National Native Title Tribunal

Registration test decision – Edited reasons

Application name	Turrbal People
Name of applicant	Connie Isaacs and Maroochy Barambah
State/territory/region	Queensland
NNTT file no.	QC98/26
Federal Court of Australia file no.	QUD6196/98
Date application made	13 May 1998
Date application last amended	24 October 2008
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, my opinion is that the claim satisfies all of the conditions in s. 190B.

Date of decision: 15 January 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 17 October 2008 pursuant to s. 99 of the Act.

Reasons for decision

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Introduction

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

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

The test

Subsection 190A(6) requires that I must be satisfied that *all* the conditions set out in ss. 190B and 190C of the Act are met, in order for me to accept a claim for registration.

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

Application overview

The application has had a long procedural history. It was originally lodged with the Registrar in May 1998 under the *Native Title Act* 1993, prior to its amendment by the *Native Title Amendment Act 1998*, which introduced the test for registration in s. 190A. The application covers a large number of land parcels within Brisbane and surrounding areas, subject to any applicable exclusions.

The application was amended by leave of the Court on two occasions in November 1999 and April 2000, with both amended claims thereafter being considered for and accepted for registration by the Registrar's delegate. The application was not removed from the Register of Native Title Claims following application of the registration test on these previous occasions.

On 2 March 2006 the Court gave leave to amend the application to reinstate reserve parcels of land that were excised when the claim was amended in 2000. On 22 February 2007, the Court again gave leave to amend, including to the area description (schedule B), the native title claim group description (schedule A) and the details of traditional physical connection (schedule M). These amendments to the application in 2006 and 2007 have not undergone the test for registration in s. 190A due to the applicant's request that the test be deferred until resolution of proceedings to replace the applicant under s. 66B. The s. 66B proceedings were decided by Spender J in *Turrbal People v State of Queensland* [2008] FCA 316 on 11 March 2008 when his Honour granted leave to replace Mrs Connie Isaacs as the sole applicant with Mrs Isaacs and Maroochy Barambah as the two persons jointly comprising applicant. The entry on the Register of Native Title Claims for the application was thereafter amended to reflect the terms of the order, as required by s. 66B(4).

In April 2008, the applicant's legal representative requested that a delegate of the Registrar provide a preliminary assessment of a proposed further amendment to the application against the

conditions of the registration test. A preliminary assessment was provided to the applicant in May 2008. In July 2008, a delegate of the Registrar agreed to defer the registration testing of the application to allow the applicant further time to amend the application, which the applicant did on 21 August 2008. The applicant's legal representative also provided the Registrar with a submission and additional information to support the application meeting the requirements of the registration test on 31 August 2008.

On 24 October 2008, the Court gave leave for the application to be amended in the terms of an amended form 1 filed on 17 October 2008, although the Court ordered two further changes to that amended form 1, at schedules A and B respectively. An amended application which incorporated these changes was filed in the Court on 30 October 2008 and the Court thereafter provided a copy to the Registrar pursuant to s. 64(4) on 10 November 2008. It is the claim in this amended application that now falls to be considered for registration pursuant to s. 190A.

Most recently, the applicant's legal representative provided further written submissions dated 2 November 2008, informing the Registrar that these submissions are to replace the submissions provided on 31 August 2008. I understand that this is because the earlier submissions related to the earlier version of the proposed amendment application filed on 21 August 2008, whereas the new submissions relate to the latest amended application filed on 30 October 2008, pursuant to the leave granted on 24 October 2008.

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 have considered all of the documents in the Tribunal's delegate registration test file (for this application (reference QC98/26), including the following documents from that file:

- the original application lodged with the Registrar on 13 May 1998 and the earlier amendments of the application in September 1999, April 2000, February 2006 and February 2007, including the related Federal Court orders granting leave to amend;
- the amended applications filed on 21 August 2008 and 17 October 2008 and the Federal Court order dated 24 October 2008 granting the applicant leave to amend;
- the written submission by the applicant's legal representative dated 31 August 2008 and copies of the following documents provided with the submission:
    - affidavit by **[Claimant 1 – name deleted]** dated 24 August 2008
    - affidavit of **[Applicant 1]** dated 24 August 2008
    - first affidavit of **[Applicant 2]** dated 24 August 2008
    - affidavit of **[Claimant 2 – name deleted]** dated 23 August 2008
    - draft amended application
    - second affidavit by **[Applicant 2]** dated 24 August 2008
    - affidavit by the applicant's legal representative dated 7 May 2007

    - three further affidavits by **[Applicant 2]** dated 14 May 2007, 20 May 2007 and 19 June 2007;
- the written submission by the applicant's legal representative dated 2 November 2008 together with a copy of an affidavit by **[Claimant 1]** dated 24 January 2006 provided with the submission;
- the decision by Spender J in *Turrbal People v State of Queensland* [2008] FCA 316 (*Turrbal*) relating to s. 66B proceedings to replace the applicant.
- The 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 19 November 2008 (the geospatial report).

Procedural fairness

The State of Queensland (the state) is a person entitled to procedural fairness; the authority for this is *Western Australia v Native Title Registrar* (1999) 95 FCR 93 (*Western Australia v Registrar*). I note that the state has a copy of the application, including the amended applications filed in the Court over the years, as it is a party to the Federal Court proceedings. The state is also aware of the s. 66B decision in *Turrbal*. In line with *Western Australia v Registrar* the state has been provided with the additional information provided by the applicant identified in the preceding paragraph and offered an opportunity to comment before my decision. The state advised an officer of the Tribunal on 2 December 2008 that it would not be providing any comment. There are two registered native title claims that partly overlap the application area (the Jinibara People QUD6128/98 and Jagera People #2 QUD6014/03 applications). However, in line with *Hazelbane v Doepel* [2008] FCA 290 at [25]–[28], it is my view that I am not required to afford procedural fairness to the applicants for these claims.

Procedural and other conditions: s. 190C

Section 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).

Doepel is authority that my consideration of s. 61(1) under 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. *Doepel* is also authority 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—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 names of the persons jointly comprising the applicant are found at the start of the form 1 and their address for service is found in Part B, at the end of the form 1.

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 entry in the National Native Title Register, and
> (iii) the applicant believes all of the statements made in the application are true, and

(iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and
(v) stating the basis on which the applicant is authorised as mentioned in (iv).

Result and reasons

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

There are two persons who jointly comprise the applicant and they have each made an affidavit that swears to the matters in ss. 62(1)(a)(i) to (iv). With respect to s. 62(1)(a)(v), each deponent states that the process of decision–making mandated under the group's system of traditional law and custom has been complied with and they also provide details of that process in paragraph 5 of their affidavits. Paragraph 5 identifies that the process involves **[Applicant 1]** as the group's elder making decisions of this kind on behalf of the rest of the persons in the native title claim group, with this having occurred on 9 February 2007. This, in my view, sufficiently sets out details of the process of decision-making for the purposes of s. 62(1)(a)(v).

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

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

Delegate's comment

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). It contains a written description and a map of the area covered by the application and a written description of areas within those boundaries not covered by the application (see attachments B and C).

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). It contains a map showing the external boundaries of the application area in attachment C.

Searches: s. 62(2)(c)

> The application must contain the details and results of all searches carried out 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). It identifies in schedule D that the applicant is not aware of any searches. In my view, the applicant is only required to provide details and results of searches that it has in fact carried out. I infer from the statement in schedule D that the applicant has not carried out any searches of the relevant kind.

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 attachment 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 and further information relating to the claimed factual basis is found in attachment G and schedules A and M of the application. This information is summarised in my reasons below when I consider the sufficiency of the material, as required by s. 190B(5).

I do not deliberate at this point in my decision on the sufficiency of the information in attachment F, or elsewhere within the application, for the purposes of s. 190C(2), in light of my view that this is the task required of me under the corresponding merit condition at s. 190B(5). It is this latter section which requires me to be satisfied that the factual basis on which it is asserted that the

native title rights and interests claimed exist is sufficient to support that assertion and, in particular, the three assertions found in ss. 190B(5)(a) to (c).

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). Details of activities currently carried out in relation to the application area are found in attachment 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). Details of the other two applications made over areas covered by this application are found in schedule H.

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). It states in schedule I that the applicant is not aware of any s. 29 notices.

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.

Section 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).

There are two other applications (the Jinibara People–QUD6128/98 and the Jagera People #2–QUD6014/03 applications) that partly overlap the area of the current application. However for these to be 'previous' applications in the sense required by s. 190C(3), they must meet all three conditions in s. 190C(3)(a), (b) and (c)— *Western Australia v Native Title Registrar* (2000) 99 FCR 33 (*Strickland FC*) at [9].

It is only those applications that were on the Register when the current application was made that meet the first element of the term 'previous' as discussed in paragraph 190C(3)(b). 'Made' means the date on which it was filed in the Federal Court, or in the case of an 'old Act' application (i.e. one made prior to 30 September 1998 when the *Native Title Amendment Act 1998* commenced), when it was lodged with the Registrar under s. 61 of the old Act—see *Strickland FC* at [41]–[52]. The current application is an old Act application that was made when it was lodged with the Registrar on 13 May 1998.

A search of all three applications against the Register reveals that the current application was made before the other two applications on 13 May 1998. The other two applications were made on 29 September 1998 and 11 March 2004 respectively. Accordingly, the two overlapping applications are not 'previous' in the sense required by s. 190C(3)(b) as they were not on the Register when the current application was made. I am therefore not required to consider whether the claim groups have any common members.

Section 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(5), if the application has not been certified, the application must:

(a) include a statement to the effect that the requirement in s. 190C(4)(b) above has been met (see s. 251B, which defines the word 'authorise'), and

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

Result and reasons

I am **satisfied** that the requirements of s. 190C(4)(b) are met for the reasons below and it therefore follows that the requirements of s. 190C(4) as a whole are met.

The application is not certified pursuant to s. 203BE by any representative body that could certify the application and accordingly, the requirements of s. 190C(4)(a) do not apply. It follows that I must consider whether I am satisfied pursuant to s. 190C(4)(b) that 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.

As the application is not certified it must also, pursuant to s. 190C(5), include a statement to the effect that the requirement in s. 190C(4)(b) has been met and briefly set out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met. The application contains the requisite statement and briefly sets out the grounds in attachment R of the application. Additionally, the two persons jointly comprising the applicant have sworn affidavits that accompany the application (see the affidavits pursuant to s. 62(1)(a) dated 27 October 2007) in which they depose that they are authorised to make the application and to deal with matters arising in relation to it by the native title claim group and also the basis for this statement. Attachment R provides information describing how the authorisation was purportedly achieved. On the basis of this information in the application and the accompanying s. 62(1)(a) affidavits, I am satisfied that the application complies with the requirements in s. 190C(5).

Although I am satisfied that the formal requirements of s. 190C(5) have been met by the information in the application, it is still necessary for me to consider the substantive condition in s. 190C(4)(b)—*Doepel* at [78].

Section 251B defines the term 'authorise' and provides that an applicant's authority from the rest of the native title claim group to make an application must be given in one of two ways, being the alternative processes described in paragraphs 251B(a) and (b):

- in accordance with any traditional process mandated for authorising 'things of this kind' (i.e. authorising an applicant to make a native title determination application), where one exists; or
- in any other case, by an agreed or adopted process in relation to authorising things of that kind.

There is a long line of authority that the second of the two processes under s. 251B may only be employed where there is no traditional process mandated for authorising things of that kind—see, for example, *Evans v Native Title Registrar* [2004] FCA 1070 at [7] and [52].

Attachment R and the two affidavits by the persons jointly comprising the applicant provide the following information in relation to their membership of the native title claim group and their authority to make the application and to deal with matters arising in relation to it by the rest of the persons in the native title claim group:

- The two applicant persons are both members of the native title claim group.

- The traditional laws and customs of the native title claim group mandate a decision making process where **[Applicant 1]** makes decisions of this kind as the Elder of the claim group.
- There was a meeting of claim group members on 9 February 2007 at which **[Applicant 1]** made a decision pursuant to this mandated traditional decision–making process to authorise herself and her daughter, **[Applicant 2]**, to make and to deal with matters arising in relation to this application. The adult members of the claim group who were not able to attend this meeting subsequently acknowledged **[Applicant 1]** authority to make the decision that she and her daughter jointly replace the existing applicant (which was **[Applicant 1]** alone), and acknowledged the making of that decision.

I am satisfied that the two applicant persons are members of the native title claim group. In this regard, I note that the schedule A description of the native title claim group identifies that the group is comprised of **[Applicant 1]** and her biological descendants. **[Applicant 1]** is one of the applicant persons. The other applicant, **[Applicant 2]**, is identified as **[Applicant 1]** daughter (see paragraph 3 of attachment R) and is clearly a member of the native title claim group on this basis.

I am also satisfied that **[Applicant 1]** and **[Applicant 2]**, as the persons jointly comprising the applicant, are authorised to make the application and to deal with matters arising in relation to it by the rest of the native title claim group. I note that their authority from the rest of the native title claim group is said to arise from a decision making process mandated by the group's traditional laws and customs where the group's elder, **[Applicant 1]**, will make the decision and this will then bind the rest of the members of the native title claim group. There does not seem to be any dispute that **[Applicant 1]** is the group's elder; this is supported by other material in the application (including that found in schedule A and attachment F) which indicates that she is the oldest surviving descendant of the **[Ancestor 1 – name deleted]**, who in turn was present in Turrbal country and identified in the historical record as the 'Chief of the Brisbane Tribe' at the time of European contact, circa 1825. This information also reveals **[Applicant 1]** to be the matriarch of the relatively compact family network that makes up the current native title claim group. In this regard, I refer to paragraph 16 of attachment F which identifies that the group comprises approximately 30 people (including children). Paragraph 16 also identifies that approximately 20 Turrbal persons live within Turrbal country and another seven regularly visit Turrbal country.

French J in *Strickland v Native Title Registrar* (1999) 168 ALR at 242; [1999] FCA 1530 (*Strickland*) said that the insertion of the word 'briefly' in s. 190C(5)(b):

> suggests that that the legislature was not concerned to require any detailed explanation of the process by which authorisation is obtained. The sufficiency of the grounds upon which the Registrar should consider that the requirement has been met is primarily a matter for the Registrar—at [57].

French J did note however at [57] that authorisation 'is a matter of considerable importance and fundamental to the legitimacy of native title determination applications' and 'it is not a condition to be met by formulaic statements in or in support of applications'.

These comments and French J's decision in relation to authorisation were approved by the Full Court on appeal against French J's decision in *State of Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 at [77]—[79].

I have referred to the case of *Strickland* because its facts are very similar to the information before me in relation to authorisation. In *Strickland*, the authorisation was supported by evidence in the s. 62(1)(a) affidavits by the two applicant persons that as the group's two elders they have authority under traditional law and custom acknowledged by the rest of the group to make decisions of this kind. A genealogy within an anthropological report provided as additional information to the delegate showed that the two applicant persons were the oldest living descendants of the group's apical ancestors.

Although French J in *Strickland* commented that 'the brevity of the assertion may be criticised', neither the Registrar nor the Court 'was in a position to reject the contention that all relevant authority is vested in the elders of the relevant native title claim group and that the applicants fall into that category'. French J concluded that it was open to the delegate to reach a state of satisfaction 'not only by reference to the assertions contained in the affidavit but also by reference to other anthropological material supplied to him'—*Strickland* at [57].

Similarly I have no information which contradicts the evidence of **[Applicant 1]** and **[Applicant 2]** that their group's traditional laws and customs mandate that a decision of this nature will be made by **[Applicant 1]** as the group's Elder and I therefore accept their evidence, particularly as it is supported by the other information that is provided in schedule A and attachment F identifying that **[Applicant 1]** is the matriarch of a relatively small family that in fact comprises the current native title claim group and the oldest surviving descendant of an Aboriginal man who was present within Turrbal country and identified as chief of the Brisbane tribe, at the time of European contact or settlement.

On the basis of the information in the application and accompanying s. 62(1)(a) affidavits, I am satisfied that the persons comprising the applicant are members of the native title claim group and are authorised to make the application and to deal with matters arising in relation to it by the rest of the persons in the native title claim group.

Merit conditions: s. 190B

Section 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).

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

> (a) information, whether by physical description or otherwise, that enables the boundaries of:

i. the area covered by the application ; and
ii. any areas within those boundaries that are not covered by the application

to be identified

(b) a map showing the external boundary of the application area

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

The written description of the external boundary (attachment B) is thorough and comprehensive using metes and bounds and referencing topographic features, cadastral boundaries, geographic coordinate points and local government boundaries) to describe the overall external boundary within which the particular land parcels covered by the application are located. The particular land parcels are then listed in a schedule, identified as 'Enclosure 1', by reference to the lot and plan numbers by which the parcels are known in the state's cadastre. The map in attachment C depicts the wider external boundary in a bold and clearly contrasting ink and also shows the particular land parcels claimed by use of a bold outline and stippled patterning that shows the location of the areas claimed within the wider external boundaries. The map contains a colour topographic image as a background, scale bar, north point, coordinate grid, locality map and source & datum notes. Features on the map are clearly labelled. The map and written description of the external boundaries were prepared by the Tribunal's Geospatial Services. In an assessment dated 19 November 2008, Geospatial express 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 the areas covered 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 areas within the external boundary that are not covered by the application (i.e. the internal boundary) is found in attachment B. This is a generic description that excludes from the application area any land subject to the acts defined in ss. 229 and 232B of the Act. It also excludes land covered by the acts described in s. 23B of the NTA. It is then stated that ss. 47, 47A or 47B apply to any such areas such that extinguishment must otherwise be disregarded, then the areas so described are in fact covered by the application. It is finally stated that the application does not include areas where native title has otherwise been extinguished.

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

For these reasons, I am satisfied that the information and map in the application required by ss. 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether the native title rights and interests are claimed in relation to the particular areas of land or waters and the requirements of s. 190B(2) are therefore met.

Section 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.

In *Doepel*, Mansfield J stated that:

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

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

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

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

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

> The starting point is a particular person. It is then necessary to ask whether that particular person, as a matter of fact, sits within one or other of the three descriptions in the Three Rules. I

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

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

> The native title claim group is comprised of **[Applicant 1]** and her biological descendants, being the only known descendants of the Turrbal man known as the **[Ancestor 1]** and the only known descendants of those people who comprised the Turrbal People as at 7 February 1788.

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 **[Applicant 1]**.

However, it is my view that the description is clearly within the bounds of the 'Three Rules' test discussed above by Carr J—I am provided with a starting point, that is, the name of the forebear of the group's members, and from there it is possible, with a further factual inquiry, to work out who is biologically descended from that forebear.

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

Section 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).

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

> The native title rights and interests which the applicant claims in relation to the application area are the following:
>
> 1. the right to exclusive possession, occupation and use of the land;

2. the right to live on the land;
3. the right to access land and waters in the claim area;
4. the right to maintain and protect sites of significance to the native title holders;
5. the right to conduct social, religious and cultural activities within the claim area;
6. the right to harvest, fish, cultivate, grow and manage plants, timber, animals, birds and fish located within the claim area;
7. the right to exchange plants, timber, animals, birds and fish located with the claim area with third parties for other things;
8. the right to make things from plants, timber and animals located within the claim area;
9. the right to exchange things made from plants, timber and animals located within the claim area with third parties for other things;
10. the right to make decisions about and to control the access to, and the use and enjoyment of, the land and waters of the claim area and the plants, timber, animals, birds and fish within the claim area;
11. the right to control access and use between the native title holders and any other Aboriginal people who recognise themselves as being governed by the traditional laws and customs acknowledged and observed by the native title holders and who seek access to, or use of, the land in the claim area in accordance with traditional law and custom;
12. the right to teach and pass on knowledge of the claimant group's traditional laws and customs pertaining to the area and knowledge of places in the area;
13. the right to learn about and acquire knowledge concerning, the claimant group's traditional laws and customs pertaining to the area and knowledge of places in the area.

The claimant group only claims the rights listed in [10] and [11] above and the right of exclusive possession, occupation, use and enjoyment in relation to:

a) any areas where there has been no previous extinguishment of native title;
b) any area of natural water resources and the solid land beneath the water where the water is found not to be tidal;
c) any areas affected by category C and D past and intermediate period acts;
d) s. 47A Reserves covered by claimant applications; and / or
e) s. 47B Vacant Crown Land covered by claimant applications.

I find the description of the rights and interests itemised at [1] to [13] to be clear and understandable.

I make the following comments in relation to the statement at the end of attachment E as to the particular areas over which the applicant claims exclusive native title or rights seeking to control access to or use of such areas. The areas in subparagraph (a) are clear and easy to understand. For subparagraph b), it is my view that any exclusive native title over natural water resources has been extinguished—I elaborate on this below at s. 190B(6)–but I am nonetheless able to understand what is claimed. For subparagraph c), it is my view that the draftsperson misunderstands the effect of the NTA in relation to extinguishment over areas covered by category C and D past and intermediate period acts—these provisions of the NTA do not 'undo' extinguishment; they merely provide that there can be no further extinguishment, so claiming exclusive native title over such areas is not necessary. I find that I can understand the description of the areas identified in subparagraphs d) and e), noting that ss. 47A and 47B is available to disregard extinguishment if the particular application before the Court meets the conditions laid down in those sections. I have decided that the statement at the end of attachment E is overall clear and understandable. Any

issues raised by the concluding words of attachment E are, in my view, to be considered by me at s. 190B(6) below when deciding which particular areas the rights and interests at [1], [10] and [11] can be prima facie established.

I am therefore satisfied that the description is sufficient to allow the native title rights and interests claimed to be readily identified.

Section 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).

The application contains a general description of the factual basis in schedule F and further relevant information about the factual basis in schedules A (description of the native title claim group), attachment G (details of activities) and schedule M (details of traditional physical connection). I note also that each of the two persons comprising the applicant has sworn to the truth of the statements in the application in their s. 62(2)(a) affidavits which were filed with the most recent amendment application on 17 October 2008. The applicant has also provided the following additional information in relation to the factual basis directly to the Registrar:

- written submission from the applicant's legal representative dated 2 November 2008
- two affidavits by **[Claimant 1]** sworn 24 January 2006 and 24 August 2008 respectively (**[Claimant 1]** is **[Applicant 1]** son)
- Affidavit by **[Applicant 1]** made 24 August 2008
- Two affidavits by **[Applicant 2]**, both made on 24 August 2008
- Affidavit by **[Claimant 2]** made 23 August 2008 (**[Claimant 2]** is an elder of the Gubbi Gubbi people and attests at [2] of his affidavit that the Gubbi Gubbi share the same laws and customs as the Turrbal People).

The application is a 'lot specific claim' in that it identifies the external boundaries of the traditional lands and waters asserted to belong to the Turrbal people, now occupied by the city of Brisbane and its outskirts, but only claims reserve and unallocated state/crown land within those boundaries. The application is made on behalf of a native title claim group described generally as the Turrbal People and more specifically as '**[Applicant 1]** and her biological descendants, being the only known descendants of the Turrbal man known as the **[Ancestor 1]**, and the only known

descendants of those people who comprised the Turrbal People as at 7 February 1788.' The applicant comprises **[Applicant 1]** and her daughter **[Applicant 2]**.

The essence of the factual basis provided by the applicant to support the assertion that the claimed native title rights and interests exist and for the three particular assertions in s. 190B(5) may be summarised as follows:

1. The native title claim group are those persons known to have a genealogical connection to the Turrbal man known as the **[Ancestor 1]**, namely **[Applicant 1]** and her biological descendants. The **[Ancestor 1]** is identified in paragraph 8 of attachment F as being described by contemporary Europeans as 'Chief of the Brisbane Tribe' and an Aboriginal man who was present within Turrbal country at the time of European contact circa 1825. Paragraph 8 of attachment F concludes with the assertion that there is no evidence to suggest that the **[Ancestor 1]** was not descended from Aboriginal persons who occupied Turrbal country immediately prior to 1788 when sovereignty was asserted by the British.

2. The historical record identifies that the Turrbal were the 'tribe' for the Brisbane region, see:
    - *Two Representative Tribes of Queensland*, John Matthew, T Fisher Unwin, London, 1910, pp. 67–69, reproduced at paragraph 1 of attachment F;
    - *Tom Petrie's Reminiscences of Early Queensland*, Petrie C, UQP, 1904, p. 117, reproduced at paragraph 6 of attachment F.

3. The line of descent from the **[Ancestor 1]** to **[Applicant 1]** (who was born in March 1920) is described in paragraph 9 of attachment F and reveals that **[Applicant 1]** is the **[Ancestor 1]** great, great, great grand–daughter. The forebears in each generation between the **[Ancestor 1]** and **[Applicant 1]** are identified by name and other relevant information, such as when they were born, who they married or had a child with and/or any known tribal affiliations.

4. The applicant's legal representative submitted on 2 November 2008 that although it is theoretically possible that there are other persons alive who carry the genes of the **[Ancestor 1]**, such persons would not be part of a properly constituted Turrbal claim group. The applicant's legal representative states that the claim group description was amended because biological descent from the **[Ancestor 1]** as the sole criteria for membership does not accurately identify the group. The applicant's legal representative avers to potential problems framing additional criteria relating to identification and acceptance as a Turrbal person in a sufficiently objective way to meet the requirement in s. 190B(3) for a sufficiently clear description of the persons in the native title claim group.

5. This latest amendment of the application clarifies that the native title claim group are a small family group descended from an Aboriginal man identified by contemporary Europeans when Brisbane was first settled in 1825 as the 'chief of the Brisbane tribe'.

6. However, the Turrbal people are not identified as the society that existed immediately prior to sovereignty; the society asserted is the Dippil People with the Turrbal being a subgroup of the Dippil, as were the Gubbi Gubbi and the Wakka Wakka. It is stated in paragraph 1 of attachment F that the society is more commonly known as the 'Gubbi Gubbi' and 'Wakka Wakka', however the name 'Dippil' is preferred by the applicant as

'Gubbi Gubbi' and 'Wakka Wakka' more properly describe other subgroups of the Dippil people.

7. The factual basis to support that the Dippil people comprised the larger society to which the Turrbal and other subgroups belonged is said to be found in the work of John Matthew in *Two Representative Tribes of Queensland* 1910. It is posited that although Matthew identified the Kabi (an alternative spelling of Gubbi Gubbi) and the Wakka as two distinct tribes, there is a passage in his work which supports the applicant's position that the two groups were part of a single society, when the author said that although they possessed 'largely distinct' dialects, the two tribes 'followed very much the same customs, they are friendly and intermarried freely, the class restrictions being the same for both' (Matthew, at p. 69).

8. Extracts are then quoted from Matthew at pp. 67 to 69 describing the territorial bounds of the Kabi (to the north of Brisbane), Wakka (to the west of the Kabi) and the 'Turrubul (Ridley) and Turrbal (Petrie) tribe of the Brisbane River. The Turrbal are said by Matthew to 'have much in common' with the Kabi.

9. It is asserted that laws and customs, such as the holding of rights in land, the use and exploitation of resources and the protection of sites of significance, conferred rights and responsibilities on particular groups of people within the Dippil people to particular areas of land. It is asserted that by those laws and customs the Dippil people were connected to the land and because the Dippil people collectively held such rights and responsibilities in relation to all areas within a wider area which includes the application area, the Dippil people as a whole were connected to the whole of that wider area by those laws and customs.

10. It is asserted that the relationship between subgroups of the Dippil people and the wider group and between the various subgroups was one where each subgroup could only speak for its own area. Support for this is said to be found in the work of Tom Petrie, *Petrie's Reminiscences of Early Queensland*, 1904 where he noted that 'each tribe had its own boundary, which was well known, and none went to hunt, etc. on another's property without an invitation, unless they knew they would be welcome, and sent special messengers to announce their arrival (at p. 117).

11. Extracts are then quoted from Petrie in which he describes gatherings at corroborees amongst the different tribes in the region and some other customary practices. Reference is also made to the work of JD Lang in *Cooksland in North–Eastern Australia* 1847 as describing the general pre–sovereignty situation, it being asserted that this also described the Dippil people and its various sub–groups, including the Turrbal. The work of Lang is that the 'Aborigines of Australia are universally divided into distinct and independent tribes, each occupying as their hunting grounds a certain portion of territory, of which the limits are generally well–defined . . .'

12. It is asserted that from sovereignty through to the present day, some of the laws and customs acknowledged and observed by the Dippil people have been handed down from one generation of the Dippil people to the next by word of mouth (including the telling of stories) and practical instruction in an unbroken chain to the present day. It is asserted that each generation of Dippil people (including the present generation) has acknowledged and observed those laws and customs. Accordingly these laws and customs may be described as *traditional* laws and customs.

13. The traditional laws and customs of the Dippil people are asserted to include laws and customs relating to the pre–sovereignty laws and customs which governed which of the particular subgroups of the Dippil people belonged to which area, including those which related to the requirement that permission is required to carry out activities on another subgroup's area. A list of the laws and customs said to be derived from the pre–sovereignty society is provided in paragraph 5 of schedule F, including those which say that members of a subgroup may hunt, fish and gather within its area, provided they do so in accordance with rules about when to take certain animals and by performing certain rituals when killing certain animals. Other laws and customs dictate that particular songs belong to particular places and/or subgroups, trade between subgroups, constructing bark huts for shelter and gender restrictions that apply to the making of certain articles such as traditional weapons and clothing and jewellery.

14. It is asserted that the Turrbal people acknowledged and observed those traditional laws and customs at sovereignty and also occupied the application area pursuant to those traditional laws and customs at sovereignty, particularly laws and customs which prescribed the bounds of their country within the wider society of the Dippil people. It is also asserted that the laws and customs observed by the Turrbal people included a law by which rights to country were passed down through cognatic descent, with membership of the claim group also requiring identification as a Turrbal person, and acknowledging and observing the laws and customs of the Dippil people. Support for this is said to be found in an extract from Petrie at p. 117 that the Turrbal or Brisbane tribe 'owned the country as far north as North Pine, south to the Logan and inland to Moggill Creek' including its flora and fauna. Petrie also discusses how particular individuals could own particular items of flora or a portion of the river which was a particularly good fishing spot, such that no one could fish there without his permission. An examination of the map in attachment C indicates that the application area does not extend outside of the areas discussed by Petrie.

15. The situation after sovereignty is canvassed in paragraph 8 of attachment F, where it is asserted that from the mid–1800s until approximately 1910, most surviving members of the Turrbal people were dispersed throughout the wider area to which the wider Dippil people are connected by their traditional laws and customs. It is asserted that through their presence in Dippil country and interaction with other Dippil people, they were able to maintain their acknowledgement and observance of Dippil laws and customs, through to the lifetime of **[Applicant 1]**, one of the persons who jointly comprise the Turrbal applicant.

16. In relation to the wider Dippil society it is asserted that they were able to maintain their cultural identity as a society at Cherbourg/Barambah settlement following the forced removal of many Dippil people there. Support for this is said to be found in the work of Blake T, *A Dumping Ground: A History of the Cherbourg Settlement*, 2001, including the references to the fact that the Aboriginal occupants or inmates organised their living quarters or camps 'according to regional or tribal affiliations' (at p. 203) and the example provided of the bottom camp comprising Wakka Wakka, Kabi Kabi and Batjala families (Blake T, p. 206).

17. It is asserted that **[Applicant 1]**, has handed down the laws and customs of the Dippil people, as they relate to ownership and use of land, water and resources within Turrbal country to female members of the claim group, especially those which relate particularly to women, such as singing, dancing, gathering and other female related activities, who have in turn taught these things to their younger members.

18. The association of **[Applicant 1]**, son, **[Applicant 2]**,, is described in paragraph 12; including visiting his country in the company of older Dippil men in order to take part in Aboriginal dance performances in Brisbane and to be shown men's sites. He was taught traditional laws and customs of the Dippil people, in relation to the use of land, water and resources in Turrbal country.

19. It is also asserted that **[Claimant 1]** is responsible for handing down the laws and customs of the Dippil people as they relate to ownership and use of land, water and resources within Turrbal country, to male members of the group, especially those things that relate particularly to men.

20. Evidentiary affidavits have been provided by the applicant to support the factual basis and the information therein generally supports the assertion that current members of the group have an ongoing association with the Brisbane region, as taught to them by other people who belong to the Gubbi Gubbi, Wakka Wakka and Butchalla groups and who also belong to the wider Dippil society. There is also an affidavit from **[Claimant 2]**, a Gubbi Gubbi elder, who states that he was taught that **[Applicant 1]**, was a Turrbal person and the only surviving member of the Turrbal people known to the Gubbi Gubbi. He also concurs with accounts by **[Applicant 1]**, and others that he goes onto Turrbal country in accordance with permission from **[Applicant 1]**, as it is 'only the Turrbal people who have the right to speak for Turrbal country as the owners of that country under our laws (that is, the laws that apply to the Turrbal, the Gubbi Gubbi and some other tribal groups)'—at [5] of his affidavit made 23 August 2008.

In my view the factual basis provided by the applicant reveals some significant hurdles in the event the claim is litigated. For instance the excerpts quoted from the historical record may equally support an assertion that the Turrbal People, although having much in common and sharing good relations with neighbouring groups such as the Kabi/Gubbi Gubbi, Wakka Wakka and Butchalla (or Batjala) groups, were nonetheless, at sovereignty, a separate society observing distinct traditional laws and customs that gave rise to their traditional ownership of the land and waters

that was settled in 1825 and later became the city of Brisbane, which they alone held and which neighbouring groups could only enter or access with permission from the Turrbal people. The lack of any positive identification in the historical record of a wider society called the Dippil People may well pose a significant evidentiary hurdle if the claim is litigated. If the native title was not held at sovereignty by a wider regional society, but by a society of Turrbal People, it may be difficult to establish that the native title claimed in this application exists in circumstances where the society that observed traditional laws and customs at sovereignty or European settlement was reduced by the early part of the 20th century to one person. There also seems to be only a tenuous link to show that a wider regional society of Dippil people have continued to acknowledge and observe traditional law and custom in a substantially uninterrupted way since sovereignty, from which the 'group' rights of the Turrbal people are asserted to stem.

However, it is not my task 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 they are true, my 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 the Full Court 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. 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 the statement by Mansfield J at [132] of *Doepel* 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. If the factual basis supports the three particular assertions, then the requirements of the section overall are likely to be met. I therefore

address the three particular assertions before concluding whether overall the requirements of the section are met.

(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.

Attachment F describes the available historical record that places the application area within the traditional country of the Turrbal people at the time Brisbane was first settled in the 19th century, including their relationship with other groups that may have been subgroups within a wider society, identified in the application as the Dippil people. The association of current members of the native title claim group with the Brisbane country of the Turrbal and within the wider reaches of Dippil country (**[Applicant 1]**, and her son **[Claimant 1]** and daughter **[Applicant 2]**,) are generally described, as are their genealogical connections to the only known Turrbal ancestor alive in 1825, namely, the **[Ancestor 1]**. The application generally describes the associations with his descendants leading to the birth of **[Applicant 1]**, in the 1920s. The application also generally describes the Dippil people, including that said to have been observed in a history of Cherbourg settlement by T Blake in 2001. **[Claimant 2]**, a Gubbi Gubbi man, provides an affidavit which generally supports the assertion that the Turrbal and the Gubbi Gubbi, although distinct groups with distinct responsibilities and rights for distinct areas of country, share the same laws and customs. There is other information in the evidentiary affidavits by **[Applicant 1]**, **[Applicant 2]**, and **[Claimant 1]** describing their learning of law and custom from Gubbi Gubbi, Wakka Wakka and Butchalla persons about the bounds of Turrbal country and how to hunt and use the resources of that country in traditional ways.

(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;

After some deliberation, I find that 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' which appears 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.

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, derives further support from *Gudjala FC* at [96] where the Full Court commented 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'.

The application before me does identify the society asserted to have existed at sovereignty, namely, the Dippil People, who are asserted to have observed laws and customs regarding such things as the holding of rights in land, use and exploitation of resources and the protection of sites of significance. It is asserted that these laws and customs confer rights and responsibilities on particular subgroups of people within the wider Dippil People group to particular areas of land—attachment F, [2]. Excerpts from the historical record that are asserted to support the existence of such a society at sovereignty are then provided, and I have referred to these above in my summary of the factual basis.

It is then asserted that some of the laws and customs acknowledged and observed by the Dippil People immediately prior to sovereignty have been handed down from one generation of the Dippil people to the next through to the present day, such that the Dippil people are connected to the application area. It is asserted that this inter–generational transmission of some of the laws and customs means that the laws and customs may be described as 'traditional' laws and customs.

These traditional laws and customs are said to include laws which provide that particular sub-groups of the Dippil people own particular areas within the country to which the wider Dippil people have the relevant connection—attachment F, [5]. The affidavits by **[Applicant 1]**, and her children, **[Claimant 1]** and **[Applicant 2]**,, and the Gubbi Gubbi elder **[Claimant 2]**, provides some support for the inter–generational transmission of laws and customs and also for the existence of a wider regional society of Dippil People, with the Turrbal, the Wakka Wakka and the Gubbi Gubbi being some of the subgroups of that wider society. I refer, for instance, to the following:

- the affidavit by **[Claimant 1]** dated 24 January 2006 at [5]–[6] says that his country is the Turrbal country of Brisbane, but indicates that he is a member of a wider society that includes his Gubbi Gubbi and Wakka Wakka Elders, who passed down traditional law and custom to him—at [3], [5]–[9];
- the affidavit by **[Claimant 1]** dated 24 August 2008 identifies that the main person who taught him the laws and customs of his people in relation to hunting was his tribal grandfather and Gubbi Gubbi man, **[Person 1 – name deleted]**. **[Claimant 1]** was taught that Gubbi Gubbi laws and Turrbal laws in relation to hunting were the same, although he needed permission to hunt on Gubbi Gubbi land and he did not need such permission for hunting on his Turrbal country—at [3];
- the affidavits by **[Applicant 1]** and **[Applicant 1]**, both dated 24 August 2008, likewise provides information about learning law and custom from other Aboriginal people who belonged to the wider society, including the Butchalla songman, **[Person 2 – name deleted]** and other elders of the Gubbi Gubbi;
- the affidavit by **[Claimant 2]** who is an elder of the Gubbi Gubbi states that the Gubbi Gubbi and the Turrbal have the same laws and customs, including those that say where each group's country is and how each group is to act when in the other group's country, including the need to seek permission before going on another group's country.

Attachment F also refers to more recent accounts of the Dippil people who lived at Cherbourg or Barambah settlement being 'able to maintain their cultural identity as a society' due to the regime allowing them to organise their living arrangements in ways that reflected traditional regional and tribal affiliations—at [11], which reproduces an account from T Blake's *A Dumping Ground: A*

History of the Cherbourg Settlement, UQP, 2001 telling of this and how the bottom camp comprised Wakka Wakka, Kabi and Batjala families.

I have some concerns about the quality of the assertions within attachment F in relation to the existence of traditional laws and customs giving rise to the claim to native title rights and interests. In my view, the factual basis provided in attachment F comes perilously close to asserting the wrong facts. Saying that the Dippil people were able to maintain their cultural identity as a society post–sovereignty (attachment F, [11]) and that its members continue to observe some of the pre–sovereignty laws and customs of the Dippil People (attachment F, [5]) may fail to address the fundamental inquiry posed by *Yorta Yorta*. This has been the recent subject of further consideration by a Full Court who identified that the relevant inquiry is 'whether the laws and customs have continued to be acknowledged and observed substantially uninterrupted by each generation since sovereignty'; it is not 'whether the *community* that existed at sovereignty continued to exist over the subsequent years with its members continuing to acknowledge and observe at least some of the traditional 1829 laws and customs relating to land'—*Bodney v Bennell* [2008] FCAFC 63 at [73].

However I have decided on balance that when read with the evidentiary affidavits, the factual basis provided in the application goes some way towards addressing the right issue. I have decided that when I read the entirety of the application together with the aforementioned evidentiary affidavits there is sufficient material to support an 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, and their predecessors had, an association with the application area.

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 explains that the link between the current native title claim group and the pre–sovereignty society arises because they are the descendants of an Aboriginal man in the Brisbane region in 1825 who is asserted to have been an authoritative and important person of the Turrbal tribe, who in turn are asserted to be the subgroup who 'owned' the Brisbane region under the traditional laws and customs of the Dippil People society. The application provides a factual basis that generally describes the inter–generational transmission of laws and customs relating to ownership of tracts of land by subgroups as members of the Dippil People society, including the observing of laws and customs relating to seeking permission before going on to the lands of another subgroup, in accordance with traditional laws and customs of the Dippil People, which laws and customs are asserted to have existed since before sovereignty. The application provides

evidentiary affidavits which show the current acknowledgement and observance by members of the Turrbal native title claim group of laws and customs that they were taught by other people who also belong to the wider Dippil People regional society that is asserted to exist in the application area and from which the claimed native title is asserted to stem.

Although the attachment F general description and the evidentiary affidavits also point to interruptions in the acknowledgement and observance of traditional laws and customs since sovereignty because of the severe impacts of European settlement on the Aboriginal peoples concerned, including drastic depletions in the numbers of Aboriginal people in the Brisbane region following European settlement in the 19th century and the removal of Aboriginal persons to Cherbourg/Barambah settlement in the 20th century, it is my view that the issue of whether these factors resulted in a cessation or break in the observance of traditional law and custom by a relevant society is ultimately for the trial judge to determine. Having considered all of the material, 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 wider regional society identified in the application as the Dippil people.

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.

Section 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.

- *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 *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 *Western Australia v Ward* (2002) 213 CLR 1 [2002] HCA 28 (*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. *the right to exclusive possession, occupation and use of the land;*

10. the right to make decisions about and to control the access to, and the use and enjoyment of, the land and waters of the claim area and the plants, timber, animals, birds and fish within the claim area;

11. the right to control access and use between the native title holders and any other Aboriginal people who recognise themselves as governed by the traditional laws and customs acknowledged and observed by the native title holders and who seek access to, or use of, the land in the claim area in accordance with traditional law and custom;

I refer to these three rights as the 'exclusive' rights and note that they are only claimed over the areas identified in the concluding paragraph of attachment E, namely:

a) *any areas where there has been no previous extinguishment of native title;*

b) *any area of natural water resources and the solid land beneath the water where the water is found not to be tidal;*

c) *any areas affected by category C and D past and intermediate period acts;*

d) *s. 47A Reserves covered by claimant applications; and / or*

e) *s. 47B Vacant Crown Land covered by claimant applications.*

Outcome: Prima facie established over areas where there has been no previous extinguishment of native title or where any extinguishment is to be disregarded pursuant to ss. 47, 47A or 47B of the Act and only to the extent that it does not cover flowing water resources.

Ward HC is authority that the 'exclusive' rights are potentially available to be prima facie established in relation to areas where there has been no previous extinguishment of native title or where extinguishment is to be disregarded as a result of the NTA. The concluding words of attachment E attempt to take account of this authority.

However, I firstly consider whether there is any material which supports the existence of 'exclusive' rights under the traditional laws and customs acknowledged and observed by the native title claim group and will then provide my reasons as to which areas I consider the rights can be prima facie established.

Ward HC states that:

> 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 identified in [1], [10] and [11] 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)*

I examined the information provided by the applicant in relation to the asserted factual basis for the claim in my reasons at s. 190B(5) and decided that a sufficient factual basis was provided for the assertion that the claimed native title rights and interests exist and for the particular assertions therein, including pertinently to the inquiry at s. 190B(6) that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claim to native title rights and interests.

A review of that same material indicates to me that, prima facie, the exclusive rights are shown to exist under traditional law and custom over those areas where they have not been extinguished. I refer to the following evidence that prima facie supports the existence of the exclusive rights:

- The application identifies the society asserted to have existed at sovereignty, namely, the Dippil People, who are asserted to have observed laws and customs regarding such things as the holding of rights in land, use and exploitation of resources and the protection of sites of significance.
- It is asserted that these laws and customs confer rights and responsibilities on particular subgroups of people within the wider Dippil People group to particular areas of land—attachment F, [2].
- Excerpts from the historical record that are asserted to support the existence of such a society at sovereignty are then provided. I refer particularly to the information in attachment F [3] that:

> The relationship between sub-groups of the Dippil people and the wider people and between the various subgroups and each other –was one where each sub-group could only speak for its own area. Petrie notes that "*each tribe had its own boundary, which was well known, and none went to hunt, etc. on another's property without an invitation, unless they knew they would be welcome, and sent special messengers to announce their arrival.*" No residual rights of any import in relation to the country of sub–groups vested in the wider Dippil People. Access by members of one sub–group was only by invitation of the latter, except in special cases such as that discussed in paragraph [4] below. [paragraph 4 discusses how regular message man could travel from tribe to tribe with safety, and presumably without special permission].

- Attachment F states that some of the laws and customs acknowledged and observed by the Dippil People immediately prior to sovereignty have been handed down from one generation of the Dippil people to the next through to the present day, such that the Dippil people are connected to the application area. It is asserted that this inter–generational transmission of some of the laws and customs means that the laws and customs may be described as 'traditional' laws and customs.
- These traditional laws and customs are said to include laws which provide that particular sub-groups of the Dippil people own particular areas within the country to which the wider Dippil people have the relevant connection and laws which require members of the wider regional society to ask permission of the landowning subgroup before conducting activities on the landowning subgroup's area—attachment F, [5].
- The affidavits by **[Applicant 1]** and her children, **[Claimant 1]** and **[Applicant 2]**, and the Gubbi Gubbi elder **[Claimant 2]**, provides some support for the inter–generational transmission of laws and customs from the pre–sovereignty society relating to the Turrbal people holding exclusive rights to the application area under the wider regional society of Dippil People:
    - **[Claimant 1]** dated 24 January 2006 at [5]–[6] says that his country is the Turrbal country of Brisbane and he is a member of a wider society that includes his Gubbi Gubbi and Wakka Wakka Elders, who passed down traditional law and custom to him—at [3], [5]–[9];
    - **[Claimant 1]** dated 24 August 2008 identifies that the laws and customs of his people include laws about needing permission to hunt on Gubbi Gubbi land, but he did not need such permission for hunting on his Turrbal country—at [3];
    - **[Claimant 2]**, an elder of the Gubbi Gubbi Gubbi, states that the Gubbi Gubbi and the Turrbal have the same laws and customs, including those that say where each group's country is and how each group is to act when in the other group's country, including the need to seek permission before going on another group's country—at [2].
    - **[Claimant 2]** says that his Gubbi Gubbi country shares a boundary with the northern boundary of Turrbal country and he does not go on to Turrbal country without permission from the Turrbal people—at [3] and [5].
    - **[Claimant 2]** says that decisions about Turrbal country are made by Turrbal people who have the right to speak for that country because of the laws that they both acknowledge and observe—at [5].

In light of this material I consider that, prima facie, the rights at [1], [10] and [11] can be established. I now discuss the areas over which I consider that, prima facie these rights can be established.

Following *Ward HC* it is my view that the exclusive rights can only be registered over areas where there has been no previous extinguishment of native title or where extinguishment is to be disregarded as a result of the NTA, following the authority in *Ward HC*. The concluding words of attachment E attempt to take account of this authority. It is also my view that the exclusive rights cannot be prima facie established over flowing water resources, despite an apparent claim to this effect in b) of attachment E. It is my view that there are no exclusive rights in relation to flowing water under the common law, although there potentially may be exclusive rights over stream beds.

It is also my view that the control and use of natural water resources in Queensland (and indeed the nation) is the subject of extensive statutory intervention (for example, the *Water Act 2000 (Qld)*) and any exclusive or controlling native title is unlikely to have survived in relation to flowing water. In my view, any native title that subsists in water areas would be non–exclusive only and confined to non–commercial 'traditional' uses. I am supported by the many consent determinations in Queensland which have not recognised anything other than non–exclusive rights over water, limited to non–commercial 'traditional' uses. For example, the most recent consent determination of *Lardil, Yangkaal, Gangalidda & Kaiadilt Peoples v State of Queensland* [2008] FCA 1855 only recognised non–exclusive rights to hunt and fish, gather and take and to use and enjoy water for personal, domestic, and non–commercial communal purposes.

2. the right to live on the land;

Outcome: prima facie established

Evidence of this is found within the affidavits of the claim group members all of whom describe living on their traditional Turrbal country under their traditional laws and customs.

3. *the right to access the land and waters in the claim area;*

Outcome: prima facie established

The evidentiary affidavits by the three claim group members (**[Applicant 1]**, **[Applicant 2]** & **[Claimant 1]**) indicate that this is a right that exists under the traditional laws and customs of the native title claim group, by which the Turrbal subgroup of the wider regional Dippil people society had the right to access and use the land and waters and to require others to ask permission from others who wished to gain access to their country

4. the right to maintain and protect sites of significance to the native title holders;

Outcome: prima facie established

The evidentiary affidavits by the three claim group members (**[Applicant 1]**, **[Applicant 2]** & **[Claimant 1]**) indicate that this is a right that exists under the traditional laws and customs of the native title claim group, by which the Turrbal subgroup of the wider regional Dippil people maintain and protect significant sites. See, for instance, **[Claimant 1]** affidavit made 24 August 2008 at [2].

5. the right to conduct social, religious and cultural activities within the claim area;

Outcome: prima facie established

The evidentiary affidavits by the three claim group members **([Applicant 1], [Applicant 2] & [Claimant 1])** indicate that this is a right that exists under traditional law and custom. See, for instance, **[Applicant 2]** first affidavit made 24 August 2008 at [6]–[8].

6. the right to harvest fish, cultivate, grow and manage plants, timber, animals, birds and fish located within the claim area;

Outcome: not prima facie established

This right is not prima facie established in light of my view that the evidentiary material does not support the existence of traditional law and custom underpinning rights and interests relating to harvesting or cultivating the resources of the area. The applicant's legal representative submitted on 2 November 2008 that **[Applicant 2]** evidence at [8] of her affidavit that she collects feathers, gum nuts and shells to use in making traditional costumes and **[Claimant 1]** evidence at [5], [7] and [8] that he was taught how to make weapons and rugs from kangaroo hides, that he hunts and fishes on Turrbal country, collects pine cones to eat and builds traditional shelters is evidence of this right. However it is my view that as framed this right suggests a more organised economic life on the land than is supported by evidence of hunting, fishing and foraging the land and waters and making things of a traditional nature. It is accordingly my view that the right as currently framed is not prima facie established on the basis of the evidence provided.

7. the right to exchange plants, timber, animals, birds and fish located within the claim area with third parties for other things;

Outcome: prima facie established

See the evidence of **[Claimant 1]** at [5] that he exchanges traditional weapons and kangaroo hide rugs with Gubbi Gubbi people for coloured sand.

8. *the right to make things from plants, timber and animals located within the claim area;*

Outcome: prima facie established

The evidentiary affidavits by the three claim group members **([Applicant 1], [Applicant 2] & [Claimant 1])** indicate that this is a right that exists under traditional law and custom. See the evidence of **[Claimant 1])** dated 24 August 2008 at [5] and [8] and **[Applicant 2]** affidavit at [8].

9. the right to exchange plants, timber, animals, birds and fish located within the claim area with third parties for other things;

Outcome: prima facie established

See the evidence of **[Applicant 2]** at [5] that he makes and exchanges traditional weapons and kangaroo hide rugs with Gubbi Gubbi people for coloured sand.

12.the right to teach and pass on knowledge of the claimant group's traditional laws and customs pertaining to the area and knowledge of the area;

13. the right to learn about and acquire knowledge concerning, the claimant group's traditional laws and customs pertaining to the area and knowledge of places in the area.

Outcome: prima facie established

The evidentiary affidavits by the three claim group members (**([Applicant 1], [Applicant 2] & [Claimant 1])**) indicate that these are rights that exists under traditional law and custom. Each deponent describes the conduct of such activities under their traditional law and customs, including the inter–generational transmission of law and custom relating to knowledge of special sites on their country.

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.

Section 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, the affidavits from **[Applicant 1], [Claimant 1] & [Applicant 2]** provide satisfactory evidence of the requisite traditional physical connection, it being the case that they talk of accessing the areas covered by the application pursuant to their traditional laws and customs, including by telling stories and singing songs, welcoming strangers, hunting and making traditional things from stuff they collect from their country. These persons all clearly belong to the native title claim group. They all describe an inter–generational transmission of law and custom from other members of the Dippil society that has been acquired over their respective lives and they show how this has connected them to their Turrbal country and enabled them to practice the laws and customs of the Dippil society on the application area.

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.

Section 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) and come to a combined result at the end of this section of my reasons.

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

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

Result and reasons

The application **meets** the requirement under s. 61A(1). The geospatial report reveals that there are no approved determinations of native title that overlap the application area.

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). Any areas over which there is a PEPA and in respect of which ss. 47, 47A or 47B do not allow extinguishment to be

disregarded, have been excluded from the application area: see attachment B at paragraphs 2 and 4.

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). Attachment E states that exclusive possession is only claimed over areas where there has been no previous extinguishment of native title.

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.

Section 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 re s. 190B(9)(a)

The application **satisfies** the paragraph 190B(9)(a). Schedule Q identifies that the applicant does not claim ownership of mineral, petroleum or gas wholly owned by the Crown.

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

The application **satisfies** the paragraph 190B(9)(b). Schedule P identifies that the applicant does not claim exclusive possession of all or part of an offshore place.

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

The application **satisfies** the paragraph 190B(9)(c). Paragraph 3 of attachment 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 requirements of s. 190B(9), because it **meets** all of the three subconditions, as set out in the reasons above.

[End of reasons]