National Native Title Tribunal

Registration test decision – Edited

Application name	Kullilli People
Name of applicant	Paola Smith, Maxine Gooda, Peter White, Ronny Watson, Eric Hood
State/territory/region	Queensland South
NNTT file no.	QC09/1
Federal Court of Australia file no.	QUD80/09
Date application made	23 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: 17 April 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.

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Introduction

This document sets out my reasons for the decision to accept the Kullilli People claimant application QUD80/09 (QC09/1) 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 her 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.

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 and other conditions is a requirement in subparagraph (2) 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 sufficiency of the relevant parts of that material for the purposes of s. 190B. 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.

Application overview

The application was filed in the Federal Court on 23 March 2009. On that date also, the Court gave a copy of the application to the Registrar pursuant to s. 63, thereby triggering the requirement for the Registrar to consider the claim in the application for registration pursuant to s. 190A(1). There is a s. 29 notice that partly affects the application area (EPP1056) with a notification date of 17 December 2009. Although the application was made outside the three month period stipulated in s. 30(1)(a)(i), I have made my decision by the end of four months after the notice was given (see s. 190A(2)).

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.

In making this decision I have considered the information in the following documents:

- Kullilli People QUD80/09 (QC09/1) application and accompanying affidavits and other documents filed in the Federal Court on 23 March 2009
- Results of searches by myself and other officers of the Tribunal (including Geospatial Services), of the application area against entries on the Register of Native Title Claims, Federal Court Schedule of Native Title Applications, National Native Title Register and other databases to ascertain any overlaps between the application area and other native title applications or other interests such as s. 29 future act notices and representative body regions, including the report of the Geospatial Services report dated 1 April 2009 (the geospatial report).

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 made in a fair, just and unbiased way. 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 State of Queensland (the State) is a person adversely affected by a decision to accept the application for registration: *Western Australia v Native Title Registrar* (1999) 95 FCR 93 (Carr J). The State was provided with a copy of the application and all other accompanying documents filed in the Federal Court pursuant to s. 66(2) and also received notice of when the decision would be made. The State advised on 17 April 2009 that it would not be making a submission in relation to the requirements of the registration test. The applicant has not provided me with any information additional to that filed in the application and other accompanying documents in relation to the requirements of the registration test. Therefore, there is no requirement to provide the State with the kind of procedural fairness discussed by Carr J in *Western Australia v Native Title Registrar*.

The material before me does not reveal the existence of any other person who may be adversely affected by a decision to accept the application for registration.

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

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. Paragraph 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)—at [16] and also at [35]–[39]. In other words, does the application contain the prescribed details and other information?

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 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), when examining s. 61(1), is procedural only and limited to a consideration of 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 cannot 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.

I am satisfied that the description in schedule A is sufficient for the purposes of s. 190C(2). There is nothing on the face of it or elsewhere in the application to indicate that not all persons in the native title claim group are included or that it is a subgroup of the native title claim group. I am therefore satisfied that the requirements of this section are met.

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 contains all details and other information required by s. 61(3).

The name of the five persons comprising the applicant and their address for service appear on pages 2 and 13 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.

Result and reasons

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.

Result and reasons

The application is accompanied by the affidavits required by s. 62(1)(a)(i) to (v). Each of the five persons comprising the applicant has made an affidavit that is filed with the application. I note that the application names one of the persons who is the applicant 'Ronny Watson' and the affidavit provided is made by Ronald Watson. I am satisfied that this is one and the same person and I direct that the Register entry for this application contain the following details for this person: Ronny Watson (also known as Ronald Watson).

Each affidavit makes the statements required by subparagraphs (i) to (iii), at paragraphs 3, 4 and 11 respectively.

The statement required by subparagraph (iv) is found in paragraphs 5–10 of each affidavit.

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 also found in paragraphs 5–10 of each affidavit, where each deponent provides details of the agreed and adopted decision-making process complied with when authorising the applicant.

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

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—at [36], [37] and [39].

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 contains all details and other information required by s. 62(2)(a).

The application provides a written description and map identifying the area covered by the application (attachments B and C) and a written description of any areas within the external boundaries that are not covered by the application (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).

Result and reasons

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

The application contains a map showing the external boundaries of the application area.

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 contains all details and other information required by s. 62(2)(c).

The application states that no searches have been carried out by the current applicant.

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 contains all details and other information required by s. 62(2)(d).

A 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 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 contains all details and other information required by s. 62(2)(e).

A general description of the factual basis is provided in attachment F. This information is summarised 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.

Result and reasons

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

These details are found 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 contains all details and other information required by s. 62(2)(g).

Schedule H states that there are no overlapping applications.

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 contains all details and other information required by s. 62(2)(ga).

Schedule HA states that there are no notices of this kind.

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 contains all details and other information required by s. 62(2)(h).

Details of s. 29 notices are found in schedule I.

Combined result for s. 62(2)

The application contains all the details and other information required by paragraphs 62(2)(a) to (h).

Combined result for s. 190C(2)

The application **satisfies** the condition of s. 190C(2), because it contains 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).

A search of the application area against the Register of Native Title Claims (see the geospatial report) reveals that there are no previous overlapping applications on the Register of Native Title Claims when the current application was made on 23 March 2009.

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.

Under s. 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition

> of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

Result and reasons

The application satisfies the condition of s. 190C(4) because it has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, thereby meeting the requirement in s. 190C(4)(a).

Which representative bodies cover the application area?

Section 190C(4)(a) requires an application to have been certified by all representative bodies recognised under s. 203AD or funded to perform the certification function under s. 203FE(1) that cover the application area or any part of it. The geospatial report shows that the application area is entirely covered by the Queensland South Native Title Services Ltd (QSNTS) representative body area. To my knowledge there are no other s. 203AD recognised bodies or s. 203FE funded bodies for the application area. Accordingly, QSNTS is the only representative body that could certify the application under Part 11, noting my finding below that it is funded to perform the certification function pursuant to s. 203FE(1).

Attachment R of the application contains a certification of the application by QSNTS. The certification is made and signed by the QSNTS's principal legal officer and is dated 17 March 2009.

Is the QNTS empowered to certify the application?

I note that QSNTS is not recognised under s. 203AD. This is alluded to at the outset of the certification which states that it is made in accordance with ss. 203BE and 203FEA.

Section 203FEA(1) provides that:

> A person or body to whom funding is made available under subsection 203FE(1) to perform a function in respect of a particular area has the same obligations and powers in relation to the performance of that function as a body recognised as the representative body for that area would have in relation to the performance of that function.

I understand that QSNTS is funded under s. 203FE(1) to perform the certification power. I am therefore satisfied that QSNTS is a representative body funded under s. 203FE(1) to perform the certification power and is therefore empowered to certify the application.

Does the QSNTS certification comply with Part 11?

For the certification to satisfy the requirements of s. 190C(4)(a), it must comply with the provisions of s. 203BE(4).

Pursuant to s. 203BE(4)(a) the certification contains statements that satisfy s. 203BE(2), that is, the principal legal officer of QSNTS is of the opinion that the requirements of s. 203BE(2) have been met—he certifies that all persons in the native title claim group have authorised the applicant to make the application and deal with all matters in relation to it and that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the claim group.

Pursuant to s. 203BE(4)(b), the certification includes brief reasons as to why QSNTS holds these opinions—see paragraph 4 of the certificate. 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—see *Doepel* at [80]–[81] and *Wakaman People 2 v Native Title Registrar and Authorised Delegate* (2006) 155 FCR 107; [2006] FCA 1198 at [31]–[32]. The reasons provided in paragraph 4 of the certification meet the requirements of s. 203BE(4)(b).

The certification finally states that the principal legal officer is satisfied that the application does not overlap with another application. I note that the information about there being no overlapping applications would appear to be responsive to the requirements of s. 203BE(4)(c). However, I also note my view that a certification may comply with subparagraph (4), notwithstanding that it does not set out what the representative body has done to meet the requirements of s. 204BE(3). This is because subsection (3) provides that a failure by the representative body to comply with the requirements therein to make all reasonable efforts to achieve agreement between overlapping applications (including proposed applications) and to minimise the number of applications over the same areas does not invalidate any certification of the application by the representative body. Having regard to the provisions of s. 203BE as a whole, it follows in my view that the omission of information in a certification relating to the efforts under subsection (3) similarly does not invalidate the certification under subsection (4).

To conclude, I find that the certification complies with the requirements of Part 11, because it contains the statements required by s. 203BE(4).

Findings

For the reasons above, I am satisfied that the requirement in s. 190C(4)(a) is met because the application has been certified by the only representative Aboriginal/Torres Strait Islander body that could certify the application, namely, QSNTS.

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.

Result and reasons

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

As I noted in my reasons above at s. 190C(2), the application complies with ss. 62(2)(a) and (b) as it contains a written description of the area covered in attachment B (the external boundary), a written description of areas not covered by the application in schedule B (the internal boundaries) and a map showing the external boundary in attachment C.

The written description of the external boundary and the map showing it are, in my view, sufficiently and reasonably clear to locate the area covered by the application on the earth's surface. The written description uses metes and bounds, references to the Queensland/New South Wales state border, geographic coordinate points, adjoining native title claimant application boundaries and also to rivers, creeks, the ridge line of the Grey Range and to a number of towns and lakes. It specifically states that the application excludes any area covered by four adjoining native title claimant applications. The A3 copy of the map in attachment C depicts the external boundary with a bold outline. The map contains details of underlying land tenure, adjoining native title applications, some geographic features and towns. It also has a north point, scale bar, coordinate grid and locality map. The information identifies the source, currency and datum notes for the description and mapping. The geospatial report expresses the opinion that the description and map are consistent and identify the application area with reasonable certainty.

Having regard to the comprehensive identification of the external boundary in attachment B and the clarity of the mapping of this external boundary on the map 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 internal boundaries is found in schedule B. This is a generic description that excludes from the application any areas that is or has been covered by the acts described in s. 23B of the Act. It is stated that if the provisions of ss. 23B(9)–(10) or ss. 47, 47A or 47B apply to any such areas, 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 information such that a more comprehensive description of these areas would be required to meet the requirements of the section. In these circumstances, I find the written description of the internal boundaries is acceptable as it offers an objective mechanism to identify which areas fall within the categories described.

For these reasons, I am satisfied that 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 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.

Result and reasons

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

As the application does not name all native title claim group members individually, s. 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.

Mansfield J stated in *Doepel* 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 also stated 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 in schedule A of the application before me provides that the native title claim group is the Kullilli People and goes on to say that the Kullilli People are the biological descendants of the 26 listed apical ancestors.

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 biological descendant of the 26 ancestral lines identified in schedule A. However, it is my view that the description is clearly within the bounds of the 'Three Rules' test discussed above by Carr J, who similarly found acceptable a description which provided for biological descendants of named ancestors being included in the membership of the native title claim group.

The Kullilli application also provides a starting point, that is, information that identifies the 26 apical ancestors from whom the group's members are biologically descended. In my view, the information that identifies the 26 apical ancestors is sufficiently detailed to enable a factual inquiry to work out who is biologically descended from those ancestors. In some cases the apical ancestor is an individual and in others it is a couple. Not all of the ancestral lines refer to a European surname, but in all cases a first or Aboriginal name is provided. In many cases, including where there is no surname, some other identifier is also provided, such as the ancestor's Aboriginal name and/or the name of their partner or spouse/s.

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).

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. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s238, ss47, 47A, or 47B apply), the Kullilli People claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group.

2. Over areas where a claim to exclusive possession cannot be recognised, the Kullilli People claim the following rights and interests:
    a) the right to access the application area;
    b) the right to camp on the application area;
    c) the right to erect shelters on the application area;
    d) the right to exist on the application area;
    e) the right to move about the application area;
    f) the right to hold meetings on the application area;
    g) the right to hunt on the application area;
    h) the right to fish on the application area;
    i) the right to use the natural water resources of the application area including the beds and banks of watercourses;
    j) 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;
    k) the right to conduct ceremony on the application area;
    l) the right to participate in cultural activities on the application area;
    m) the right to maintain places of importance under traditional laws, customs and practices in the application area;
    n) the right to protect places of importance under traditional laws, customs and practices in the application area;
    o) the right to conduct burials on the application area;
    p) the right to speak for and make non-exclusive decisions about the application area;
    q) the right to cultivate and harvest native flora according to traditional laws and customs

3. The native title rights and interests are subject to:
    a) The valid laws of the State of Queensland and the Commonwealth of Australia; and
    b) The rights conferred under those laws.

It is my view that the description of the claimed native title rights and interests is clear and easily understood. 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.

Result and Reasons

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

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

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 by a Full Court (French, Moore and Lindgren JJ) in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*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'.

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).

I note also my view that *Doepel* is authority that I should approach the task by analysing 'the information available to address, and make findings about, the particular matters to which s. 190B(5) refers'—at [130]. I refer also to *Doepel* at [132] where Mansfield J said 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 sub-assertions in subparagraphs (a) to (c), then the requirements of the section overall are likely to be met. I therefore address the three sub-assertions before concluding whether overall the requirements of the section are met.

Information before me in relation to the factual basis

The application refers me to the contents of attachment F for a general description of the factual basis. This appears to be a report or an excerpt of a report by the anthropologist retained by QSNTS to research and report on the claim in this application, **[Anthropologist 1 – name deleted]**—see annexure 'A' and the reference to '**[Anthropologist 1 – name deleted]** 2008 Kullili Native Title Claim Application Schedule F (Form 1) and Schedule M Report for QSNTS'. Further information in relation to the factual basis is provided in schedule A (description of the native title claim group). Attachment M provides details of traditional physical connection by members of the native title claim group with areas covered by the application. I note that much of the information in attachment M replicates that found in attachment F and also appears to have been authored by **[Anthropologist 1 – name deleted]**.

Each of the persons comprising the applicant states in their s. 62(1)(a) affidavit that they believe all of the statements made in the application are true.

Further material relevant to the factual basis is found in an affidavit by **[Anthropologist 1 – name deleted]** which was filed with the application on 23 March 2009. **[Anthropologist 1 – name deleted]** affidavit provides details of his anthropological qualifications and expertise at [1]–[4] of his affidavit. He states at [5] that he has conducted 'extensive anthropological research in relation to south-west Queensland' where the claim is situated and at [6] that he has been 'working and maintaining contact with Kullilli families over the last eight years'.

[Anthropologist 1 – name deleted] states that he provided a preliminary or pre-connection report on the Kullilli People to QSNTS in July 2006 for 'the purpose of satisfying the State's guidelines for negotiation of a consent determination'—at [6] and [8]. **[Anthropologist 1 – name deleted]** states at [8] that in his July 2006 report he was 'able to make some preliminary observations about the society of Kullilli People and their connection of *(sic)* the land and waters subject to this claim.'

[Anthropologist 1 – name deleted] also provided recommendations to QSNTS 'regarding appropriate boundaries for the current Kullilli application'—at [7]. **[Anthropologist 1 – name deleted]** states at [7] that although the boundary described in the application and presented to the authorisation meeting on 10 May 2008 'is not strictly in accordance with my recommendations I would not regard the difference as significant, and say that the appropriate boundary is not less than that claimed' in the map as referred to in paragraph 11 of my affidavit'. Although the map refered to in [11] of the affidavit and copied at annexure A bears a date that is later than the date of the authorisation meeting, I am prepared to accept that the meeting considered a map which showed a boundary along the lines of that depicted on this map, as this seems to be the effect of **[Anthropologist 1 – name deleted]** sworn affidavit evidence at [11]. There is nothing in any of the

information before me to suggest that a map showing different boundaries was considered by those at the meeting.

[Anthropologist 1 – name deleted] states in [9] that since July 2006 he has 'been involved in additional research in and around country being claimed by the Kullilli people' and that his 'current views on the society of the Kullilli People and their connection of the land and waters subject to the claim' have not changed. These views are found in [13] of the affidavit. **[Anthropologist 1 – name deleted]** does stipulate at [13] that his affidavit has been prepared for the purposes of securing registration of the application and it 'is preliminary in the sense that additional research would be required for the presentation of a connection report to the state or for preparation for a hearing on trial'. In my view, this is entirely acceptable for the purposes of s. 190B(5), noting the comments of the Full Court in *Gudjala FC* at [92] quoted above.

(a) that the native title claim group have, and their predecessors had, an association with the application area;

I am **satisfied** that the factual basis provided is sufficient to support the assertion that the native title claim group have, and their predecessors had, an association with the application area.

I see from the map in attachment C showing the external boundaries of the application area that it encloses a large area of south-western Queensland from its border with New South Wales to the northern reaches of the Grey Range. The Bulloo River intersects the application area from the south-western reaches to the north-eastern reaches of the application area. Bulloo Downs station is a large pastoral holding in the south-eastern reaches of the application area. Thargomindah town and station is located centrally in the east of the application area and Noccundra is located centrally on the western boundary. The map identifies that the Kullilli application area is bounded by four neighbouring native title claims—Wongkumara People (QUD52/08) to the west, Boonthamurra People (QUD435/06) to the north-west, Mardigan People (QUD26/07) to the north-east and Budjiti People (QUD53/07) to the south-east.

[Anthropologist 1 – name deleted] states in [13A] that there was a normative society of Kullilli people at the time of sovereignty and European occupation of the area. He states that the Kullilli apical ancestors listed in schedule A 'were present and resident in the area and living as part of that normative society at about the time of European settlement of Kullilli traditional lands'. European settlement of the area is identified in attachment F as having occurred in the 1860s (on pp. 1–2). I see from the map in attachment C of the application that the places identified as having a connection with the Kullilli at the time of European settlement (Bulloo River, Bulloo Downs station, Thargomindah station and Thargomindah town) are all covered by the application.

Attachment F refers to early ethnographic material identifying that the country around the Bulloo/Thargomindah region is the traditional country of the Kullilli—see Mathews (1905) who located the Kullilli 'east of the Wonkamurra on the Bulloo Downs. North is Boonthamurra.' Reference is also made to correspondence to Mathews on 21 September 1898 from Acting Sergeant M Daley to the effect that the Thargomindah 'tribe' is called 'Callillie' (this would appear to be a variant spelling of 'Kullilli'). This information about the boundaries of the Kullilli at or shortly after European settlement generally supports the boundaries covered by the Kullilli application, noting that it abuts but does not overlap any of the neighbouring native title claims.

Attachment F identifies on pp. 2–3 that most of the Kullilli apical ancestors were born on Kullilli country. Attachment M states (p. 2) that these ancestors remained on country and were able to work on pastoral stations following European settlement:

- **[Persons 2, 3 and 4 – names deleted]** were born on Dynevor Downs (located to the east of Thargomindah outside of the application area, but proximate to it);
- **[Persons 5, 6, 7, 8 and 9 – names deleted]** were born on Norley (a station located centrally in the eastern reaches of the application area);
- **[Persons 10, 11, 12, 13, 14, 15 and 16 - name deleted]** were born on Thargomindah (within the application area);
- **[Persons 17, 18, 19, 20, 21, 22, 23, 24 and 25 – names deleted]** with Bulloo Downs (within the application area).

[Anthropologist 1 – name deleted] states in [13B]–[13C] that the descendants of the Kullilli apical ancestors have continued to conduct themselves as part of a Kullilli normative society with each successive generation continuing to identify as Kullilli and continuing the same or substantially similar traditions and customs. At [16] **[Anthropologist 1 – name deleted]** points out that individuals born in the 1920s were growing up with elders who themselves were born and grew up in an entirely pre-European traditional society. **[Anthropologist 1 – name deleted]** refers to the life histories of two families who were never removed from country—at [13B].

At [13C] **[Anthropologist 1 – name deleted]** states that other Kullilli families 'also occupy regularly Kullilli country from nearby residential centres such as Bourke, Thargomindah, Quilpie and Cunnamulla and further afield'. There is also information in **[Anthropologist 1 – name deleted]** affidavit and attachment F describing how Kullilli people who were taken from their country to Aboriginal reserves were able to maintain their identity and knowledge of the traditional laws and customs of their forebears—see **[Anthropologist 1 – name deleted]** [13A], [16]; attachment F, p. 3. Attachment F refers to the discussion in Tennent–Kelly (1935:471–2) of 'the lively Kullilli society on Cherbourg' including the 'persistence of belief in totems, supernatural entities and the links that these cultural aspects had to country'. **[Anthropologist 1 – name deleted]** states in [13C] that virtually all families visit country for hunting, fishing and camping, including to teach younger generations about country and to inspect sites significant to their particular family. Numerous specific examples of current association by particular members of the native title claim group with the application area are provided throughout attachment F.

[Anthropologist 1 – name deleted] states his opinion at [15] that the claim group as a whole has a continuous association with the claim area.

Having regard to all of this information I am **satisfied** that the factual basis provided is sufficient to support the assertion that the native title claim group have, and the predecessors of those persons had, an association with the area. There is sufficient and detailed information in **[Anthropologist 1 – name deleted]** affidavit and in attachment F to support the assertion.

(b) that there exist traditional laws acknowledged and traditional customs observed by the native title claim group that give rise to the claim to native title rights and interests;

I am **satisfied** that the factual basis provided is sufficient to support the assertion that there exist traditional laws acknowledged and traditional customs observed by the native title claim group that give rise to the claim to native title rights and interests.

In my view, the assertion in s. 190B(5)(b), and that found in s. 190B(5)(c), needs to be understood in light of the definition of 'native title' or 'native title rights and interests' in s. 223(1) of the Act, and particularly the elements of that definition in subparagraph (a):

> (1) 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 or interests are possessed under the traditional laws acknowledged and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders;

It is also my view that the usage in ss. 190B(5)(b) and (c) of terminology similar to that found in s. 223(1)(a) in turn requires a consideration of the decision by the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 (*Yorta Yorta*) of what is meant by the term 'traditional' in the context of s. 223(1)(a). In my view this is supported by the decision at first instance in *Gudjala v Native Title Registrar* [2007] FCA 1167 which comprehensively summarised the principles enunciated in *Yorta Yorta* at [26] and then sought to apply them to the factual basis provided in the Gudjala application, an approach which was not criticised or overturned by the Full Court in *Gudjala FC*.

The High Court in *Yorta Yorta* 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 had this to say about the meaning of 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.

In light of these passages from *Yorta Yorta*, I am of the view 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. I note my view here that the second element of what is meant by the term 'traditional laws acknowledged, and the traditional customs observed' in s. 223(1)(a) discussed at [47] of *Yorta Yorta* is referrable to the assertion in s. 190B(5)(c),

namely, that the factual basis must support an assertion that the group have continued to hold the native title in accordance with those traditional laws and customs.

In my view, *Gudjala FC* confirms that the factual basis for the assertion in s. 190B(5)(b) 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. I refer to the comments of the Full Court at [96] 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'.

[Anthropologist 1 – name deleted] states his view in [13A] that the society observed when the area was first settled in the 1860s was a 'semi nomadic hunting/gathering society that dwelt on the lands around an area at least as large as the area' shown on the map annexed at 'B' of his affidavit (this is the area covered by the application). He states his view that the society was comprised of sub-groups making a decentralised social structure, coming together for special events and major land issues'. **[Anthropologist 1 – name deleted]** identifies two Kullilli persons who told to Tindale in the 1930s about their Kullilli traditional law and custom relating to kinship, including moieties and totem, and the bounds of Kullilli country told. He also names two Kullilli elders who in more recent times left taped records of their knowledge of Kullilli culture.

At [13B], **[Anthropologist 1 – name deleted]** states that the descendants of the group's apical ancestors have 'continued to conduct themselves as part of that normative society with each successive generation continuing to identify as Kullilli People and continuing traditions and customs of the original apical ancestors with modification having regard to changing circumstances'. **[Anthropologist 1 – name deleted]** states in [16] that the continuous association of the group with the application area is based on traditional laws and customs.

At [18] **[Anthropologist 1 – name deleted]** states that the apical ancestors 'were part of a very strong Kullilli society, which, after a short period of frontier violence, received well and greatly assisted the settlement of the first pastoralists in the area'. This happened in the 1860s. **[Anthropologist 1 – name deleted]** comments that 'published and unpublished records comment that Kullilli individuals and their families formed a well structure *(sic)* society.'

At [19] he states:

> Kullilli society had a complex system of traditional laws and customs which included large corroborees, ceremonial sites, arranged marriages, daily hunting and gathering, and taking leave from stockman employment to go on lengthy walkabouts before returning to their employment as stockmen.

[Anthropologist 1 – name deleted] notes that this is documented in the literature and in oral histories from both Kullilli and pastoralists. He asserts that there are also government records at the Queensland state archives which provide ample evidence of a continuous presence of Kullilli individuals and families in the area.

[Anthropologist 1 – name deleted] refers at [20] to the process of traditional arranged marriage, saying that this is a 'powerful indicator of a group of individuals being a society'. He says that there are many documented examples of these among the descendants of the apical ancestors. He notes that traditionally arranged marriages were made to ensure that individuals belong to the

proper moiety and totem. He notes that the last known arranged marriage within the Kullilli occurred as late as 1945.

This information from **[Anthropologist 1 – name deleted]** supports an assertion that there was a Kullilli society in the early to-mid 20th century observing traditional laws and customs which were 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. Attachment F (pp.4–7) provides details of the anthropological and historical documents which reported and commented on the traditional system or Aboriginal society that operated in south-western Queensland at and after European settlement. These documents discuss traditional laws and customs relating to patrilocal residence and moeity systems that allocated totems to the four subclasses within that system via matrilineal inheritence. These moiety systems also determined social practices of marriage and relationships with other family members. Totemic allocations governed allocations of resources and and also becomes a spiritual link to country.

On p. 6 of attachment F is the statement:

> The current Kullilli group are aware of these systems and still identify with their subclass and totem affiliations through a cognatic system of descent (traced through either the mother and/or father) and the rights and interests in land that are linked to these kinship affiliations.

It is stated that Kullilli initiation cermonies continued until the last one on country in 1927 and this shows how Kullilli people 'retained cultural aspects despite European settlement'. Attachment F also states that 'Kullilli people have continued to hunt, fish, gather plants and camp in the claim area in accordance with the traditional laws and customs of the Kullilli.'

In relation to the continuation of that society and its continued observation of traditional law and custom rooted in pre-sovereignty society, **[Anthropologist 1 – name deleted]** states in [22] that from his research:

> I am able to say that the Aboriginal society which existed at sovereignty is in general terms the same society today, with substantially the same traditional laws and customs as those which are observed by members of the contemporary claim group.

He elaborates on this point in [23] saying that the Kullilli community 'is a vibrant dynamic society, which embraces its history and traditions' and 'has survived European settlement with its laws and customs substantially intact. He provides the following evidence for this:

- Kullilli people 'value and appreciate their identity and revere where they come from and what unites them as a people.' They know where their traditional country lies and 'uniformly understand how a particular person is entitled to assert Kullilli identity'.
- Hunting, fishing and foraging in the area is widely practised, as are traditional methods and customs as to how these things are practised.
- Kullilli society have a widespread knowledge of the location and importance of significant sites with the claim area, and widespread observance of rules about avoiding sites, caring for sites, or following rituals before entering specific sites.
- Cultural knowledge has been passed down orally from one generation to the next without interruption since sovereignty.
- There is a clear correspondence between the knowledge of culture and significant sites and seniority of individuals within Kullilli society.

- There are clear indications of a process of inheritance of knowledge and awareness of significant sites.

There are some indications in the material that the laws and customs now acknowledged and observed by the native title claim group have undergone some change from those observed by the society at the time of European settlement. For example, arranged marriages are no longer practised, the last having occurred in the 1940s (**[Anthropologist 1 – name deleted]** [20]). Schedule A indicates that the group now observe cognatic descent to establish group membership, rather than the complex system of moieties and subclasses, totemic affiliations via matrilineal inheritance and social marriage practices described in attachment F. Attachment F (p.6) states that the current group 'are aware of these systems and still identify with their subclass and totem affiliations through a cognatic system of descent (traced through either the mother and/or father) and the rights and interests in that are linked to these kinship affiliations'. Whether there has been a permissable adaptation of the traditional laws and customs of the pre-sovereignty society may well be an issue at the trial.

I am **satisfied** that the totality of the information I have considered provides a sufficient factual basis for the assertion that there exist traditional laws and customs that give rise to the claim to native title rights and interests.

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

I am **satisfied** that the factual basis provided is sufficient to support the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

In my view, the issue 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 the claimed native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way, this being the second element to the meaning of '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: compare this with *Yorta Yorta* at [47] and also at [87].

The application asserts that the current native title claim group observe the traditional laws and customs of a pre-sovereignty society as did their apical ancestors, who are identified as having belonged to that society after European settlement of the region. The application provides a factual basis that generally describes the inter-generational transmission of laws and customs relating to their Kullilli identity and the bounds of their country, including laws and customs relating to descent (with some change or adaptation), totemic affiliations, hunting fishing and foraging, knowledge of special sites and the customs to be observed when entering sites on country.

I have noted above that the material indicates some change or adaptation to the descent rules governing acquisition by group members of rights and interests in their country. It seems likely that these changes result from the impact of European settlement on the Kullilli, discussed in both attachment F and **[Anthropologist 1 – name deleted]** affidavit.

I note that a Full Court recently commented in *Griffiths v Northern Territory* [2007] FCFCA 178 that changes to descent rules that govern acquisition of rights and interests by group members is a

'vexed' question, namely, whether such a change 'necessarily has the consequence that the rights and interests are not possessed under the traditional laws acknowledged, and the traditional customs observed, by the relevant Aboriginal peoples (see s 223 of the NT Act)'. In that case the Full Court found no error by the trial judge in accepting evidence that 'the underpinning normative system has not changed'—at [141].

It is argued by **[Anthropologist 1 – name deleted]** and in attachment F that despite the effects of European settlement, sufficient numbers were able to remain on country, to work on pastoral stations and to maintain their communal identity as Kullilli People whilst living on reserves, such that the group has continued to observe the laws and customs of the pre-sovereignty society in a substantially uninterrupted way to the present day. Numerous and specific examples are provided by **[Anthropologist 1 – name deleted]** and also in attachment F of Kullilli individuals and families who, it is asserted, have continued to maintain their Kullilli identity and to observe the laws and customs of their forebears. The totality of the information in my view answers what is required by the section. In my view, the issue of whether there has been a cessation or break in the observance of traditional law and custom by a relevant society is ultimately for the trial judge to determine.

I find that I am **satisfied** that the factual basis provided is sufficient to support an assertion that the native title claim group have continued to hold native title in accordance with the traditional laws and customs of a pre-sovereignty society.

Conclusion

To conclude, as I am satisfied that a sufficient factual basis is provided to support the three particular assertions in s. 190B(5), it follows that overall, I am satisfied that the requirements of this section are met.

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) 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).

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 on these three points as follows:

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 prima facie supports the existence 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).

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 *Western Australia v Ward* (2002) 213 CLR 1 [2002] HCA 28 (*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) prima facie cannot be established.

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 *Ward HC*.

With these principles in mind I will consider each individual right and interest described in attachment E. I intend to consider the 'exclusive' rights claimed at [1], [10] and [11] together as these rights raise particular legal issues that should be considered together. I note that the concluding paragraph of attachment E identifies that rights [1], [10] and [11] are claimed only over particular areas. It appears that the intent is to claim these rights only over areas where exclusivity has not been extinguished.

To assist the reader, I identify at the outset of each right being considered whether or not I consider that, prima facie, the claimed right can be established:

1. *Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s238, ss47, 47A, or 47B apply), the Kullilli People claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group.*

Outcome: not prima facie established.

Ward HC states:

> a core concept of traditional law and custom [is] the right to be asked permission and to 'speak for country'. It is the rights under traditional law and custom to be asked permission and to 'speak for country' that are expressed in common law terms as a right to posses, occupy, use and enjoy land to the exclusion of all others— at [88]. See also at [90] – [93].

Sampi v State of Western Australia [2005] FC A 777 states:

> the right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation—at [1072].

More recently, the Full Court in *Griffiths v Northern Territory* (2007) 243 ALR 7 (*Griffiths*) reviewed the case law about what was needed to prove the existence of exclusive native title in any given case and found that it was wrong for the trial judge to have approached the question of exclusivity with common law concepts of usufructuary or proprietary rights in mind:

> . . . the question whether the native title rights of a given native title claim group include the right to exclude others from the land the subject of their application does not depend upon any formal classification of such rights as usufructuary or proprietary. ***It depends rather on consideration of what the evidence discloses about their content under traditional law and custom.*** It is not a necessary condition of the existence of a right of exclusive use and occupation that the evidence discloses rights and interests that "rise significantly above the level of usufructuary rights"—at [71]. (*emphasis added)*

The Full Court in *Griffiths* indicates at [127] that what is required to prove exclusive rights such as that claimed in this application is to show how, under traditional law and custom, being those laws and customs derived from a pre-sovereignty society and with a continued vitality since then, the group may effectively 'exclude from their country people not of their community', including by way of 'spiritual sanction visited upon unauthorised entry' and as the 'gatekeepers for the purpose of preventing harm and avoiding injury to country'. The Court stressed at [127] that it is also:

important to bear in mind that ***traditional law and custom***, so far as it bore upon relationships with persons outside the relevant community ***at the time of sovereignty***, would have been framed by reference to relations with indigenous people. (*emphasis added)*

There is a reference on pp. 6–7 of attachment F to one of the Kullilli elders who 'remained adamant that dire consequences would result either in Kullilli people transgressing boundaries or visiting restricted sites or others unlawfully entering Kullilli country.' On p. 7 of attachment F is the statement that 'to this day, Kullilli people will not access another group's country to hunt or fish without proper permission.' However, I find that these statements do not prima facie establish a traditional law and custom which gives rise to a right to exclude others from the application area. The description provided in attachment F of the pre-sovereignty society and its traditional laws and customs (see pp. 4–10) does not identify as one of its rules or laws that the group may exclude Indigenous people who do not belong to their community, as discussed in *Griffiths*. I am not prepared to infer that such a law exists in the absence of clear information within the application as to its asserted operation before European settlement.

2. *Over areas where a claim to exclusive possession cannot be recognised, the Kullilli People claim the following rights and interests:*

    a) *the right to access the application area;*

    b) *the right to camp on the application area;*

    c) *the right to erect shelters on the application area;*

    d) *the right to exist on the application area;*

    e) *the right to move about the application area;*

    f) *the right to hold meetings on the application area;*

    g) *the right to hunt on the application area;*

    h) *the right to fish on the application area;*

    i) *the right to use the natural water resources of the application area including the beds and banks of watercourses;*

    j) *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;*

    k) *the right to conduct ceremony on the application area;*

    l) *the right to participate in cultural activities on the application area;*

Outcome: All 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. 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. Attachment F (p. 4) states that anthropological and historical documents show that there was a traditional Aboriginal system in operation in the area that 'involved a social tribal organisation with regulations involving descent, marriage, and totems which were heavily based in connections to certain tracts of country'. This 'strong and vibrant' traditional Kullilli society existed at the time of settlement in the 1860s and it observed laws and customs related to 'patrilocal residence, with

matrilineal inheritance of the moiety system, totemic links, food prohibitions, initiation rites and regular 'inter tribal' ceremonial gatherings, traditional trade routes, responsibility and duty of care for traditional lands.'

Numerous and specific examples are found throughout attachment F (pp. 10–29) 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.

m) the right to maintain places of importance under traditional laws, customs and practices in the application area;

n) the right to protect places of importance under traditional laws, customs and practices in the application area;

Outcome: Both prima facie established.

These similar rights are discussed on pp. 29–34 of attachment F. This information, in my view, show how these rights are currently exercised under the traditional laws and customs of the Kullilli people, including those relating to assignment of totems, location of sacred sites and a duty to protect those areas, including having a spiritual responsibility to look after these places.

o) the right to conduct burials on the application area;

Outcome: Not prima facie established.

The information provided in relation to this right and interest indicates that the group buried their dead on the application area at sovereignty, this is no longer practised due to the laws of the new sovereign which make it illegal to bury outside cemeteries today. Attachment F states on p. 34 that Kullilli traditional custom still consists of having traditional smoking ceremonies and maintenance and protection of the graves of ancestors. This seems more akin to a right to conduct ceremony, than to conduct burials. I am not satisfied that this right is prima facie established

p) the right to speak for and make non-exclusive decisions about the application area;

Outcome: Not prima facie established

Based on the authorities discussed above under right [1], it is my view that a 'right to speak for country' exerts a right to control which is an integral element of the exclusive right of possession, occupation, use and enjoyment. On the basis of my finding above that the application does not prima facie establish the group's right to possess, occupy, use and enjoy the application area as against the whole world, it must follow that a 'right to speak for country' cannot be established either. It may be that the application could support, prima facie, the group's right to make non-exclusive decisions about the area, however, I am of the view that I cannot separate the rights as this would amount to an impermissable re-drafting of the application.

I therefore cannot find that the right can be prima facie established.

q) the right to cultivate and harvest native flora according to traditional laws and customs

Outcome: Not prima facie established.

In my view the material does not support the existence of a traditional law and custom underpinning rights and interests relating to cultivating or harvesting the native flora of the area. Rather the material indicates that the society at sovereignty was a semi-nomadic hunter/gathering society— **[Anthropologist 1 – name deleted]** [13A]. Indeed the information provided in attachment F in relation to this right at pp. 37–38 relate hunting and gathering being currently conducted by members of the native title claim group according to traditional law and custom.

Conclusion

As I consider that prima facie, some of the claimed native title rights and interests can be established, the requirements of this section are met. I direct that only those rights established prima facie are to be entered on the Register of Native Title Claims and that the entry also include details of the concluding paragraph of schedule E, namely:

3. *The native title rights and interests are subject to:*
    a) *The valid laws of the State of Queensland and the Commonwealth of Australia; and*
    b) *The rights conferred under those laws.*

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).

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 attachments F and M and **[Anthropologist 1 – name deleted]** affidavit 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 customs when entering sites.

On the basis of this material, I am satisfied 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). There are no approved determinations of native title covering 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.

Result and reasons

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

Items 2 and 3 of schedule B states that any area covered by a PEPA is excluded from the application area. I note that schedule L asserts a claim to the benefit of ss. 47, 47A and 47B where available. Section 61A(2), when read with s. 61A(4), permits a claim in these terms

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).

Item 3 of schedule B states that exclusive possession is not claimed over areas subject to any PNEPAs. I note also that schedule E provides that exclusive possession is only claimed over areas where there has been no extinguishment or where the Act allows extinguishment to be disregarded. Finally, I note again that schedule L asserts a claim to the benefit of ss. 47, 47A and 47B where available. Section 61A(3), when read with s. 61A(4), permits a claim in these terms.

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 the native title claim group do not claim ownership of 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).

The application does not extend to any offshore places.

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

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

Item 6 of schedule B excludes from the application area any area where 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]