National Native Title Tribunal

Registration test decision

Application name:	Wanyurr Majay People
Name of applicant:	Ms Annie Wonga, Mr Mark Raymond Wilson, Mr Adrian Clive Murray, Mr Andrew Victor Miller, Ms Monica Bethel Willis, Ms Lilian Mavis Willis (Senior)
State/territory/region:	Queensland
NNTT file no.:	QC08/9
Federal Court of Australia file no.:	QUD296/08
Date application made:	15 September 2008
Name of delegate:	Hamish MacLeod

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: 4 February 2009

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Hamish Macleod

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

Reasons for decision

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Introduction

This document sets out my reasons for the decision to accept the claimant application for registration.

Section 190A of the *Native Title Act 1993* (Cwlth) requires the Native Title Registrar to apply a 'test for registration' to all claimant applications given to him under ss. 63 or 64(4) by the Registrar of the Federal Court of Australia (the Court), but with the exception of amended applications that satisfy ss. 190A(1A) or 190A(6A).

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 on 1 September 2007, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

Delegation of the Registrar's powers

I have made this registration test decision as a delegate of the Native Title Registrar (the Registrar). The Registrar delegated her powers regarding the registration test and the maintenance of the Register of Native Title Claims under ss. 190, 190A, 190B, 190C and 190D of the Act to certain members of staff of the National Native Title Tribunal (the Tribunal), including myself, on 17 October 2008. This delegation is in accordance with s. 99 of the Act. The delegation remains in effect at the date of this decision.

The test

In order for a claimant application to be placed on the Register of Native Title Claims, s. 190A(6) requires that I must be satisfied that *all* the conditions set out in ss. 190B and 190C of the Act are met.

Section 190B sets out conditions that test particular merits of the claim for native title. Section 190C sets out conditions about 'procedural and other matters'. Included amongst the procedural conditions is a requirement that the application must contain certain specified information and documents. In my reasons below I consider the s. 190C requirements first, in order to assess whether the application contains the information and documents required by s. 190C *before* turning to questions regarding the merit of that material for the purposes of s. 190B.

A summary of the result for each condition is provided at Attachment A.

Application overview

The Wanyurr Majay People native title determination application was filed in the Federal Court on 15 September 2008. A copy was forwarded to the Tribunal pursuant to s. 63 of the Act on 17 September 2008.

The application was filed by [Lawyer's Name Removed] of North Queensland Land Council as legal representatives on behalf of Ms Annie Wonga, Mr Andrew Victor Miller, Mr Mark Raymond Wilson, Ms Monica Bethel Willis, Mr Andrian Clive Murray, Ms Lilian Mavis Willis (Senior) on behalf of the Wanyurr Majay People.
I note the Wanyurr Majay People were previously referred to as the 'Lower Coastal Yidinji People' and that there have been various previous spellings of the group name including 'Wanyurr

Madjanji' which is the name on the first draft of the Form 1 provided to the Tribunal for preliminary assistance on 23 June 2006.

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.

I am also guided by the case law (arising from judgments in the courts) relevant to the application of the registration test. Among issues covered by such case law is the issue that some conditions of the test do not allow me to consider anything other than what is contained in the application while other conditions allow me to consider wider material.

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.

In making my decision, I have considered the contents of the Tribunal file 'QC08/9 Wanyurr Majay People; 2008/0231 Vol 1' and confidential materials prepared for the North Queensland Land Council NTRB Aboriginal Corporation by [details of the Confidential Materials removed].

Procedural fairness steps

As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are fair, just and unbiased. Procedural fairness requires that a person who may be adversely affected by a decision be given the opportunity to put their views to the decision-maker before that decision is made. They should also be given the opportunity to comment on any material adverse to their interests that is before the decision-maker. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

- The applicant provided additional material for the delegate's consideration on a confidential basis on 15 September 2008. This material was provided to the state government who, on 12 December 2008, confirmed that it did not have any comment to make on the material.

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.

Delegate's comment

I address each of the requirements under ss. 61 and 62 in turn and I come to a combined result for s. 190C(2) below.

Section 190C(2) requires the Registrar to be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by ss. 61 and 62. If the application meets all these requirements, the condition in s. 190C(2) is met.

I note that in the case of *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*) at [16] Mansfield J stated that 'section 190C(2) is confined to ensuring the application, and accompanying affidavits or other materials, contains what is required by ss 61 and 62'.

His Honour also said at [39] in relation to the requirements of s. 190C(2): '...I hold the view that, for the purposes of the requirements of s 190C(2), the Registrar may not go beyond the information in the application itself.'

I am of the view that *Doepel* is authority for the proposition that when considering the application against the requirements in s. 190C(2), I am not (except in the limited instance which I explore below in my reasons under s. 61(1)) to undertake any qualitative or merit assessment of the prescribed information or documents, except in the sense of ensuring that what is found in or with the application are the details, information or documents prescribed by ss. 61 and 62.

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.

Result and reasons

The application **meets** the requirement under s. 61(1).

In light of s. 190C(2), I must be satisfied that the application contains all the information required by s. 61(1). If the description of the native title claim group in the application indicates that not all persons in the native title group are included, or that it is , in fact, a subgroup of the native title group, then the requirements of s. 61(1) under s. 190C(2) would not be met and the claim could not be accepted for registration. This reasoning is drawn from *Doepel* at [36].

This consideration does not require me to look beyond the information contained in the application and prescribed accompanying affidavits. It also does not require me to undertake some form of merit assessment of the material to determine whether I am satisfied that the native title claim group has been correctly described: *Doepel* at [36] to [37]. In light of *Doepel* I have only considered the information contained in the application itself.

The description of the persons in the native title claim group is found in Schedule A of the application, which is reproduced in my reasons below at s. 190B(3). Schedule A states the claim group comprises all persons who are descended through either the male or female line from 14 named people. There is nothing in the application before me which suggests that the claim group, as described in Schedule A, is a subgroup of a larger group or that not everyone has been included where they should have been.

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.

Result and reasons

The application **meets** the requirement under s. 61(3).

Part B of the application provides the name and address for service of the applicant.

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.

Result and reasons

The application **meets** the requirement under s. 61(4).

Schedule A of the amended application does not name the persons in the native title claim group, but contains a description of the persons in the group.

Application in prescribed form: s. 61(5)

> The application must:
> (a) be in the prescribed form,
> (b) be filed in the Federal Court,
> (c) contain such information in relation to the matters sought to be determined as is prescribed, and
> (d) be accompanied by any prescribed documents and any prescribed fee.

Result and reasons

The application **meets** the requirement under s. 61(5).

The application contains the information prescribed by ss. 61 and 62, and is accompanied by the prescribed documents (that is, an affidavit from each of the persons who comprise the applicant prescribed by s. 62(1)(a)) thereby meeting the requirements of s. 61(5)(c) and (d).

I am not required under s. 190C(2) to consider whether the prescribed fee has been paid to the Federal Court.

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

(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.

Result and reasons

The application **meets** the requirement under s. 62(1)(a).

To satisfy the requirements here the persons comprising the applicant may jointly swear/affirm an affidavit; alternatively each of those persons may swear/affirm an individual affidavit.

Affidavits sworn by each of the named persons comprising the applicant accompany the application at Attachments R2 to R7. Each affidavit is competently witnessed and addresses each of the criteria stipulated in s. 62(1)(a)(i) to (v).

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

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

Delegate's comment

My decision regarding this requirement is the combined result I come to for s. 62(2) below. Subsection 62(2) contains paragraphs (a) to (h), and I address each of these subrequirements in turn, as follows immediately here. My combined result for s. 62(2) is found below and is one and the same as the result for s. 62(1)(b) here.

Result

The application **meets** the requirement under s. 62(1)(b).

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.

Result and reasons

The application **meets** the requirement under s. 62(2)(a).

Schedule B of the application, provides some information about the boundaries of the application and directs me to 'Attachment B' for further information. This further information appears as 'Schedule B' in the application. I take this to be a typographic error. The information supplied enables the boundaries of the application area and the areas not covered by the application to be identified. A qualitative assessment of this material is found in my reasons under s. 190B(2).

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).

Result and reasons

The application **meets** the requirement under s. 62(2)(b).

Schedule C refers to a map provided and labelled 'Attachment C'. There is a map that is labelled 'Annexure A' in the application which I take to mean '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.

Result and reasons

The application **meets** the requirement under s. 62(2)(c).

The application provides details of searches carried out by or on behalf of the applicant in schedule D which states 'To the applicant's knowledge no such 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.

Result and reasons

The application **meets** the requirement under s. 62(2)(d).

A description of the claimed native title rights and interests is found in Schedule E. The description does not merely consist of a statement to the effect that the native title rights and interests are all the native title rights and interests that may exist, or that have not been extinguished, at law.

Description of 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.

Result and reasons

The application **meets** the requirements under s. 62(2)(e).

The decision in *Doepel* requires me to decide whether the application contains the prescribed details and other information required by ss. 61 and 62. I am not obliged to undertake any merit or qualitative assessment of the material for the purposes of s. 190C(2)—see *Doepel* at [16] and also at [35]–[39].

Section 190B(5)(a) to (c) requires me to be satisfied as to the sufficiency of the information contained in Attachments F1 and F2, and whether it amounts to the factual basis on which it is asserted that the native title rights and interests claimed exist in the three assertions found in that section.

In the Full Court consideration of s. 190B(5) in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*), the Court indicated that an application which 'fully and comprehensively' furnished the details required by s. 62 'might also provide sufficient information to enable the Registrar to be satisfied about all matters referred to in s. 190B' – at [90].

At [92], the Court discussed the nature and quality of the information required by s. 62(2)(e). It said that the requirement for a general description of the factual basis in s. 62(2)(e) 'is an important indicator of the nature and quality of the information required by s. 62'. The Court then said that:

> In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required 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. The applicant is not required to

provide evidence that proves directly or by inference the facts necessary to establish the claim — at [92].

A general description of the factual basis is provided in Schedules F and G which in turn are supplemented by the information provided in the affidavits of [Applicant 1] and [Applicant 2] in Attachments F1 and 2 and two volumes of anthropological and genealogical material. I analyse this material in my reasons below when I consider the requirements of s. 190B(5). Without making a qualitative or merit assessment of the content of this material, the schedules, attachments and material address the requirement of s. 190C(2) that the application contain certain details and other information, namely a general description of the factual basis. The relevant test for the analysis of s. 190C(2) is the authority in *Doepel* that the Registrar is not to undertake a qualitative or merit assessment of the details required by ss. 61 or 62 when checking for compliance with s. 190C(2). That task is undertaken when considering the associated merit condition which, for the details required by s. 62(2)(e), is the condition in 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.

Result and reasons

The application **meets** the requirement under s. 62(2)(f).

Details of activities are contained in Schedule G.

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.

Result and reasons

The application **meets** the requirement under s. 62(2)(g).

Schedule H states 'As far as the Applicant is aware there are no native title determination applications entered on the Register of native title claims covering any part of the claim area'.

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.

Result and reasons

The application **meets** the requirement under s. 62(2)(ga).

Schedule HA states 'The Applicant is not aware of any notifications issued under Paragraph 24MD(6B)(c)'.

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.

Result and reasons

The application **meets** the requirement under s. 62(2)(h).

Schedule I states 'There are no section 29 Notices issued over the area claimed of which the Applicant is aware'.

Combined result for s. 62(2)

The application **meets** the combined requirements of s. 62(2), because it **meets each of the subrequirements of ss. 62(2)(a) to (h).**

Combined result for s. 190C(2)

The application **satisfies** the condition of s. 190C(2), because it **does** contain all of the details and other information and documents required by ss. 61 and 62, as set out in the reasons above.

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.

Result and reasons

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

An analysis carried out by the Tribunal's Geospatial Services (GeoTrack number 2008/1652) on 23 September 2008 (geospatial report) states that, as per the Register of Native Title Claims, there are no applications or determinations that fall within the determination area as of that date.

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.

Result and reasons

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

For the reasons set out below, I am satisfied that the requirements set out in s. 190C(4)(a) are met because the application has been certified by each Aboriginal/Torres Strait Islander body that could certify the application.

Schedule R of the application states 'A copy of the certificate of North Queensland Land Council Representative Body Aboriginal Corporation (NQLC), is attached as 'Attachment R1''. Attachment R1 is a copy of a certification of the application by NQLC, which has been signed by three Governing Committee Members who are identified as 'duly authorised delegates' in the jurat. The Common Seal of NQLC has been affixed and execution is dated 3 September 2008. The certification refers to the provisions of s. 203AD, and advises that it is the Aboriginal/Torres Strait Islander body recognised under that section.

Schedule K of the application states that NQLC is the only representative body for the application area. This is supported by the geospatial report which shows that the application area is entirely covered by the NQLC representative body area and that there are no other recognised bodies under s. 203AD or funded bodies under s. 203FE for the application area. Accordingly, the NQLC is the only representative body that could certify the application under Part 11, noting my finding above that it is funded to perform the certification function.

Therefore I am of the view that NQLC is empowered to certify the application and I must therefore consider whether the certification complies with s. 203BE.

Certificate: NQLC

For the certification to satisfy the requirements of s. 190C(4)(a) it must comply with the provisions of s. 203BE(4)(a) to (c) and for the reasons that follow I am satisfied that it does so comply.

The certificate contains the statement that the NQLC is of the opinion that the requirements of s. 203BE(2)(a) and (b) have been met, in particular that:

(a) all the persons in the native title claim group have authorised the Applicant to make the Application and to deal with matters arising in relation to it; and

(b) all reasonable efforts have been made to ensure that the Application describes or otherwise identifies all other persons in the native title claim group.

This satisfies the requirement of s. 203BE(4)(a).

Pursuant to s. 203BE(4)(b), the certification includes brief reasons as to why the NQLC holds these opinions. I note that s. 190C(4)(a) does not require me to 'look behind' these reasons or to question the merits of the representative body's certification. This reasoning is drawn from *Doepel* at [80]–[81], which was confirmed in *Wakaman People 2 v Native Title Registrar and Authorised Delegate* (2006) 155 FCR 107; [2006] FCA 1198 at [31]–[32].

Finally, the certification shows that the requirements of s. 203BE(3), for the purposes of s. 203BE(4)(c), have been met, as the certification states that the area covered by the application is not also covered, in part or in whole by any other application; nor does NQLC intend to lodge an overlapping claim, nor is it aware of any other persons intent to do so. I understand this to be an accurate summation of the situation in relation to overlapping claims due to the fact that no overlapping claims are identified in the geospatial report of 23 September 2008.

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.

Information regarding external and internal boundaries: s. 62(2)(a)

The application must contain information, whether by physical description or otherwise, that enables identification of the boundaries of:

(i) the area covered by the application, and

(ii) any areas within those boundaries that are not covered by the application.

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

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

Result and reasons

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

Schedule B of the application, 'Identification of boundaries', refers to Attachment B as identifying the boundaries of the area covered by the application.

Attachment B is entitled 'Schedule B Wanyurr Majay Description' and describes the application area as all land and waters subject to the following various land parcels. Fourteen lots are identified by lot on plan numbers. Portion of lot 19NPW696 is subject to this application and is described by a metes and bounds description referencing QUD6027/99 Ngadjon-Jii People 2 (QC99/30) and coordinate points to six decimal places. The description was prepared by the Tribunal's Geospatial Services and is dated 23 November 2006.

Schedule B, part A lists general exclusions of areas within those boundaries that are not covered by the application. Attachment B further specifically excludes any land and waters subject to native title determination application QUD6027/99 Ngadjon-Jii People 2 (QC99/30) as per the Schedule 21 October 2006.

Schedule C of the application, 'Maps', refers to Attachment C.

Attachment C is a monochrome copy of a map prepared by the Tribunal's Geospatial Services dated 17 November 2006 and includes:

- the application area depicted by a bold line;
- cadastral boundaries with some lot and localities information;

- various insets and the excluded application depicted by a bold line;
- scalebar, northpoint and coordinate grid'; and
- notes relating to the source, currency and datum of data used to prepare the map. The coordinates are referenced to the Geocentric Datum of Australia 1994 (GDA94).

The Tribunal's geospatial report of 23 September 2008 concludes, 'The description and map are consistent and identify the application area with reasonable certainty'. I have regard to this expert advice and accept its findings.

The information and map in the application required by sections 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 areas of land or waters.

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.

Result and reasons

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

A description of the native title claim group is supplied at Schedule A of the application, which states:

> The claim group comprises all the persons who are descended through either male or female line from the following apical ancestors:
> (a) Njinggungara/Pannikin and Tobias Paben.
> (b) Nellie Tobi/Pannican and Charles Siy Mauii.
> (c) Doranga and Tjanpumolo - the Wonga family.
> (d) Tilly Palmer.
> (e) Jenny and Moses - the Lydia Murray family.
> (f) Boy Loui and Minnie - the Willis family.
> (g) Bella Drahm (nee Ami) and Annie Edwards.
> (h) Polly Russell.

Schedule A does not name the persons in the native title claim group for the purposes of s. 190B(3)(a) and therefore I need to be satisfied that the requirements of s. 190B(3)(b) are met.

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], his Honour 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 of [sic] any particular person in the identified native title claim group can be ascertained'.

Further, Carr J in *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93 (*Western Australia v Native Title Registrar*) found that a description may nonetheless comply with s. 190B(3)(b) even though:

> 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... The Act is clearly remedial in character and should be construed beneficially: *Kanak v National Native Title Tribunal* (1995) 61 FCR 103 at 124—at [67].

While an initial reading of the native title claim group description appears to be the descendants of a list of apical ancestors, I note the inclusion of 'the Wonga family', 'the Willis family' and 'the Lydia Murray family' in the description. In *Colbung v The State of WesternAustralia* [2003] FCA 774 (*Colbung*) Finn J found a description which provided that the group were 'the Isaacs family and other related people including George Webb' was 'Simply too uncertain'—at [36].

The description in the application can be distinguished from *Colbung* in that the mention of the three families is made in the context of named apical ancestors. Further the [Confidential Material], contains, at [reference to Confidential Material] genealogies of the named apical ancestors. The claim group description identifies that the claim group 'comprises by all the persons who are descended through either male or female line from the following apical ancestors'. This information allows persons in the claim group to be reliably identified and provides information as to the group's ancestors that enable a factual inquiry which sufficiently identifies the members of the claim group by reference to apical ancestors.

Given the context of the use of the phrase 'the family', the authorities that identify, amongst other things, the remedial nature of the Act, and the associated confidential material supplied with the application that refers back to apical ancestors, 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.

Result and reasons

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

The rights and interests claimed must be described in a clear and easily understood manner to meet the requirements of this section: *Doepel* at [91] to [92], [95], [98] to [101], [123].

Section 190B(4) requires the Registrar or her delegate to be satisfied that the description contained in the application of the claimed native title rights and interests is sufficient to allow the rights and interests to be readily identified. For the purposes of the condition, then, only the description contained in the application can be considered.

Section 62(2)(d) requires that the application contain:

> a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests) but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished at law.

This terminology suggests that Parliament intended to screen out applications that describe native title rights or interests in a manner that is vague or unclear.

Section 190B(4) requires the Registrar or her delegate to be satisfied that the description contained in the application of the claimed native title rights and interests is sufficient to allow the rights and interests to be clearly identified. The use of the phrase 'native title rights and interests' in s. 190B(4) may be used to exclude any rights and interests that are claimed but are not native title rights and interests as defined by s. 223.

Section 223(1) states:

> The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.

The description of the 33 claimed native title rights and interests listed in Schedule E is reproduced in my reasons for s. 190B(6). I find that the native title rights and interests are clear, understandable and make sense and, accordingly, the requirements of this section are met.

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

> The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:

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

Delegate's comments

I consider each of the three assertions set out in the three paragraphs of s. 190B(5) in turn and come to a combined result for s. 190B(5) below.

The Law

Kiefel J said in *Queensland v Hutchison* (2001) 108 FCR 575 that regard may be had to additional information if:

> such evidence goes beyond what was required to be set out in the application…section 190B(5) may require more [than what is required for s. 62(2)(e)], for the Registrar is required to be satisfied that the factual basis asserted is sufficient to support the assertion. This tends to assert a wider consideration of the evidence itself, and not of some summary of it—at [25].

In *Doepel*, Mansfield J stated that:

> Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the 'factual basis on which it is asserted' that the claimed native title rights and interests exist 'is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted factual basis for those 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 Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role 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—at [17]. (Emphasis added.)

This paragraph of the *Doepe*l judgment was quoted in *Gudjala FC*, with the emphasis in italics as appears above. The Full Court in *Gudjala FC* went on to say at paragraph [90]:

> …Indeed, there is no reason to doubt that this statutory scheme contemplates that it would be open to the Registrar to accept an application based on the application, including the accompanying affidavit, without having regard to other information of the type referred to in s 190A(3). *Accordingly, the statutory scheme appears to proceed on the basis that the application and accompanying affidavit, if they, in combination, address fully and comprehensively all the matters specified in s 62, might provide sufficient information to enable the Registrar to be satisfied about all matters referred to in s 190B. This suggests that the quality and nature of the information necessary to satisfy the Registrar will be of the same general quality and nature as the information required to be included in the application and accompanying affidavit. Of course, if an applicant fails to fully and comprehensively furnish the information required by s 62 then there is a risk that the Registrar will not accept the claim* although that risk is ameliorated by the power of the Registrar to consider information additional to that contained in the application, including documents (other than the application) provided by an applicant: see s 190A(3)(a).

and, at [92]:

> Of central importance in this appeal are the details specified by s 62(2)(e), namely details which constitute a general description of the factual basis on which it is asserted that the native title rights and interests claimed existed and, in particular, the matters referred to in ss 62(2)(e) (i), (ii) and (iii). Those details are in aid of the description, with some particularity, required by s 62(2)(d) of the asserted native title rights and interests. The fact that the detail specified by s 62(2)(e) is described as "a general description of the factual basis" is an important indicator of the nature and quality of the information required by s 62. *In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based.* In particular, the applicant is not required 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. *The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim.*

I have quoted sections of this decision at length, and italicised the parts that directly refer to the assessment of s. 190B(5), the wording of which is similar to ss. 62(2)(e)(i),(ii) and (iii).

In summary, for the information in an application to satisfy the requirements of s. 190B(5) it must 'be in sufficient detail to enable a genuine assessment of the application…and be something more than assertions at a high level of generality', but, also it need be no more than 'a general description of the factual basis on which the application is made', and need not 'provide evidence that proves directly or by inference the facts necessary to establish the claim'. Balanced against these findings is the passage quoted above from the decision in *Doepel* (paragraph 17) where the court considered the test the Registrar is required to apply under s. 190B(5). The Full Court chose to quote and emphasize that section of those reasons, namely 'that requires the Registrar to address the quality of the asserted factual basis for those 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'.*

Information considered by the delegate

I turn now to the quality of the asserted factual basis provided in the application.

In arriving at my decision on whether each of the requirements of s. 190B(5) have been met, I consider the application itself, and subject to s. 190A(3), must have regard to information that is contained in the application and other documents provided by the applicant and may have regard to such other information I consider appropriate.

I have regard to the information contained in Schedules F, G and M and Attachments F1 and F2. The named persons comprising the applicant have signed affidavits that swear that they believe the statements made in the application are true.

In considering the quality of the asserted factual basis, I note the status of the authors of supplied and additional information.

[References to the Confidential Material have been removed] I find that, on the basis of this information, [the author of the Confidential Material] is a person able to provide expert knowledge in relation to the application.

Schedule F states the following assertions as examples of facts giving rise to the assertion of native title:

- Members of the claim group continue to have a close association, including a spiritual connection with the claim area according to their traditional laws and custom;
- Members of the claim group continue to pass on to their descendants traditional laws and customs and stories and beliefs concerning their traditional country included in the claim area;
- Members of the claim group continue to use the claim area for hunting, fishing and gathering of traditional bush medicines and other materials in accordance with their traditional laws and customs;
- Members of the claim group continue to care for their traditional country, including the claim area, in accordance with traditional laws and customs passed down to them by their forebears and predecessors; and
- Members of the claim group continue to exercise a body of traditional laws and customs, which has been passed down to them from generation to generation by their forebears and predecessors; such traditions and customs include traditional laws and customs which deal with caring for country, controlling access to country, the holding of ceremonies on traditional country including the claim area and the use of traditional country.

The affidavits of [Applicant 1] at Attachment F1 and [Applicant 2] at F2 are then referred to as providing further detail. They identify themselves as claim group members and detail the exercise of their traditional rights and interests with geographical references.

Schedule G details activities currently being carried out by the native title claim group members and state:

> Claim group members continue to exercise a body of traditional laws and customs passed down to them from generation to generation by their forebears and predecessors. Such traditions and customs include:
>
> (a) Controlling access to country
>
> (b) Speaking for country
>
> (c) Caring for country
>
> (d) The holding of ceremonies on country
>
> (e) Use of country for traditional purposes
>
> (f) Gathering in the claim area
>
> (g) Hunting in the claim area
>
> (h) Fishing in the claim area

(i) Camping in the claim area

(j) Occupying the claim area

(k) Visiting the claim area

(l) Protecting lands within the claim area

(m) Preserving sites of significance in the claim area

(n) Participating in consultation processes and land use decision-making in relation to third parties.

It is further asserted in Schedule G that 'Wanyurr Majay children and young people visit their country to learn about their culture and histories. The claim group live in close vicinity to the lands claimed and continue to access them on a regular basis'.

At Schedule M, 'Traditional physical connection', the applicant asserts:

> Throughout the whole time for which written records exist in relation to such matters and throughout the whole of the time for which oral history accounts exist in relation to such matters, the Wanyurr Majay native title claim group members between them (and as their ancestors between them have continuously done in the past) use, occupy and enjoy the whole of the claim area, through their physical presence and residence of the vast majority in close proximity to the claim area.
>
> Many members of the Wanyurr Majay native title claim group continue to reside within close proximity to the claim area and to exercise their native title rights by, amongst other things, hunting, fishing and taking part in ceremonial activities within the claim area.
>
> The Wanyurr Majay native title claim group's traditional laws and customs acknowledge that, within the group there may be certain individuals, families or sub-groups who will have sometimes stronger and sometimes lesser rights and responsibilities in relation to particular areas of land and waters within the claim area and the nature and incidents of such differentiations will be determined in accordance with their traditional laws and customs.

Result and reasons re s. 190B(5)(a)

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(a).

The [Confidential Material] includes information on:

- The claimant group's association with the claim area.
- The claimant group's contemporary association with the claim area.
- The relationship between the claimant group and their predecessors who had an association with the area.

[References to the Confidential Material have been removed]

The information provided in [the Confidential Material] and the analysis of and attribution to particular apical ancestors, current members of the claim group, and the named persons comprising the applicant goes beyond a high level of generality. It is specific and detailed. In

combination with the assertions in the various schedules, and the two supplied affidavits, I am satisfied that there is a sufficient factual basis for the assertion that the native title claim group have, and its predecessors had, an association with the area covered by the application.

Result and reasons re s. 190B(5)(b)

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

The [Confidential Material] quotes in paraphrase the requirements of this section. It sets out:

- The normative laws and customs of the society at effective sovereignty.
- The normative laws and customs of the society associated with the claim area in the contemporary period.
- Other factors of law acknowledged and customs observed by the contemporary claimant group.

[References to the Confidential Material have been removed]

I have reproduced the definition of 'native title' or 'native title rights and interests' which appears in s. 223(1) of the Act above in my consideration of s. 190B(4).

Sections 190B(5)(b) and (c) use the term 'traditional' which was considered by the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 (*Yorta Yorta*) in the context of s. 223(1)(a). The High Court held that:

> "traditional" does not mean only that which is transferred by word of mouth from generation to generation, it reflects the fundamental nature of the native title rights and interests with which the Act deals as rights and interests rooted in pre sovereignty traditional laws and customs—at [79].

The High Court also said the following about the term 'traditional laws and customs' in s. 223(1)(a) at [46]–[47]:

> First, it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are "traditional" laws and customs.
>
> Secondly, and no less importantly, the reference to rights or interests in land or waters being *possessed* under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist. And any later attempt to revive adherence to the tenets of that former system cannot and will not reconstitute the traditional laws and customs out of which rights and interests must spring if they are to fall within the definition of native title. (Emphasis in original.)

These findings from *Yorta Yorta* indicate that the factual basis for s. 190B(5)(b) must describe how the laws acknowledged and customs observed by the native title claim group are rooted in the traditional laws and customs of a society that was in existence at the time of European settlement of the area covered by the application. The second tranche of what is meant by the term 'traditional laws acknowledged, and the traditional customs observed' in s. 223(1)(a) discussed at paragraph [47] of *Yorta Yorta* is linked to the assertion in s. 190B(5)(c), namely, that the factual basis must support an assertion that the group has continued to hold the native title in accordance with those traditional laws and customs.

Under s. 190B(5)(b) the factual basis for the assertion must identify the society that is asserted to have existed at least at the time of European settlement, and from which the group's current traditional laws and customs are derived. This is supported by *Gudjala FC* at paragraph [96] where the Full Court found that there was material in the *Gudjala* application which 'contained several statements which, together, would have provided material upon which a decision–maker could be satisfied that there was, in 1850–1860, an indigenous society in the claim area observing identifiable laws and customs'. The Court held at [96] that 'this question and others' are ones 'that s. 190B requires must be addressed'.

To demonstrate that there exist traditional laws and customs acknowledged by, and traditional laws and customs observed by the native title claim group that give rise to the claim of native title rights and interests, [the Confidential Material] describes:

1. The normative laws and customs which governed the society associated with the claim area at sovereignty;
2. The persistence amongst contemporary claimant group of normative laws and customs derived from the society associated with the claim area at sovereignty.

[Reference to the Confidential Material have been removed]

From the information provided in the [Confidential Material] which is on occasion supplemented by the two affidavits of [Applicant 1], and [Applicant 2] attached to the application, I am satisfied that the factual basis is sufficient to support the assertion in subparagraph (b) that there exist traditional laws acknowledged by and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests.

Result and reasons re s. 190B(5)(c)

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

[References to the Confidential Material have been removed]

The continuity requirement at s. 190B(5)(c) is whether the factual basis is sufficient to support the assertion that the native title claim group has 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. The use of the word 'traditional' when it is used to describe the traditional laws and customs acknowledged and observed by Indigenous peoples as giving rise to claimed native title rights and interests was considered in *Yorta Yorta* :

> For exactly the same reasons, acknowledgment and observance of those laws and customs must have continued substantially uninterrupted since sovereignty. Were that not so, the laws and customs acknowledged and observed *now* could not properly be described as the *traditional* laws and customs of the peoples concerned—at [87].

[References to the Confidential Material have been removed]

I am satisfied after considering the information contained in the [Confidential Material] in conjunction with the assertions and affidavits in the application that the factual basis is sufficient to support an assertion that the native title claim group have continued to hold the native title in accordance with their traditional laws and customs.

Combined result for s. 190B(5)

The application **satisfies** the condition of s. 190B(5) because the factual basis provided is **sufficient** to support each of the particularised 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.

Result and reasons

The application **satisfies** the condition of s. 190B(6). The claimed native title rights and interests that I consider can be prima facie established are identified in my reasons below.

I note from the outset that the rights and interests claimed are not exclusive in nature.

At Schedule E, the following sentence precedes the list of rights and interests claimed:

> 1) The native title rights and interests claimed are not to the exclusion of all others and are the rights to:

This section of the Act requires 'at least some' of the native title rights and interests to be claimed. The Registrar takes the view that only one right or interest need be established for the requirements of s. 190B(6).

The term "prima facie" was considered in *North Ganalanja Aboriginal Corporation v Qld* 185 CLR 595 (*North Ganalanja*) by their Honours Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, who noted:

> The phrase can have various shades of meaning in particular statutory contexts but the ordinary meaning of the phrase "prima facie" is: "At first sight; on the face of it; as it appears at first sight without investigation." [citing Oxford English Dictionary (2nd ed) 1989].

I have adopted the ordinary meaning referred to in *North Ganalanja* in considering whether some of the claimed native title rights and interests claimed can be established on a prima facie basis.

At my reasons under s. 190B(4) I stated that the native title rights and interests claimed are readily identifiable. In my reasons under s. 190B(5) I was satisfied that there was a sufficient factual basis to support each of the assertions set out therein.

The description of the thirty-three rights and interests claimed is contained at Schedule E. I reproduce that description here in full below. I will consider each right and interest separately, or, where they are of a like nature, as a group.

> 1) The native title rights and interests claimed are not to the exclusion of all others and are the rights to:
> i. maintain and use the claim area;
> ii. conserve the natural resources of the claim area;
> iii. protect the claim area and the natural resources of the claim area for the benefit of the Native Title holders;
> iv. care for the claim area for the benefit of the Native Title holders;
> v. use the claim area and the natural resources of the claim area for social purposes;
> vi. use the claim area and the natural resources of the claim area for cultural purposes;
> vii. use the claim area and the natural resources of the claim area for religious purposes;
> viii. use the claim area and the natural resources of the claim area for spiritual purposes;
> ix. use the claim area and the natural resources of the claim area for customary purposes;
> x. use the claim area and the natural resources of the claim area for traditional purposes;
> xi. reside on, the claim area;
> xii. to camp on the claim area;
> xiii. to travel across the claim area;
> xiv. exercise rights of use and disposal over the natural resources of the claim area;
> xv. to use the claim area for growing and producing plant material;
> xvi. to harvest plant material from the claim area;
> xvii. to exchange plant material from the claim area with other persons;
> xviii. to exchange the natural resources of the claim area with other persons;
> xix. to discharge cultural rights duties and obligations or responsibilities with respect to the claim area;
> xx. to discharge spiritual rights duties and obligations or responsibilities with respect to the claim area;
> xxi. to discharge traditional rights duties and obligations or responsibilities with respect to the claim area;
> xxii. to discharge customary rights duties and obligations or responsibilities with respect to the claim area;
> xxiii. preserve sights of significance to the Native Title holders and other Aboriginal people on the claim area;
> xxiv. conduct secular activities on the claim area;
> xxv. conduct ritual activities on the claim area;
> xxvi. conduct cultural activities on the claim area;
> xxvii. conduct burials on the claim area;
> xxviii. maintain the cosmological relationship of beliefs, practices and institutions through ceremony and proper and appropriate custodianship of the claim area and special and sacred sites, to ensure the continued vitality of culture, and the well being of the Native Title holders;
> xxix. inherit Native Title rights and interests in relation to the claim area in accordance with custom and tradition;
> xxx. dispose of Native Title rights and interests in relation to the claim area in accordance with custom and tradition;

xxxi. resolve disputes between the Native Title holders and other Aboriginal persons in relation to the claim area;
xxxii. construct structures for the purpose of exercising the Native Title rights on the claim area;
xxxiii. maintain structures for the purpose of exercising the Native Title rights on the claim area.

Information supporting the rights and interests claimed can be found in the application and additional materials. Schedules F, G and M make various assertions that are relevant to the requirements of this section. The affidavits of [Applicant 1], and [Applicant 2], Attachments F1 and F2 respectively, and the [Confidential Material] provide firsthand accounts and supportive anthropological research information.

[References to the Confidential Material have been removed]

As stated above, where the rights and interests claimed are of like nature, I will consider them together. The thirty-three rights claimed can be divided into six groups which correlate with the [reference to the Confidential Material has been removed]. Some of the rights and interests claimed are not recognised as such at law, and others do not have examples of activities in the claim area that would support them. The content of the material supplied, and the two affidavits that form part of the application contain examples that are specific to the six subheadings of Redmond.

<u>The right to maintain and protect Story places.</u>

i. maintain and use the claim area;
ii. conserve the natural resources of the claim area;
iii. protect the claim area and the natural resources of the claim area for the benefit of the Native Title holders;
iv. care for the claim area for the benefit of the Native Title holders;
xxiii. preserve sights of significance to the Native Title holders and other Aboriginal people on the claim area;

Result: Rights established.

In *Alyawarr* the Full Court of the Federal Court upheld: 'the right to have access to, maintain and protect places and areas of importance on or in the land and waters including rock art, engraving sites and stone arrangements'—at [135] to [140]. In the consent determination of *Andrew Passi on behalf of the Meriam People v Queensland* [2001] FCA 697—at [3b] the Court recognised the right to 'conserve, manage, use and enjoy the natural resources of the determination area for the benefit of the common law holders including for social, cultural, economic, religious, spiritual, customary and traditional purposes.' These rights are recognised as traditional rights and interests at law. [Reference to the Confidential Material has been removed] At paragraphs 28 and 29 of the affidavit of [Applicant 2], [Applicant 2] states that she teaches young ones how to look after country, and was told to do so by her father 'when he was gone'. At paragraph 24 of the affidavit of [Applicant 1], [Applicant 1] states that he has an 'obligation to look after sites and maintain them'.

I find that these rights are prima facie established.

The right to conduct ceremonies and ritual action on the claim area

vi. use the claim area and the natural resources of the claim area for cultural purposes;
xxvi. conduct cultural activities on the claim area;
xix. to discharge cultural rights duties and obligations or responsibilities with respect to the claim area;
vii. use the claim area and the natural resources of the claim area for religious purposes;
viii. use the claim area and the natural resources of the claim area for spiritual purposes;
xx. to discharge spiritual rights duties and obligations or responsibilities with respect to the claim area;
ix. use the claim area and the natural resources of the claim area for customary purposes;
x. use the claim area and the natural resources of the claim area for traditional purposes;
xxi. to discharge traditional rights duties and obligations or responsibilities with respect to the claim area;
xxv. conduct ritual activities on the claim area;
xxviii. maintain the cosmological relationship of beliefs, practices and institutions through ceremony and proper and appropriate custodianship of the claim area and special and sacred sites, to ensure the continued vitality of culture, and the well being of the Native Title holders;

Result: Rights established.

In *Sampi v Western Australia (No 3)* [2005] FCA 1716 (*Sampi*) – at [5c], the non-exclusive 'right to access, use and take any of the resources thereof (including water and ochre) for food, trapping fish, religious, spiritual, ceremonial and communal purposes', was recognised. Further, in the consent determination of *Mundraby v Queensland* [2006] FCA 436, (*Mundraby*) the right to 'perform social, cultural, religious, spiritual or ceremonial activities thereon and invite others to participate in those activities in accordance with traditional laws and customs'—at [para 3(b)(vi)] was accepted.

In the affidavit of [Applicant 2], she refers to being taught 'history, language, stories and culture', and inheriting the role of the story teller from her [Family Member], this role being exclusively female. [Reference to the Confidential Material has been removed]

I find that these rights are prima facie established.

The right to live on, travel through and use country for everyday activities.

xi. reside on the claim area;
xii. to camp on the claim area;
xiii. to travel across the claim area;
xxxii. construct structures for the purpose of exercising the Native Title rights on the claim area;
xxxiii. maintain structures for the purpose of exercising the Native Title rights on the claim area.
v. use the claim area and the natural resources of the claim area for social purposes;
xxiv. conduct secular activities on the claim area;

Result: rights xi, xii, and xiii established

In *Alyawarr* a right to 'live on the land, to camp, to erect shelters and other structures and to travel over and visit any part of the land and waters' – at [para 3(b)] was accepted. As to the particular question of permanent/maintained structures which might possibly be inconsistent with non-exclusivity, the court was of the view that:

> Consistently with what was said by Nicholson J in *Daniel (No 2)* and Sundberg J in *Neowarra*, the right to 'live' on the land can be interpreted as a right to live permanently on the land without any conflict with pastoral leaseholders' rights. That right does not necessarily involve permanent settlement at a particular place. The issue therefore reduces to the question whether a native title right of permanent settlement is inconsistent with a pastoral leaseholder's rights. There is no logical reason why it must be so. Just as the right to live permanently on the land does not necessarily give rise to inconsistency with the pastoral leaseholder's rights, neither does the right to erect a permanent structure. The existence of such a structure does not preclude a pastoralist's right to require its removal in the event that it conflicts with a proposed exercise by the pastoralist of a right under the lease. It is not inevitable that such a conflict will arise.

Despite reference to scar trees, markings and natural formations, however, there is no reference to 'structures' per se in the materials. The rights of **xxxii** and **xxxiii** therefore cannot be prima facie established.

The claimed right at **xxiv** to 'conduct secular activities on the claim area,' and **v** 'to use the claim area and the natural resources for social purposes' are too broad and vague as they represent all non-religious activity and social activities on the claim area as being a right or interest. These cannot be claimed as a native title right or interest.

There is abundant material to support the claimed rights and interests of **xi, xii,** and **xiii.** [Reference to the Confidential Material has been removed] Further, [Applicant 2] in her affidavit at paragraph 16 states 'As a family, we would often head up to Frenchman's creek, every weekend and school holidays and stay there for the day, to hunt, fish and gather'.

I find that rights **xi, xii**, and **xiii** are prima facie established.

<u>The right to hunt, fish, gather and prepare natural resources in accordance with traditional law and custom.</u>

xiv. exercise rights of use and disposal over the natural resources of the claim area;
xv. to use the claim area for growing and producing plant material;
xvi. to harvest plant material from the claim area;
xvii. to exchange plant material from the claim area with other persons;
xviii. to exchange the natural resources of the claim area with other persons;

Result: Rights established

I note from the outset that the claimed rights and interests **xiv** to **xvii** do not use the word 'hunt'. I take this activity to be inferential from the term 'use and disposal of natural resources'. [Reference to the Confidential Material has been removed]

In *Alyawarr* the view of the Court was that 'The right to trade is a right relating to the use of the resources of the land. It defines a purpose for which those resources can be taken and applied. It is difficult to see on what basis it could not be a right in relation to land' – at [153].

The right to use the natural resources has been recognised as both exclusive and non-exclusive in nature in several cases including in *Sampi* and *De Rose v South Australia* [2002] FCA 1341 (*De Rose*).

I find that all rights in this group can be prima facie established.

The right to be buried on claim area and/or maintain and protect burial sites.

xxvii. conduct burials on the claim area;

Result: Right established.

This right has been confirmed as exclusive and non-exclusive in nature in *Wik Peoples v State of Queensland (determination 1)* [2000] FCA 1443 and *Alyawarr* respectively.
[Reference to the Confidential Material has been removed]

I find that this right can be prima facie established.

The right to enact a system of permissions for controlling access to, and authorising others' rights to, country in the claim area.

xxix. inherit Native Title rights and interests in relation to the claim area in accordance with custom and tradition;
xxx. dispose of Native Title rights and interests in relation to the claim area in accordance with custom and tradition;
xxxi. resolve disputes between the Native Title holders and other Aboriginal persons in relation to the claim area;

Result: Rights xxix and xxx established.

The right to resolve disputes claimed at xxxi was considered by Justice Sundberg in *Neowarra v Western Australia* [2003] FCA 1402 (*Neowarra*) where it was found to be 'a right in relation to people and not in relation to land or waters'. Therefore the right cannot be established.

In *Mundraby* the right to '...pass on native title in relation thereto in accordance with traditional laws and customs' was granted in a consent determination.

[Reference to the Confidential Material has been removed]

I find the rights claimed in **xxix** and **xxx** can be prima facie established.

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.

Result and reasons

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

The term 'traditional' referred to in my reasons for s. 190B(5) as defined by the High Court in the *Yorta Yorta* sense, and consequently 'traditional physical connection' means a physical connection in accordance with the particular traditional laws and customs relevant to the claim group. At paragraph [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'.

[Reference to the Confidential Material has been removed]

Schedule M of the application refers to use, occupation and enjoyment of the whole claim area, and hunting, fishing and taking part in ceremonial activities within the claim area.

The affidavit of [Applicant 1], at paragraph 24 of his affidavit refers to traditional legal and customary rights and obligations to look after and maintain sites, and carry out traditional activities such as hunting and fishing. At paragraph 25 he states that he still goes regularly to Fishery Creek and Fig Tree Creek on the claim area. Similarly, at paragraph 27 of [Applicant 2]'s affidavit she states that she continues to visit the area near Boulders and Frenchman's Creek, and is the caretaker, appointed by her father, of the area around Babinda.

Consequently I find that at least one member of the native title claim group currently has 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.

Delegate's comments

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.

Result and reasons

The application **meets** the requirement under s. 61A(1).

The geospatial report reveals that there are no approved determinations of native title that overlap the application area as of 23 September 2008.

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.

Result and reasons

The application **meets** the requirement under s. 61A(2), as limited by s. 61A(4).

Schedule B outlines the following exclusions.

Paragraph B excludes areas of exclusive possession that are named at s. 23B(2)(c) of the Act and public roads. Paragraph C, subject to paragraph E, excludes any land or waters covered by the construction of public works. Paragraph D excludes lands or waters where native title rights and

interests have otherwise been extinguished. At paragraph E, where an act specified in paragraphs B or C falls within the provisions of s. 23B(9), (9A), (9B), (9C) or (10) of the Act, the area covered by the act is not excluded from the application.

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.

Result and reasons

The application **meets** the requirement under s. 61A(3), as limited by s. 61A(4).

The application does not say that ss. 47, 47A or 47B apply to it. Schedule L of the application states 'Not applicable'. Schedule B, paragraph E 1) states that where acts specified in paragraphs B and C fall within the provision of s. 23B(9), exclusion of acts benefiting Aboriginal Peoples or Torres Strait Islanders, the area is not excluded from the application.

The claimed rights and interests at Schedule E are non-exclusive.

Combined result for s. 190B(8)

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.

Delegate's comments

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

Result and reasons re s. 190B(9)(a)

The application **satisfies** the subcondition of s. 190B(9)(a).

Schedule Q states that there is no claim to any minerals, petroleum or gas wholly owned by the Crown.

Result and reasons re s. 190B(9)(b)

The application **satisfies** the subcondition of s. 190B(9)(b).

Schedule P states 'The area claimed does not include any offshore places'.

Result and reasons re s. 190B(9)(c)

The application **satisfies** the subcondition of s. 190B(9)(c).

I am not aware, and the material before me does not disclose, that the claimed native title rights and interests have otherwise been extinguished.

Combined result for s. 190B(9)

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

[End of reasons]