content of any asserted traditional laws and customs. Further, this general assertion is to be contrasted with the evidence provided by the applicant as to what transpired at the meeting, where those in attendance resolved that they did not have any traditional laws and customs which mandated how the decision was to be made and then proceeded to agree and adopt the 'majority vote' decision-making settled upon in the first resolution. There is also the s. 62(1)(a) affidavit evidence from the three persons comprising the applicant identifying that the native title claim group do not have traditional laws and customs which mandate a particular decision-making process when authorising an applicant or making decisions of that kind.[26] The conduct of the persons at the authorisation meeting clearly supports that the group do not regard themselves as bound by any traditional laws and customs which mandate how an authorisation decision is to be made. They so decided after receiving legal advice on what the Native Title Act required in relation to authorisation of an applicant. They then proceeded to resolve that there were no relevant traditional laws and customs and then proceeded to agree and adopt a majority vote decision-making process.

Person 3 may be asserting that traditional law and custom has not been followed because the three applicant persons are not representative of the entire native title claim group in that they only represent the interests of two families within that group with a traditional connection to the

[26] Applicant 1 [10], Applicant 2 [10] and Applicant 3 [9].

northern parts of the application area. I note, however, that the Courts have consistently emphasised that there is no provision in the Act which provides that the applicant must be comprised of representatives from each family group who make up the native title claim group: *Coyne v Western Australia* [2009] FCA 533 at [24], referring also to the observations of Spender J in *Combined Mandingalbay Yidinji-Gunggandji Claim v State of Queensland* [2004] FCA 1703 at [16]–[17], which was cited with appproval by the Full Court in *Nobel v Mundraby* [2005] FCAFC 212.

I am satisfied that there are no traditional laws and customs which mandate how the authorisation decision must be made, such that s. 251B(a) does not apply to the decision to authorise the applicant in this particular application.

It follows that a valid authorisation of the applicant must have utilised a process of decision-making agreed to and adopted by the persons in the native title claim group, as provided for in s. 251B(b). In my view the decisions made at the authorisation meeting are capable of withstanding the dissent from the four Family 2 members because there was a validly agreed and adopted decision-making process and this allowed a majority decision to secure the requisite authorisation of an applicant to make and deal with the new Barada Barna application. In this regard, I refer to the uncontested information that 25 persons at the authorisation meeting voted in favour of the new application, with only the four Family 2 members refusing to support it.

A prerequisite for any such decision must involve extending a reasonable opportunity to the entire native title claim group to participate in the adoption of a decision-making process and the making of decisions pursuant to that process. I am satisfied that every reasonable opportunity was extended to the entire native title claim group, including the Family 2and Family 4 families, to participate in the authorisation process.

The information before me shows that the authorisation meeting was extensively advertised in the print and radio media in the weeks leading up to the meeting. Further information provided by the applicant (see affidavits by Applicant 2 and Anthropologist 1) is that they extensively travelled the region to visit the known families within the native title claim group and to consult the elders within those families about the details of the new claim and to tell them to look out for the public notice they would be placing in various newspapers for an authorisation meeting in September 2008 in Rockhampton. Applicant 1 has provided an affidavit dated 1 December 2008 stating that there were about five meetings with the SBK People (I understand this to include the Smith family) in 2007 and early 2008 about whether a new claim could include both the former BBKY and SBK claim areas. There is information from the applicant's legal representative that the anthropologist 2, was at the authorisation meeting and discussed the particulars of the new claim and the anthropological evidence said to support it, including the Family 2 genealogy and how they fitted into the native title claim group. I note also the information from Applicant 1 and the applicant's legal representative that there were a series of meetings with the Family 2 in 2007 and early 2008 about whether any claim could include the SBK area.

I find that similarly comprehensive efforts were made to involve the Family 4 in the authorisation process, including meeting with four elders from that family at their home before the meeting to explain the details of the new claim and to inform them that an authorisation meeting would be held and to look out for the public notice they would be placing in a number of newspapers for a meeting sometime in September 2008. There is also the statement from the Family 4 elder (Person 5) following the authorisation meeting saying that she supports the new claim. Finally, Person 2's

adverse information appears to have been primarily motivated by an erroneous assumption that the Family 4 have been excluded from the native title claim group.

In all the circumstances, it appears to me that extensive and comprehensive efforts were made before and at the authorisation meeting to ensure that every reasonable opportunity was extended to the native title claim group as a whole to participate in the authorisation of an applicant, such that the decisions at the authorisation meeting can be seen to be representative of the entire native title claim group. The meeting was attended by 29 persons and the information is that this was a well-attended meeting, particularly in light of the extensive consultation amongst the various families that took place before the meeting.

It follows that I am satisfied that the majority decision-making process agreed to and adopted by the native title claim group at that meeting and the decisions made pursuant to that process are valid because more than a majority of the persons at the meeting voted in favour of the applicant's authority to make the application and to deal with matters arising in relation to it.

It remains for me to find that the persons at the meeting validly agreed that if a person authorised at the meeting was unable or unwilling to act as the applicant after the meeting, this would not affect the authority of the persons who remained authorised as the applicant. This was clearly agreed to in the fifth resolution. In the face of this resolution, it is my view that Person 3's subsequent refusal to take up the role of applicant cannot disturb the authority of the remaining three persons authorised at the meeting.

Adverse information from the Wiri People

The North Queensland Land Council (the NQLC) states in two letters to the Registrar dated 24 November 2008 and 2 April 2009 that:

- NQLC act for the Wiri Core applicant (QUD372/06).
- The Wiri Core applicant instructs NQLC that the Barada Barna application, although it does not overlap the Wiri Core application, nonetheless extends too far and goes into the traditional country of Wiri People (I understand that the country in dispute is in the northern reaches of the Barada Barna application).
- The Barada Barna claim cannot be properly authorised as it claims country which belongs to Wiri People.
- The NQLC legal officer, together with a number of Wiri people, travelled to Rockhampton and attended at the place advertised for the authorisation meeting and sought to be admitted to discuss this with the Barada Barna people.
- They were denied entry to the meeting and therefore denied the opportunity to discuss this with the Barada Barna people.
- The Wiri people assert that the claim cannot be said to be properly authorised as traditional law and custom has not been followed. If traditional law and custom had been followed, then the claim would not protrude into Wiri Country.

Person 4 is a Wiri person who has written to the Registrar on two occasions, in similar terms, dated 20 October 2008. It appears that he relies on his second missive received by the Tribunal on 14 November 2008 and I have turned to this later letter to extract the substance of Person 4's concerns:

- He is an elder of the Family 6, who are Wiri People. The Family 6's primary native title claim is the Wiri #2 application. (I understand that Person 4 refers to the Wiri People #2

QUD6251/98 application, which the Barada Barna application did overlap in its northern reaches, prior to the Federal Court dismissing the Wiri #2 application on 27 March 2009.)

- Person 4 views this new Barada Barna application as another attempt to claim native title over country that properly belongs to the Wiri People. This has been ongoing since the BBKY #3 claim was made over the Wiri #2 application in 2000.[27]
- He tried to attend the authorisation meeting to discuss his concerns about the Barada Barna application intruding too far north onto Wiri country but was not allowed entry when he revealed his Wiri connections.
- Person 4 also asserts that some of the Family 5 members were excluded from the authorisation process and/or are not covered by the publicly advertised description of the persons who qualify as Barada Barna people. He says that the descendants of Ancestor 6 (a sister to Ancestor 7 – name deleted, who was the son of the Barada Ancestor, Ancestor 8 – name deleted) have been excluded. He says that Ancestor 7 had a sister, Ancestor 9 – name deleted, also of the Barada tribe. The omission of Ancestor 9 from the list of Barada Barna apical ancestors has also resulted in the exclusion of Ancestor 9's descendants from the authorisation process.

When I read Person 4's information overall, together with the NQLC information, I discern that there is a dispute of some years standing between two competing groups about who holds native title in the northern reaches of the Barada Barna application area and that it remains unresolved, despite the recent dismissal of the formerly overlapping BBKY #3 and Wiri #2 applications.

Applicant's response to the information from the Wiri People

The applicant argues in response that the Wiri people are not part of the Barada Barna people native title claim group and as such are not entitled to participate in the authorisation of the application. The Wiri people who tried to attend the authorisation meeting were asked if they were a descendant of any of the nine ancestors. When they replied no, they were told that they could not enter the meeting as it was an authorisation meeting for the Barada Barna native title claim group. The applicant also relies on the fact that the Barada Barna application does not overlap the Wiri Core application and that there is no current Wiri application that overlaps the Barada Barna application.

In relation to the information from Person 4 that there are members of the Family 5 who have been excluded from the authorisation process or from the native title claim group, the applicant provides a letter from Anthropologist 2[28] that his research does not support that the Barada Barna apical ancestor, Ancestor 8 had a sister Ancestor 9. He also states in that letter and at [6] of his further affidavit dated 21 July 2009 that Ancestor 6 and her descendants are included in the description of the native title claim group and were invited to the authorisation meeting.

My decision in relation to the information from the Wiri People

[27] I understand that Person 4 is referring here to the BBKY #3 application (QUD6011/01) which was filed in the Federal Court on 21 March 2001, and which covered the northern reaches of the Barada Barna application, until its dismissal on 23 December 2008. Of the three BBKY claims, the BBKY #3 application overlapped the Wiri #2 application.
[28] See letter signed by Anthropologist 2 dated 15 April 2009.

The contention from the NQLC and also from Person 4 is that I cannot be satisfied that the applicant is authorised because the persons invited to and who participated in the authorisation meeting do not include, and the applicant has not been authorised by, all the persons who hold native title in the application area, it being the case that the application intrudes onto the traditional country of the Wiri People. It is argued that the Wiri People are thus properly part of the 'native title claim group' from whom the authorisation must stem, as stipulated in s. 61(1).

Although there is some information before me that the fourth Barada Barna ancestor,'Ancestor 10' shares some similarities with the Wiri Core apical ancestor, 'Ancestor 11, it would appear that the Wiri People and the Barada Barna People are nonetheless distinct and competing native title claim groups. This is to be contrasted with the facts in *Wiri People* where the information revealed a real dispute about the identity of the authorising persons such that I could not be satisfied that they comprised the entire 'native title claim group', as defined in s. 61(1).

In relation to the two apical ancestors named Ancestor 10 and Ancestor 11 potentially being the same person, Anthropologist 2 has made a further affidavit to the effect that he is not of the opinion that they are the same person. His view is that there are numerous Ancestors with the same name from this region and this could be the source of some confusion.[29] Notwithstanding this, it seems tolerably clear that some of the same people are referred to in both applications. In the Wiri Core application, the information is they are Wiri. In the Barada Barna application, the information is that they are Barada Barna.

To illustrate, I refer to the following information from both applications indicating that some of the same people are referred to in both the Wiri Core and the Barada Barna application:

- In the anthropological report in attachment F of the Wiri Core application, Person 10 – name deleted is said to have provided a statement in which he states that he is a traditional owner of Wiri country who learnt about his country, including Lake Elphinstone, from his mother's mother, Ancestor 11. (Lake Elphinstone is in the north-western most corner of the Barada Barna application.)
- Applicant 2, Person 11- name deleted and Person 12 – name deleted all talk in the affidavits that they have filed to support the Barada Barna application about grandmother Ancestor 11 and Person 10 along with his Ancestor 11, being their Barada Barna predecessors and having a strong affiliation or connection to Lake Elphinstone.
- The Wiri Core anthropological report refers to Person 12 (also spelt 'deleted' and 'deleted'), Ancestor 3 and Person 10 as Wiri people; whereas the Barada Barna affidavit evidence and anthropological report indicates that they are Barada Barna people.

Having said this, it is noteworthy that Person 12, Applicant 2 and Person 11 (who all clearly attest to a connection with grandmother or Ancestor 11 and Person 10 and to Lake Elphinstone as Barada Barna people and not as Wiri People) have made affidavits supporting the Barada Barna application, but have not done so in support of the Wiri Core application. It is also noteworthy that the families to which they apparently belong (the Family 5 and Family 3) have clearly been included in the authorisation process for this new Barada Barna application and also clearly voted to authorise an applicant to make and deal with the Barada Barna application on their behalf.

[29] Anthropologist 2, 21 July 2009, [7].

It seems that the existence of persons common to both applications may become an issue when determining either or both the Barada Barna and Wiri Core applications, but it is not for me to determine or make findings about people's potential native title holding status, nor do I believe it to be relevant to my authorisation decision. This is because of my view, despite indications that the two groups may have a common ancestor or include some of the same people, that the Wiri People are nonetheless a separate and competing native title claim group to the Barada Barna native title claim group and are therefore not required to participate in an authorisation process for a native title application that does not purport to represent or include them.

I conclude that the dispute as to the northern reaches covered by the Barada Barna application is ultimately a matter for the Federal Court when determining whether or not the native title claimed in the Barada Barna application exists and, if it does, the identity of the native title holders. The appropriate course for Wiri people who dispute the Barada Barna application is to join as respondent parties. If there are Wiri people who seek a determination of native title in their favour over country covered by the Barada Barna application, it appears that they will need to authorise an applicant to make their own claimant application over those areas (see *Commonwealth v Clifton* (2007) 164 FCR 355).

I have decided that what is before me from the Wiri People is to be distinguished from that which arose in *Wiri People v Native Title Registrar* [2008] FCA 574 (*Wiri People*). *Wiri People* involved the review of my decision that the Wiri #2 application did not meet the requirements of s. 190C(4)(b) where the evidence relating to the proper composition of the Wiri #2 claim group was 'conflicting and contentious', including adverse information and submissions from the representative body that the Wiri People were a wider group than that which authorised the Wiri #2 applicant. I found that I could not be satisfied that the group described in the Wiri #2 application was the whole of the 'native title claim group', as that term is defined in s. 61(1). My decision was upheld by the Court on review.

I do not find the information from Person 4 about the potential omission of persons from the native title claim group or from the authorisation process to be persuasive in light of Anthropologist 2's affidavit that he is satisfied as a result of the anthropological research that has been undertaken, that the description of the group as the descendants of the nine identified apical ancestors includes all persons with a continuing traditional connection and association with the application area and that this can be traced back to the time of earliest settlement of the claim area. [30]

Summary of my decision

For the reasons I have given, I am satisfied that the applicant is authorised as a result of the native title claim group following its validly agreed and adopted decision-making process at the authorisation meeting on 20 September 2008 which permitted decisions to be made by a majority of those who voted for the applicant's authority at that meeting.

In the face of the applicant's information that there were significant efforts to consult widely amongst the members of the native title claim group before the meeting and to notify them of the forthcoming authorisation meeting, I am satisfied that every reasonable opportunity was extended to the members of the native title claim group to participate in the authorisation of the

[30] Anthropologist 2, 21 July 2009, [4].

applicant. I am also satisfied that the meeting was well attended by the native title claim group as a whole, noting that 29 persons attended and the applicant's information that this represented a well-attended meeting by persons from the native title claim group, including the four Family 2 members. The evidence is that all of the identified families within the native title claim group, apart from the Family 4, were represented at the meeting. In relation to the Family 4, the information overall shows that they were consulted before the meeting and that the family overall agrees with the decisions taken in their absence to authorise the applicant. As I have said, the fifth resolution passed at the meeting clearly contemplated that the applicant's authority would continue, despite Person 3 refusing to take on the role after the meeting. Finally in relation to the events at the authorisation meeting, it is clear that the applicant's authority to make and deal with the Barada Barna application received more than the requisite majority support, with only the four Family 2 members not voting in support of the new application.

To conclude, all of the information I have reviewed supports that the applicant is authorised to make the application and to deal with matters arising in relation to it by all the other persons in the native title claim group, notwithstanding that the four Family 2 members and Person 2 from the Family 4 do not themselves support the decisions made that day. I have also concluded that the Wiri People are a separate and competing native title claim group who are not required to participate in the authorisation of the Barada Barna application.

The application therefore satisfies the condition in s. 190C(4).

Merit conditions: s. 190B

Subsection 190B(2)
Identification of area subject to native title

> The Registrar must be satisfied that the information and map contained in the application as required by ss. 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

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

Section 190B(2) requires that the information in the application describing the areas covered by the application is sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters. The information required to be contained in the application is that described in ss. 62(2)(a) and (b), namely:

(a) information, whether by physical description or otherwise, that enables the boundaries of:
    i. the area covered by the application ; and
    ii. any areas within those boundaries that are not covered by the application
    to be identified;
(b) a map showing the external boundary of the application area.

The application contains a written description of the internal and external boundaries in schedule B and attachment B respectively. A map showing the external boundary is found in attachment C of the application.

The written description in attachment B consists of a lengthy series of geographic coordinate points to identify the external boundary on the earth's surface. The coordinates are referenced to the Map Grid of Australia 1994 (MGA94) in Eastings and Northings shown to three decimal places. This information can be verified against the map in attachment C, which contains a coordinate grid. The map filed in the Federal Court is a colour A3 map which clearly shows the external boundary as a bold outline. The map also contains a topographic raster image as a background, scale bar, north point and locality map. Finally, the map contains notes relating to the source, currency and datum of data used to prepare it. I note that the map was prepared by the Tribunal's Geospatial Services (Geospatial). In an assessment dated 5 March 2009, Geospatial express the opinion that the description and map are consistent and identify the application area with reasonable certainty. The report also notes that the amendment of the application has resolved the issue previously raised by Geospatial Services and the coordinate points are now in sequential order.

The description in attachment B specifically identifies four native title applications which are excluded from the application by reference to the relevant application name, Federal Court reference and date. I see that one of the Federal Court references is incorrect—it should say QUD372/06, not QUD372/068. This is clearly a typographical error and does not in my view affect the overall certainty of the description for the purposes of s. 190B(2).

Having regard to the comprehensive identification of the external boundary in attachment B and the clarity of the mapping of the application area in attachment C, I am satisfied that the external boundaries of the application area have been described such that the location of it on the earth's surface can be identified with reasonable certainty.

A written description of the areas within the external boundary that are not covered by the application (i.e. the internal boundary) is found in schedule B. This is a generic description that excludes from the application area any land covered by a range of grants or acts, including freehold and the acts described in s. 23B of the Native Title Act . It is then stated that if ss. 47, 47A or 47B apply to any such areas such that extinguishment must otherwise be disregarded, then the areas so described are, in fact, covered by the application. It is finally stated that the application does not include areas where native title has otherwise been extinguished.

A generic or class formula to describe the internal boundaries of an application is acceptable if the applicant has only a limited state of knowledge about any particular areas that would fall within the generic description provided: see *Daniels & Ors v State of Western Australia* [1999] FCA 686. There is nothing in the information before me to the effect that the applicant is in possession of a tenure history or other information such that a more comprehensive description of these areas would be required to meet the requirements of the section. The applicant expressly states in schedule D that it has not made any searches of non–native title interests. In these circumstances, I find that the written description of the internal boundaries is acceptable as it offers an objective mechanism to identify which areas fall within the categories described. This may require considerable research of tenure data held by the particular custodian of that data, but nevertheless, it is reasonable to expect that the task can be done on the basis of the information in attachment B2.

For these reasons, I am satisfied that the information and map in the application required by ss. 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether the native title

rights and interests are claimed in relation to the particular areas of land or waters, and the requirements of s. 190B(2) are therefore met.

Subsection 190B(3)
Identification of the native title claim group

> The Registrar must be satisfied that:
> (a) the persons in the native title claim group are named in the application, or
> (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

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

As the application does not name all native title claim group members individually, paragraph 190B(3)(a) is not applicable. Paragraph 190B(3)(b) requires me 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.

In *Doepel*, Mansfield J stated that:

> The focus of s. 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group. Section 190B(3) has two alternatives. Either the persons in the native title claim group are named in the application: subs 3(a). Or they are described sufficiently clearly so it can be ascertained whether any particular person is in that group: subs (3)(b). Although subs (3)(b) does not expressly refer to the application itself, as a matter of construction, particularly having regard to subs (3)(a), it is intended to do so—at [51].

At [37], Mansfield J states that the focus of s. 190B(3) is not 'upon the correctness of the description of the native title claim group, but upon its adequacy so that the members [sic] of any particular person in the identified native title claim group can be ascertained'.

A description that necessitates a further factual inquiry to ascertain whether a person is in the group may still be sufficient for the purposes of s. 190B(3). In *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 at [64], Carr J considered a claim group described as:

> 1. the biological descendants of the unions between certain named people;
>
> 2. persons adopted by the named people and by the biological descendants of the named people; and
>
> 3. the biological descendants of the adopted people referred to in paragraph 2 above.

His Honour referred to this method of identification as the 'Three Rules' and stated he was satisfied that the application of these rules described the group sufficiently clearly, his reasoning being:

> The starting point is a particular person. It is then necessary to ask whether that particular person, as a matter of fact, sits within one or other of the three descriptions in the Three Rules. I think that the native title claim group is described sufficiently clearly. In some cases the application of the Three Rules may be easy. In other cases it may be more difficult. Much the same can be said about some of the categories of land which were used to exclude areas from

> the claim. ***It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently***. It is more likely to result from the effects of the passage of time and the movement of people from one place to another. The Act is clearly remedial in character and should be construed beneficially: *Kanak v National Native Title Tribunal* (1995) 61 FCR 103 at 124. In my opinion, the views expressed by French J in *Strickland* at para 55…in relation to definition of areas, apply equally to the issue of sufficient description of the native title group–at [67](***emphasis added***).

The description of the claim group in schedule A of the application before me is in these terms:

> The application is made on behalf of the Barada Barna People being the descendants of the following apical ancestors:
> 1. Bob Lotus
> 2. Lizzy Payne
> 3. Daisy (wife of Booyah McDonald)
> 4. Maggie (wife of Toby Barker & Peter Darwin & Michael Angus)
> 5. "Polly" Mary (wife of Robert Noble & Bert Fox)
> 6. Robert Noble
> 7. Lizzie (wife of Paddy Flynn)
> 8. Polly (wife of Thomas Mitchell)
> 9. Lucy Ross

This description does require a further factual inquiry to establish if any particular person is in the group due to the requirement that a person claiming membership must show that they are a descendant of one or more of the apical ancestors.

However, it is my view that the description is clearly within the bounds of the 'Three Rules' test discussed above by Carr J—I am provided with a starting point, that is, the names of the apical ancestors, and from there it is possible, with a further factual inquiry, to work out who is descended from such persons.

I am satisfied that the claim group has been described sufficiently clearly so that it can be ascertained whether any particular person is in the group.

Subsection 190B(4)
Native title rights and interests identifiable

> The Registrar must be satisfied that the description contained in the application as required by s. 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.

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

My view is that for a description to meet the requirements of this section, it must describe what is claimed in a clear and easily understood manner: *Doepel* at [91] to [92], [95], [98] to [101], [123]. Any assessment of whether the rights can be prima facie established as 'native title rights and interests', as that phrase is defined in s. 223, will be discussed in relation to the requirement in s. 190B(6).

Schedule E contains the following description of the claimed native title rights and interests:

1. The right to access the application area.
2. The right to camp on the application area.
3. The right to erect shelters on the application area.
4. The right to exist on the application area.
5. The right to move about the application area.
6. The right to hold meetings on the application area.
7. The right to hunt on the application area.
8. The right to fish on the application area.
9. The right to use the natural water resources of the application area including the beds and banks of watercourses.
10. The right to gather the natural products of the application area (including food, medicinal plants, timber stone, ochre and resin) according to traditional laws and customs.
11. The right to conduct ceremony on the application area.
12. The right to participate in cultural activities on the application area.
13. The right to maintain places of importance under traditional laws, customs and practices in the application area.
14. The right to protect places of importance under traditional laws, customs and practices in the application area.
15. The right to conduct burials on the application area.
16. The right to speak for and make non-exclusive decisions about the application area.
17. The right to cultivate and harvest native flora according to traditional laws and customs.

I find the description of the rights and interests itemised at [1] to [17] to be clear and understandable and I am therefore satisfied that the description is sufficient to allow the native title rights and interests claimed to be readily identified.

Subsection 190B(5)
Factual basis for claimed native title

> The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:
> (a) that the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interest, and
> (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The application **satisfies** the condition of s. 190B(5).

The applicant's factual basis materials

Schedule F (being the place in the Form 1 which requires a general description of the factual basis) refers to an anthropological report by Anthropologist 2 and Anthropologist 1 dated September 2008 (the anthropological report) and to five affidavits, three from the persons comprising the applicant and two from other claim group members, for details of the general description of the factual basis. These documents were filed with the application and copies were provided by the Court to the Registrar along with the application.

Registrar's task at s. 190B(5)

General comments about the nature of the task

I am not, as the Registrar's delegate, to 'test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts'—*Doepel* at [17]. Although I am required 'to address the quality of the asserted factual basis', I must assume that what is asserted is true, and assuming it is true, the task is whether I am satisfied that 'the asserted facts can support the claimed conclusions'—*Doepel* at [17]. This assessment of the task at s. 190B(5) from *Doepel* was recently approved in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (French, Moore and Lindgren JJ) (*Gudjala FC*) at [83]–[85].

The Full Court in *Gudjala FC* commented that a sufficient factual basis for the assertions in s. 190B(5) must 'be in sufficient detail to enable a genuine assessment of the application by the Registrar under s. 190A and related sections, and must be something 'more than assertions at a high level of generality'—at [92]. The Full Court also said that providing a sufficient factual basis does not require the applicant to 'provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim'—at [92]. The Full Court concluded that the applicant is 'not required to provide evidence that proves directly or by inference the facts necessary to establish the claim'—at [92].

The Full Court indicated at [93] of *Gudjala FC* that if the Registrar were to approach the material provided in relation to the factual basis 'on the basis that it should be evaluated as if it was evidence furnished in support of the claim', that would be erroneous.

Following *Doepel* and *Gudjala FC*, I therefore do not evaluate the material as if it were evidence furnished in support of the claim, nor do I criticise or refuse to accept what is stated in the application and the supporting evidentiary affidavits in relation to the factual basis (apart from its sufficiency to fully and comprehensively address the relevant matters in s. 190B(5)). My assessment of the material is limited to whether the asserted facts can support the claimed conclusions set out in subparagraphs (a) to (c) of s. 190B(5).

In *Gudjala FC* at [68] to [72] and [77], the Full Court considered the primary judge's analysis[31] of the elements a sufficient factual basis must address in order to answer the criteria found in s. 190B(5). There is nothing in the reasons to indicate that the Full Court considered the primary judge to have erred. It is therefore my view that in assessing whether the asserted facts are sufficient to support the propositions in s. 190B(5)(a) to (c), I must consider how those propositions interact with the definition in s. 223 of the expression 'native title rights and interests' and the related case law.

Adverse information

As I discussed in my reasons above for the authorisation condition at s. 190C(4), there is adverse information from a number of sources which potentially undermines the asserted factual basis. In summary, the adverse information from Person 1, Person 3 and on behalf of the Wiri people is to the effect that:

- the Barada Barna application extends too far north into country that belongs to the Wiri people;

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

- it also extends too far south into Kabalbara country;
- the correct formulation for any native title claim that includes the area covered by the Barada Barna application should include other tribal groups such as the Kabalbara and the Yetimarla/Yetimarala. More recently, Person 3 has said that the Koinjamal should also be included in such a claim. The boundaries of that claim should extend further south to cover the remainder of the BBKY claim areas and the SBK areas;
- the anthropological information presented at the authorisation meeting was confusing and contradictory and it is not clear why this new claim is formulated in the way that it is, including the identification of Ancestor 1 as a Barada apical ancestor, when she has previously been identified as a Kabalbara ancestor.

It is difficult to know to what extent I may consider this potentially adverse information, noting that the Registrar's task at s. 190B(5) is clearly not to supplant the Court's role: in assessing the sufficiency of the factual basis under s. 190B(5) it is not for her to determine whether native title exists. The Registrar is not to evaluate the factual basis as if it were evidence provided in support of the claim, and the applicant is not required to provide evidence of the type which would prove all of the facts necessary to succeed in their native title claim: *Gudjala FC* at [92]. As I have noted above, what is required of the Registrar is to address the quality of the applicant's asserted factual basis for the claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the role is to determine whether the asserted facts can support the claimed conclusions; but it is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts. It may therefore follow from the authority in *Doepel* and *Gudjala FC* that disputed issues relating to the area over which a native title determination should be made or the identity of the native title holders are issues for the trial and it is not appropriate that I consider them here.

But in any event, it seems to me that the applicant's response to the adverse information strongly indicates that the formulation of this new native title application is supported by extensive anthropological research in the region that it covers. I note that additional material has been provided by the applicant to support the factual basis in the face of those who dispute the boundaries covered by the application and the description of the native title claim group. In this regard, I refer to the affidavit by Anthropologist 2 dated 21 July 2009 in which he states:

- Anthropological research that has been carried out over many years in this region, including that by Anthropologist 3 and Anthropologist 4 has resulted in agreement amongst the anthropologists working in the region that there should not be one large claim over all of the areas previously covered by the BBKY claims and the SBK claim.
- Anthropologist 3 and Anthropologist 4 concluded that there should be two claim groups, one in relation to the northern part of the old BBKY claims and another for the southern areas of the BBKY areas, all of the SBK area and an area claimed by the Powder family for the Yetimarala people.
- Anthropologist 2 was retained to work with Anthropologist 1 to identify the composition of the northern claim group and the claim boundaries. They conducted detailed research into the composition and traditional country of the northern claim group.

- The Barada Barna application is consistent with their research and recommendations. Anthropologist 2 is firmly of the view that the members of the claim group and their ancestors had a continuing traditional connection and association with the whole of the claim area and the anthropological report demonstrates how that connection and association can be traced back to the time of earliest settlement of the application area.
- The boundaries covered by the Barada Barna claim are consistent with the views of all four anthropologists.

That is not to say that there are not disputed issues of fact. However I am of the view that the applicant's response to the adverse information, including the production of further material indicating that the claim is supported by the anthropological research that has been conducted in the region, supports the factual basis for the general assertion that the claimed native title rights and interests exist and also supports the factual basis for the three particular assertions in subparagraphs 190B(5)(a) to (c).

Each particular assertion in s. 190B(5)

Finally, in relation to how I approach the task, I note that *Doepel* is authority that I should analyse 'the information available to address, and make findings about, the particular matters to which s. 190B(5) refers'—at [130]. I refer also to the comments of Mansfield J at [132] that it is correct for the Registrar to focus primarily upon the particular requirements of s. 190B(5), as this is the way in which the Act draws the Registrar's attention to the task at hand. If the factual basis supports the three assertions in subparagraphs (a) to (c), then the requirements of the section overall are likely to be met. I therefore address the three assertions before concluding whether overall the requirements of the section are met.

Each particular assertion in s. 190B(5)

Subsection 190B(5)(a)— that the native title claim group have, and the predecessors of those persons had, an association with the area

I understand from comments by Dowsett J in *Gudjala* that a sufficient factual basis for this assertion needs to address:

- That the claim group as a whole presently has an association with the area, although it is not a requirement that all members must have such an association at all times.
- That there has been an association between the predecessors of the whole group over the period since sovereignty—at [52].

This analysis of what the factual basis materials must support was not criticised by the Full Court in *Gudjala FC*—see [69] and also at [96]. I note that the elements discussed by Dowsett J at [52] and that referred to by the Full Court at [96] appear to refer to the assertion that there is a cohesive community of people who observe 'traditional'[32] law and custom and who are associated with the application area over the period since sovereignty.

[32] The meaning of 'traditional', as it appears in s. 223(1)(a), is the subject of the decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta HC*).

Dowsett J in *Gudjala* indicated that it may not suffice for individual members of the group to speak only about their own association and that of their families and predecessors since European settlement—at [52]. My own view is that I would be prepared to treat information of this kind from individuals within the claim group as illustrating or providing concrete examples as to how the whole group and its predecessors are associated with the area over the period since sovereignty. This kind of information may assist overall to provide a sufficient factual basis, if considered in conjunction with the entirety of the asserted facts.

For the application before me I have, in addition to the anthropological report, affidavits from two applicant persons (Applicant 1 and Applicant 2) in which they describe their particular associations and that of their predecessors. All three applicant persons also state that they are senior Barada Barna persons and provide details of their descent from an ancestor or ancestors in schedule A which qualifies them as a member of the Barada Barna native title claim group. All three applicant persons swear to the truth of the statements made in the application. I am prepared to accept that they also swear to the truth of the matters discussed in the anthropological report referred to in schedule F of the application and filed in the Court with the application.

Two further affidavits have also been filed in the Court with the application by Person 11, dated 30 October 2008, and Person 12, dated 30 October 2008.

The applicant, Applicant 1, provides the following information relating to his association, and that of his predecessors, with the application area:

- He is a member of the native title claim group through descent from the apical ancestors Ancestor 12 – name deleted and "Ancestor 13 – name deleted—at [3].
- The land and waters covered by the application lie within his father's country and the authority to speak for this country has passed to him under the custom and tradition of the native title claim group—at [11].
- Applicant 1 is a managing director of Cultural Heritage Body – name deleted which undertakes cultural heritage assessments on the native title claim group's country and acts to protect and maintain 'our physical and spiritual links to the cultural landscape'—at [12].
- Applicant 1 learnt about his country, its cultural sites and places of importance from his father who was a drover in the Nebo area. Customary knowledge, including that relating to the lie of the land, how the rivers run, where to find certain plants, water and spiritual connection to country was passed to him by his father and other elders of the claim group—at [13]. This included the imparting of knowledge about the proper way to hunt and fish in accordance with their customs and traditions. Whilst working on stations throughout his country as a stockman he would camp out and practise these skills in the way his people had always done—at [14].
- When Applicant 1 was in his mid-forties, his father passed to him the responsibility to protect his group's country which he has done by the cultural heritage work he undertakes on country and to speak for country on matters of tradition and custom—at [15].
- Applicant 1 details a long and active association with the country of his predecessors, including by camping there, visiting it, hunting and gathering there, looking for ochre, conducting welcome to country and smoking ceremonies, undertaking cultural heritage work on it. He does this by himself, as taught to him by his father and other relatives. He engages in these activities with other claim group members.

The applicant Applicant 2 states at [12] that he lives on country at Hamilton Park.Applicant 2 states that he is a member of the claim group as a result of descent from the apical ancestor Ancestor 14 – name deleted—at [3]. Applicant 2 states that the land and waters covered by the application lie within his mother's country and the authority to speak for this country has passed to him under the custom and tradition of the native title claim group—at [11].

Applicant 2 describes making didgeridoos using a special wood from the box wood tree on country which he smooths down with sandpaper, although his father told him that in the old days their people would have used sand or rocks to smooth them down. His son paints them in the traditional style—at [13]. Applicant 2 was shown the tree to use and which not to use for didgeridoos by his uncle, Person 10. Person 10 would take Applicant 2on country and show him things, such as how to make a didgeridoo and boomerang, how to collect bush tucker, where to see the cave paintings at Lake Elphinstone, which Applicant 2 says is a very important place on country. Person 10 was in turn shown these things by his grandmother, Ancestor 10. I assume that this is the apical ancestor 'Ancestor 10)' identified in schedule A of the application.

Applicant 2 shows these things to his childern and others—at [12]. Applicant 2 states at [13] that he takes his kids 'out at weeks at a time and live off the land and teach them about our culture in the school holidays'. The laws he was taught by his old people included: never leave a fire going when leaving camp; don't leave fish at the bank of a waterhole or creek; never take more than you can eat; don't kill for the fun of it—at [15].

Applicant 2 concludes his affidavit with a paragraph about each family making decisions, but Elders always having the last or final say, as this was the way it was done traditionally. Applicant 2 states that he has authority of the area where his people roamed, namley, Saltbush Park, Connor River, Funnel Creek and Isaac River. Applicant 2 says this area is of particular importance to his family. Applicant 2 says that his own family hold regular meetings and get-togethers and they communicate with other Barada Barna families along the 'murri grape vine'. Applicant 2 states that they are all one people and must work together as the old people told them to. They do get together to discuss decisions regarding progress of their native title claim and about cultural heritage matters; however, the final decisions rest with the Elders. Applicant 2 says that 'I still always discuss decisions and get advice from my elders'—at [16].

The information from Applicant 2 is that he and his family, including Person 10, assert an active association with the application area around Saltbush Park, Hamilton Park, the Connors River, Funnel Creek and Isaac River. A lot of the knowledge held by Applicant 2 appears to have come to him from Person 10, who in turn received it from the Barada Barna apical ancestor, Ancestor 10 who was Person 10's grandmother. The country to which they are particularly affiliated lies around the northern and eastern reaches of the application area. The map in attachment C reveals that the Isaac River traverses the application area from south-east to north-west. Saltbush Park is located in a relatively central spot within the eastern reaches of the application area. Hamilton Park is located to the north of Saltbush Park. The Connors River and Funnel Creek are located in the north-eastern reaches of the application area.

Person 11 (not to be confused with the Applicant 2) states that he is a Barada Barna man. His mother is Ancestor 15 and his grandmother is Ancestor 10. I assume that the latter is the apical ancestor 'Ancestor 10)' identified in schedule A of the application. Person 11 speaks of his older brother Person 10 being taught a lot by their grandmother, Ancestor 10. I assume this is the

apical ancestor Ancestor 10 and that Person 10 discussed by Applicant 2. Person 11 says that he always stops at Lake Elphinstone and looks around and clears away any rubbish. He says that he and others in their group do this as often as possible 'because the caves there are a significant place for our people'—at [2].

As a young boy Person 11 learnt about witchety grubs and collecting burrum berries, split jacks and yams to eat. He has showed his sons how to find these things. Person 11 says that his brothers all worked with their mother Ina on country around the claim area. Their grandmother Ancestor 10 taught his older siblings quite a bit, including about gathering edible lily bulbs from the lake and hunting turtle from the lake as well—at [4]. Person 11 tells how old Person 10 would camp out at Mt Fort Cooper; he 'would just pull up anywhere on country all the time'—at [4]. The information from Perosn 11 is to the effect that he and his family, dating back to their apical ancestor grandmother Ancestor 10, are associated with the country of their predecessors, which is located in the northern reaches of the application area and beyond, around Lake Elphinstone, Saltbush Park, Mt Fort Cooper and Nebo.

Person 12 states that he used to go out on country quite often with Person 10, but ill health now prevents him visiting country as often as he used to—at [1]. Person 12 says that he knows places on country on Homevale Station. The map in attachment C of the original application indicates that Homevale Station is outside the northern boundary of the application area. Person 12 states that Person 10 used to tell him how he was there with Person 10's mother (Ancestor 15) and father (Ancestor 16 – name deleted). Person 10 used to go on walkabout with 'nana Ancestor 10'. I assume that this is again a reference to the apical ancestor identified in schedule A as 'Ancestor 10)'. Ancestor 10 showed them all sorts of bush tucker and places and one time Ancestor 10 went to Lake Elphinstone and met some of her people there who were 'wild murris' and had not come to live on the stations—at [2].

Person 12 states that 'Lake Elphinstone is a very important place for us and was an important place for our ancestors – there was permanent water there, artesian water – it's no good there now because of the mining'—at [3]. Person 10 was taken there by grandmother Ancestor 10 and he in turn took Person 12 there. He showed him the rock art there. Person 12 has taken some of his boys there to show them the site and how their ancestors lived and would like to continue to do this, when he is able—at [3]. Person 12 tells about Person 10 taking him places on country, about learning things there, including hunting, gathering, using ochre for painting and also learning about their heritage. Person 12 takes the kids there so they can get an awareness of who they are as Barada Barna people. Person 12 does cultural heritage work on country. He also learnt things from his grandad (Ancestor 16) and from Person 2.

The information from Person 12 is to the effect that he and his family have an association with the country of their predecessors, dating back to their ancestor Ancestor 10, particularly around Lake Elphinstone and Homevale Station.

The anthropological report referred to in schedule F and filed with the application provides the following relevant information in relation to the factual basis for the assertion in subparagraph (a) of s. 190B(5):

- the native title claim group are the Barada Barna people, who are the descendants of the nine apical ancestors named in schedule A of the application;

- the nine apical ancestors have been identified by the research of anthropologists into the application area as members of the society of Indigenous people with rights and interests in the application area at the time of European settlement;
- the anthropological report provides details to show the associations of some of the apical ancestors with the application area dating back to the time of European settlement in the mid-to-late 19th century;
- the anthropological report asserts (p. 6) that the continuity of the association of past and current members of the claim group was enabled, firstly, because they were not removed to missions and secondly, because of their continued participation in the pastoral industry. The report then provides extensive information about current members having an extensive and ongoing association with the area dating back to the earliest times following European settlement when their apical ancestors lived, particularly the Family 5 and Family 3 members. Information is also provided about the associations of the Family 2 and Family 4 members with the application area.

Having regard to all of this information, I am satisfied that the factual basis supports an assertion that the native title claim group have, and the predecessors of those persons had, an association with the area covered by the application.

Subsection 190B(5)(b)—that there exist traditional laws and customs acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests

The language of the assertion in subparagraph (b) nearly mirrors that found in s. 223(1)(a). In my view, I must therefore be satisfied that the factual basis is sufficient to support an assertion that the claimed native title rights and interests find their source in 'traditional' laws and customs. My usage of inverted commas around the word 'traditional' in this statement highlights that its meaning in ss. 223(1)(a) is central to an understanding of whether native title rights and interests exist in relation to an area of land or waters. I understand that the legislature intends that the expression 'traditional' in relation to the meaning of native title rights and interests is used uniformly throughout the Act.

Accordingly, as was discussed by Dowsett J in *Gudjala* at [26], the factual basis provided by an applicant must pay attention to the High Court's decision in *Yorta Yorta* and in Full Court decisions since as to what is meant by rights and interests being possessed under 'traditional' laws and customs. This aspect of Dowsett J's decision was not criticised by the Full Court in *Gudjala FC* who noted that one question, amongst others, which needs to be addressed in the factual basis materials is whether 'there was, in 1850–1860, an indigenous society in the area, observing identifiable laws and customs'—at [96].

The following is a brief synopsis of the case law which has developed around the requirement in 223(1)(a) that native title rights and interests must be possessed under 'traditional' laws and customs:

- For laws and customs to be 'traditional', they must derive from a body of norms or normative system that existed before sovereignty and which has had a substantially continuous existence and vitality since sovereignty.

- A society is a body of people united in their acknowledgement and observance of laws and customs with normative content.
- The acknowledgement and observance of the laws and customs of the pre-sovereignty normative system must have continued 'substantially uninterrupted' in each generation from sovereignty until the present time.
- It is this continuity in the acknowledgement/observance of traditional laws and customs, rather than continuity of a society, which must inform the inquiry as to whether the native title is possessed under 'traditional' laws and customs.
- Change or adaptation of traditional law and custom may be acceptable; however, the trial court needs to carefully consider whether it points to a cessation or substantial interruption of the normative system, such that the laws and customs currently acknowledged and observed are no longer traditional; i.e. they are not the laws and customs of the normative system at sovereignty.[33]

Having regard to the authorities, it is my view that the factual basis provided by an applicant to support the assertion in s. 190B(5)(b) needs to address that the traditional laws and customs giving rise to the claim to native title rights and interests have their origin in a pre-sovereignty normative system with a substantially continuous existence and vitality since sovereignty. I note that Dowsett J was of the view in *Gudjala* that the factual basis materials for this assertion must address:

- That the laws and customs currently observed have their source in a pre–sovereignty society and have been observed since that time by a continuing society—*Gudjala* at [63];
- That there existed at the time of European settlement a society of people living according to a system of identifiable laws and customs, having a normative content—*Gudjala* at [65] and see also at [66] and [81];
- That explains the link between the claim group described in the application and the area covered by the application, which process, in the case of a claim group defined using an apical ancestry model, may involve 'identifying some link between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage', although the apical ancestors need not themselves have comprised a society—at [66] and [81].

This aspect of Dowsett J's decision was not criticised by the Full Court in *Gudjala FC*—see [71]–[72] and again at [96].

The four affidavits from Applicant 1, Applicant 2, Person 11 and Person 12 all provide support for the assertion in s. 190B(5)(b) speaking as they do to:

- the current existence of a number of interrelated persons observing the laws and customs of their parents, grandparents and other relations, who collectively assert a Barada Barna identity over the application area;
- an ongoing traditional association with the application area that dates back to the turn of the 19th century or the early 20th century, when some of the older people with extensive

[33] The special meaning of the word 'traditional' in s. 223(1) was first considered by the High Court in *Yorta Yorta*. What is required under s. 223(1) has been considered in numerous decisions since, including the Full Court decisions of *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442; [2005] FCAFC 135 (*Alyawarr FC*) and *Bodney v Bennell* (2008) 167 FCR 84; [2008] FCAFC 63 (*Bennell FC*). This synopsis is drawn from *Yorta Yorta HC*, *Alyawarr FC* and *Bennell FC*.

knowledge of the northern reaches of the application area and of law and custom were born or alive, including the group's apical ancestors.

The anthropological report provides further support for this assertion elaborating as it does on the linkage between the current laws and customs described in the affidavits and the traditional laws and customs of an Indigenous society in the application area at the time of European contact or settlement of the area (as discussed in *Gudjala FC* at [96]) and to the continuity of traditional law and custom since contact by the native title claim group as a whole. I refer to the following information in the anthropological report:

- At the time of British colonisation of the application area, the Barada Barna people were a dynamic functioning society, exercising traditional laws and customs and the application area was within the traditional territory of the Barada Barna people.
- British colonisation saw an encroachment on the traditional lands of the Barada Barna people, however the struggles and violence that this caused was followed by co-operation between the two societies.
- The settlers drew on the knowledge of the Barada Barna to find water and food and the Barada Barna found work on pastoral stations in the area. It is asserted that the majority of Barada Barna people were not removed from their country to missions following European settlement of their country. Those that were removed (like members of the Family 4) retain their knowledge of traditional law and custom and return to country to pass this onto younger generations.
- The result of people not being removed has been pivotal in the maintenance of a continuing system of law and custom which continues to regulate their society today and which is based on the system of laws and customs of the society at contact. The system that has been carried down through the generations of Barada Barna people has evolved and adapted from the original system; however, it is rooted in the laws and customs of the society at the time of European settlement.
- The traditional laws and customs of the Barada Barna include that land ownership is communal and that the Barada Barna elders hold the land on trust for all the Barada Barna people. The Barada Barna native title claim group defines itself on a number of levels, the most important being that there is a demonstrated blood relation to a Barada Barna apical ancestor.
- The personal histories of the Barada Barna claimants (as shown in the applicant's affidavits and the affidavits from Person 11 and Person 12) demonstrate a continued physical presence in the Isaac and Connor Rivers Basin (the general area covered by the application). This stretches back to the time that the nine apical ancestors were alive, some of whom were born at the time of British contact with the area and were still alive in the 1950s.There has been an inter-generational transmission of traditions to existing members of the native title claim group, including Person 13 – name deleted, Person 12, Applicant 1, Person 14 and Person 9 who are still alive today and are considered knowledge holders of the Barada Barna people. This means that the continuity of knowledge has been maintained since British contact to the present.
- Information is provided to show that most of Barada Barna apical ancestors were born on and/or lived in areas within the application area from the latter half of the 19th century to the early part of the 20th century. Quite detailed information is provided in the anthropological

- A lot of information is provided to show the inter-generational transmission of law and custom from the time of European settlement of the application area in the latter half of the 19th century and the continuity of that traditional law and custom in relation to the application area by the current members of the native title claim group, including by generations of the Family 5 and Family 3 families and also by members of the Family 4 and Family 2 families.

Based on the material before me, I am satisfied that the factual basis is sufficient to support an assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claimed rights and interests.

Subsection 190B(5)(c)—that the native title claim group have continued to hold native title in accordance with those traditional laws and customs

I am **satisfied** that the factual basis is sufficient to support the assertion in s. 190B(5)(c).

I take the view that the assertion in subparagraph (c) is also referrable to the second element of what is meant by the term 'traditional laws and customs' in *Yorta Yorta*, namely, that the native title claim group have continued to hold their native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way: see *Yorta Yorta* at [47] and also at [87].

Gudjala indicates that this particular assertion may require the following kinds of information:

- that there was a society that existed at sovereignty that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed to the current claim group;
- that there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement—at [82].

The Full Court in *Gudjala FC* at [96] appears to agree that the factual basis must identify the existence of an Indigenous society observing identifiable laws and customs at the time of European settlement in the application area.

The affidavits and anthropological report, discussed above, identifies that the society at sovereignty was the Barada Barna people and that the application area falls within the traditional territory of that pre-sovereignty society. The affidavits and the anthropological report provide examples of how the claim group have continued to observe and acknowledge traditional laws and customs, including those that allow them to access and use the application area under the laws and customs that have been in operation in the application area since the earliest contact with European settlers.

Having regard to all of these materials, examples of which I have referred to above, I am of the view that there is a sufficient factual basis for the assertion that the native title claim group has continued to hold the claimed native title by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way.

Conclusion

To conclude, the application **satisfies** the condition of s. 190B(5) overall because I am satisfied that the factual basis is sufficient to support each of the three particular assertions in s. 190B(5), as set out in my reasons above.

Subsection 190B(6)
Prima facie case

> The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.

The application **satisfies** the condition of s. 190B(6) because of my finding below that, prima facie, at least some of the claimed native title rights and interests can be established. Only those rights and interests that prima facie can be established are to be entered on the Register of Native Title Claims—see s. 186(1)(g) and the note to s. 190B(6).

Registrar's task at s. 190B(6)

I note the following comments by Mansfield J in *Doepel* in relation to the Registrar's consideration of the application at s. 190B(6):

> . . . Section 190B(6) requires some measure of the material available in support of the claim—at [126].
>
> On the other hand, s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s 190B(6)—at [127].
>
> . . . s 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed—at [132].

Following *Doepel*, it is my view that I must carefully examine the asserted factual basis provided for the assertion that the claimed native title rights and interests exist against each individual right and interest claimed in the application to determine if I consider, prima facie, that they:

- exist under traditional law and custom in relation to any of the land or waters under claim;
- are native title rights and interests *in relation to land or waters* (see chapeau to s. 223(1)); and
- have not been extinguished over the whole of the application area.

I elaborate below on these three points:

1. *Right exists under traditional law and custom in relation to any of the land or waters under claim*

It is my view that the definition of 'native title rights and interests' in s. 223(1) and relevant case law must guide my consideration of whether, prima facie, an individual right and interest can be established. I refer to my discussion at s. 190B(5) above in relation to the authority provided by *Yorta Yorta* as to what it means for rights and interests to be possessed under the ***traditional*** laws

acknowledged and the ***traditional*** customs observed by the native title claim group (my emphasis).

It is not my role to resolve whether the asserted factual basis will be made out at trial. The task is to consider whether there is any probative factual material which supports the existence of each individual right and interest, noting that as long as some can be prima facie established the requirements of the section will be met. Only those rights and interests I consider, prima facie, can be established will be entered on the Register pursuant to s. 186(1)(g). An element of that task requires me to consider whether there is some material which supports the existence prima facie of the claimed rights and interests under the ***traditional*** laws and customs acknowledged and observed by the native title claim group. See the discussion above in relation to this topic at s. 190B(5).

2. *Right is a native title right and interest in relation to land or waters*

It is my view that s. 190B(6) requires that I consider whether a claimed right can in fact amount to a 'native title right and interest' as defined in s. 223(1) and settled by case law, most notably *Ward HC* that a 'native title right and interest' must be 'in relation to land or waters'. In my view, any rights that clearly fall outside the scope of the definition of 'native title rights and interests ' in s. 223(1) cannot be established, prima facie.

3. *Right has not been extinguished over the whole of the application area*

I note there is now much settled law relating to extinguishment which, in my view, I do need to consider when examining each individual right. For example, if there is evidence that the application area is or was entirely covered by a pastoral lease, I could not (unless ss. 47–47B applies) consider exclusive rights and interests to be prima facie established, having regard to a number of definitive cases relating to the extinguishing effect of pastoral leases on exclusive native title, starting with *Western Australia v Ward* (2002) 213 CLR 1 [2002] HCA 28 (*Ward HC*).

Considering the claimed native title rights and interests

With these principles in mind I will consider the native title rights and interests described in schedule E. To assist the reader, I identify at the outset whether or not I consider that, prima facie, the claimed right or rights can be established. I have grouped together those rights where similar issues arise or similar factual information is provided to support that they can be established, prima facie. The applicant has provided me with a table prepared by its counsel dated 20 July 2009 which usefully refers me to relevant information within the anthropological report and the supporting affidavits to support the claimed rights and interests, prima facie:

1. *The right to access the application area.*
2. *The right to camp on the application area.*
3. *The right to erect shelters on the application area.*
4. *The right to exist on the application area.*
5. *The right to move about the application area.*
6. *The right to hold meetings on the application area.*

7. The right to hunt on the application area.

8. The right to fish on the application area.

9. The right to use the natural water resources of the application area including the beds and banks of watercourses.

10. The right to gather the natural products of the application area (including food, medicinal plants, timber stone, ochre and resin) according to traditional laws and customs.

11.The right to conduct ceremony on the application area.

12. The right to participate in cultural activities on the application area.

Outcome: I consider all of these rights to be prima facie established.
I proposed to consider all of these rights together as they relate to the group's access to and use of the area covered by the application. In my view there is ample material to prima facie establish the observance of traditional law and custom giving rise to rights and interests of this nature in relation to the application area. The anthropological report identifies that land ownership of the claim group is a communal ownership derived from the system operating in the area at the time of European contact (p. 5). The anthropological report states that these rights, like the right to access the application area, are currently exercised by the group and its exercise is based on the pre-contact normative system (see, for example, the information on p. 25–26).

These rights have been handed down through generations of Barada Barna people to the current members who exercise them as they were taught by their Elders. The exercise of these rights involves the group's elders having authority to allow or deny access to country, in relation to younger generations, who must inform the Elders of their wish to access country and ask for advice concerning where they may or may not go.

Numerous and specific examples are found throughout the anthropological report and the affidavits of Applicant 1, Applicant 2, Person 12 and Person 11 indicating that these are rights that currently exist under the traditional laws and customs of the native title claim group, by which the group access the area, camp on it, erect shelters, exist there, move about it, hunt, fish, use its natural resources, gather its products, conduct ceremony and participate in cultural activities.

13. The right to maintain places of importance under traditional laws, customs and practices in the application area.

14. The right to protect places of importance under traditional laws, customs and practices in the application area.

Outcome: I consider both these rights to be prima facie established.
These similar rights are discussed in the anthropological report at pp. 67-69 and 69-71. This information, in my view, show how these rights are currently exercised under the traditional laws and customs of the Barada Barna people, including those relating to assignment of responsibility to look after significant sites and allocation of these responsibilities on a gender basis. Information is provided to show how current members of the claim group, including Applicant 1, Applicant 2, Person 15- name deleted, Person 9 and Person 14 were told by their Elders to look after their country. The members of the group hold to the view that they will get

sick or bad things will happen if they don't look after country and their ancestors. The affidavits provided by Applicant 1, Person 12, Applicant 2 and Person 11 all provide concrete examples of the inter-generational transmission of knowledge about the special places on their country and the requirement under law and custom that they look after and protect these places.

15. The right to conduct burials on the application area.

Outcome: established, prima facie.
There is information provided in the anthropological report (p. 71) and in Applicant 1's s. 62(1)(a) affidavit (49, 71–72) that under their traditional laws and customs the native title claim group have always buried their dead and conducted traditional smoking ceremonies, although the rules around this have adapted to those of the new sovereign.

16. The right to speak for and make non-exclusive decisions about the application area.

Outcome: established, prima facie.
The anthropological report identifies (p. 72) that this right is exercised under the traditional laws and customs of the native title claim group and is derived from the pre-contact normative system which divided the application area into estates and the required that those seeking to enter or use the country of another person's estate must seek permission from persons with the authority to speak for that country. In present times, the group recognises that there are individuals within the group who speak for country and who may extend permission for others to access or use the application area and this is how they have always conducted themselves in relation to their Barada Barna country and in their transactions with others in their group and their Aboriginal neighbours. These are usually authoritative Elders within the various families that make up the native title claim group and the various families are particularly affiliated with certain places over which they have authority to speak. See, for example, the information in Applicant 2's s. 62(1)(a) affidavit that he must listen to his Elders and that where his people roamed, he has the authority over that area, including areas that are particularly important to his family around Saltbush Park, Connor River, Funnel Creek and Isaac River (16).

17. The right to cultivate and harvest native flora according to traditional laws and customs.

Outcome: not established, prima facie.

In my view, the material does not support the existence of a traditional law and custom underpinning rights and interests relating to cultivating and harvesting the native flora of the area. Rather the material overall indicates that the pre–sovereign society was a semi-nomadic hunter/gathering society although in more recent times the group have conducted more organsied cultivation and harvesting activities, for example, they have started a bush tucker garden (p. 74 of the anthropological report).

Conclusion

As I consider that, prima facie, all but one of the claimed native title rights and interests can be established, the requirements of this section are met. I direct that the rights at 1–16 are to be entered on the Register of Native Title Claims and that the entry also include details of the statement from schedule Q of the application qualifying that the application does not make any claim for ownership of minerals, petroleum or gas wholly owned by the crown.

Subsection 190B(7)
Traditional physical connection

> The Registrar must be satisfied that at least one member of the native title claim group:
> (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or
> (b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:
> (i) the Crown in any capacity, or
> (ii) a statutory authority of the Crown in any capacity, or
> (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

The application **satisfies** the condition of s. 190B(7).

I have taken the phrase 'traditional physical connection' to mean a physical connection in accordance with the particular traditional laws and customs relevant to the claim group, being traditional' as discussed in *Yorta Yorta*. I note also that at [29.19] of the explanatory memorandum to the Native Title Amendment Act 1998, it is explained that the connection described in s. 190B(7) 'must amount to more than a transitory access or intermittent non-native title access'.

In my view, there are numerous and specific references to current and previous members of the native title claim group throughout the anthropological report and affidavit material which provides satisfactory evidence of the requisite traditional physical connection by members of the native title claim group. The material refers to members of the group accessing the areas covered by the application pursuant to their traditional laws and customs, including by hunting, foraging for food, visiting sites and observing traditional law and custom. See for example the extensive information about members of the Family 5, Family 3, Family 4 and Family 2 families who have all lived in the application area or visited it extensively and the inter-generational transmission of traditional knowledge that stretches back to the earliest times of European contact and settlement of the application area.

On the basis of this material, I am satisfied that there are numerous current members of the native title claim group (including the Family 2, Family 5, Family 3 and Family 4 families) who currently have or previously had a traditional physical connection with a part of the land or waters covered by the application.

Subsection 190B(8)
No failure to comply with s. 61A

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

Section 61A contains four subsections. The first of these, s. 61A(1), stands alone. However, ss. 61A(2) and (3) are each limited by the application of s. 61(4). Therefore, I consider s. 61A(1)

first, then s. 61A(2) together with (4), and then s. 61A(3) also together with s. 61A(4). I come to a combined result below.

No approved determination of native title: s. 61A(1)

> A native title determination application must not be made in relation to an area for which there is an approved determination of native title.

The application **meets** the requirement under s. 61A(1). There are no approved determinations of native title over the application area.

No previous exclusive possession acts (PEPAs): ss. 61A(2) and (4)

> Under s. 61A(2), the application must not cover any area in relation to which
> (a) a previous exclusive possession act (see s. 23B)) was done, and
> (b) either:
> (i) the act was an act attributable to the Commonwealth, or
> (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act.
>
> Under s. 61A(4), s. 61A(2) does not apply if:
> (a) the only previous exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
> (b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

The application **meets** the requirement under s. 61A(2), as limited by s. 61A(4). Any areas over which there is a PEPA and in respect of which ss. 47, 47A or 47B do not allow extinguishment to be disregarded, have been excluded from the application area: see schedule B.

No exclusive native title claimed where previous non-exclusive possession acts (PNEPAs): ss. 61A(3) and (4)

> Under s. 61A(3), the 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) a previous non-exclusive possession act (see s. 23F) was done, and
> (b) either:
> (i) the act was an act attributable to the Commonwealth, or
> (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act.
>
> Under s. 61A(4), s. 61A(3) does not apply if:
> (a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
> (b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

The application **meets** the requirement under s. 61A(3), as limited by s. 61A(4). The rights and interests claimed in schedule E do not indicate a claim to exclusive possession, occupation, use and enjoyment over the application area. I note also the statement in paragraph 4 of schedule B

that exclusive possession is not claimed over areas subject to valid previous non-exclusive possession acts.

The application **satisfies** the condition of s. 190B(8), because it **meets** the requirements of s. 61A, as set out in the reasons above.

Subsection 190B(9)
No extinguishment etc. of claimed native title

> The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:
> (a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
> (b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
> (c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss. 47, 47A or 47B.

I consider each subcondition under s. 190B(9) in turn and I come to a combined result below.

The application **satisfies** the subcondition of s. 190B(9)(a). Schedule Q states that the application does not make any claim for ownership of minerals, petroleum or gas wholly owned by the Crown and the native title rights and interests claimed in schedule E similarly do not reveal any such claim.

The application **satisfies** the subcondition of s. 190B(9)(b). The application is located inland of the coastline and does not extend to offshore places.

The application **satisfies** the subcondition of s. 190B(9)(c). The final paragraph of schedule B identifies that the application excludes land or waters where the native title rights and interests have been otherwise extinguished.

The application **satisfies** the condition of s. 190B(9) overall, because it **meets** all of the three subconditions, as set out in the reasons above.

[End of reasons]

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