National Native Title Tribunal

Registration test decision

Application name	Western Bundjalung People
Name of applicant	Tim Torrens, David Mundine, Kathy Malera-Bandjalan, Bronwyn Bancroft, Leonard Gordon, David Walker, Terrence Robinson, Andrew Donnelly, Gary Brown and Graeme Walker
State/territory/region	New South Wales
NNTT file no.	NC11/5
Federal Court of Australia file no.	NSD2300/2011
Date application made	19 December 2011
Name of delegate	Heidi Evans

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).

Date of decision: 29 March 2012

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Heidi Evans

Delegate of the Native Title Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D of the ***Native Title Act 1993*** (Cwlth) under an i**nstrument of delegation dated** 24 August 2011 and made **pursuant to s. 99 of the Act.**

Reasons for decision

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Introduction

This document sets out my reasons, as the Registrar's delegate, for the decision to accept the application for registration pursuant to s. 190A of the Act.

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

Application overview

The Registrar of the Federal Court of Australia (the Court) gave a copy of the Western Bundjalung People claimant application to the Native Title Registrar (the Registrar) on 21 December 2011 pursuant to s. 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

Given that the claimant application was made on 19 December 2011 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

Therefore, in accordance with subsection 190A(6) I must accept the claim for registration if it satisfies all of the conditions in 190B and 190C of the Act. This is commonly referred to as the registration test.

Registration test

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 among the procedural conditions is a requirement that the application must contain certain specified information and documents. In my reasons below I consider the s. 190C requirements first, in order to assess whether the application contains the information and documents required by s. 190C *before* turning to questions regarding the merit of that material for the purposes of s. 190B.

Pursuant to ss. 190A(6), the claim in the application must be accepted for registration because it does satisfy all of the conditions in ss. 190B and 190C. A summary of the result for each condition is provided at Attachment A.

Information considered when making the decision

Subsection 190A(3) directs me to have regard to certain information when testing an application for registration; there is certain information that I *must* have regard to, but I *may* have regard to other information, as I consider appropriate.

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

The following is a list of all the information and documents that I have considered in reaching my decision:

- Western Bundjalung People NC11/5 claimant application (including the Form 1 and accompanying documents);
- 'Pre-contact sites summary and apical ancestor biographies,' Report prepared by [*name removed*] dated November 2011;
- Geospatial assessment and overlap analysis (GeoTrack: 2011/2314) prepared by the Tribunal's Geospatial Services dated 5 January 2012;
- Copy of the Geospatial database iSpatialView search results of the application area, dated 23 December 2011;
- Correspondence between the Tribunal, and the State and the applicant regarding procedural fairness processes.

I have *not* considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss. 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK, without the prior written consent of the person who provided the Tribunal with that information, either in relation to this claimant application or any other claimant application or any other type of application, as required of me under the Act.

Also, I have *not* considered any information that may have been provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice' - see s. 94D of the Act. Further, mediation is private as between the parties and is also generally confidential (see also ss. 94K and 94L).

Procedural fairness steps

As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are made in a fair, just and unbiased way. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication—*Hazelbane v Doepel* [2008] FCA 290 at [23] to [31]. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are set out below.

In accordance with s. 66(2), the case manager wrote to the State on 21 December 2012 providing a copy of the application and granting until 13 January 2012 should the State wish to comment on the application. In an email dated 12 January 2012, the State advised that it would not be providing any submissions in relation to the application.

A letter was also sent to the applicant advising receipt of the application, and providing the applicant until 13 January 2012 to submit any additional material for the delegate to consider in applying the conditions of the registration test. As the applicant is represented by the relevant representative body for the area, NTSCORP, the letter also met the requirements for notification to the representative body pursuant to s. 66(2A).

On 16 January 2012, the applicant advised that they had been unable to meet the requirement to provide additional information by 13 January 2012, due to the office being shut down over the Christmas period. Subsequently, additional material was attached to the email, with a request

that the delegate consider this material for the purposes of registration testing. This additional information was provided by the applicant on a strictly confidential basis.

The case manager wrote to the applicant on 17 January 2012, advising that in accordance with the requirements of procedural fairness, the additional material was to be provided to the State, subject to the State's agreement to confidentiality conditions regarding the use of that material. The applicant agreed by email dated 18 January 2012 to the State receiving the additional information.

By letter dated 18 January 2012, the case manager informed the State that additional information had been provided by the applicant and that upon signing a confidentiality agreement regarding the use of that information, the State would be provided with a copy, to allow for them to comment on the material. Shortly following this, the State made a request to the Tribunal that the confidentiality agreement be amended. On 25 January 2012, the case manager spoke with the applicant confirming the State's request. The applicant subsequently agreed to the amendment. In an email dated 27 January 2012, the case manager informed the State that the applicant had agreed to the removal of the clause.

In an email dated 3 February 2012, the State advised the case manager that a decision regarding whether the State would sign the confidentiality agreement had not yet been reached. By telephone conversation with the case manager on 10 February 2012, the State advised that they would not be making comments in relation to the additional information provided by the applicant. In accordance with their failure to sign and return the revised confidentiality agreement, the State was not provided with a copy of the additional material.

The applicant was advised of the State's decision not to provide comments on the additional information (and not to receive a copy of the material) by email from the case manager dated 14 February 2012.

Procedural and other conditions: s. 190C

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

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

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

In reaching my decision for the condition in s. 190C(2), I understand that this condition is procedural only and 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. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s. 190C(2)— *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*) at [16] and also at [35]–[39]. In other words, does the application contain the prescribed details and other information?

It is also my view that I need only consider those parts 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 (as specified in s. 190C(2)). I therefore 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.

Turning to each of the particular parts of ss. 61 and 62 which require the application to contain details/other information or to be accompanied by an affidavit or other documents:

Native title claim group: s. 61(1)

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

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

I note that, in accordance with the discussion above, my only concern at this condition of the registration test is whether the application sets out the information required by the terms of s. 61(1). In considering this, I am not required to look beyond the contents of the application, nor am

I required to undertake any form of merit assessment of the information provided to determine whether or not the claim group described 'is in reality the correct native title claim group' – *Doepel* at [37] and [39].

I am, however, required to consider whether the application is brought on behalf of all members of the native title claim group – *Doepel* at [35]. Subsequently, where I am of the view that the claim group description involves only a subgroup, or part of those persons comprising the whole of the native title claim group, I may not reach the necessary level of satisfaction that the application contains the required information.

The description of the native title claim group, the Western Bundjalung People, is set out in Schedule A and Attachment A. There is nothing on the face of the application which leads me to be of the view that the description does not include all persons in the group, or that it is a subgroup of the native title claim group.

The application contains the details and information required by s. 61(1).

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

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

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

The name and address for service of the applicant's representative appears at Part B of the application.

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

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

The application contains all details and other information required by s. 61(4).

In accordance with *Doepel*, I am of the view that this condition of the registration test is restricted to ensuring that the information required by s. 61(4) is contained in the application.

In reference to the test at s. 61(4) for the purposes of s. 190C(2), the case of *Gudjala 2007* confirms that the task is a 'matter of procedure' and does not require an assessment of whether the description is 'sufficiently clear', but merely that one is provided – at [31] and [32]. An assessment of the claim group description, and whether it is sufficiently clear in order to ascertain whether any particular person is in fact a member of the group, I consider to be my role under the corresponding merit condition at s. 190B(3).

A description of the persons in the Western Bundjalung People native title claim group, in accordance with the terms of s. 61(4)(b), appears at Schedule A and Attachment A of the application.

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

> The application must be accompanied by an affidavit sworn by the applicant that:

(i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and
(ii) the applicant believes that none of the area covered by the application is also covered by an approved determination of native title, and
(iii) the applicant believes all of the statements made in the application are true, and
(iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and
(v) setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it.

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

The application is accompanied by ten affidavits from each of the persons jointly comprising the applicant. These persons are Tim Torrens, David Mundine, Kathy Malera-Bandjalan, Bronwyn Bancroft, Leonard Gordon, David Walker, Terrence Robinson, Andrew Donnelly, Gary Brown and Graeme Walker.

Each affidavit is signed by the deponent and competently witnessed. I am satisfied that each of the affidavits sufficiently addresses the matters required by s. 62(1)(a)(i) to (v).

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

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

The application contains all details and other information required by s. 62(1)(b).

The application does contain the details specified in ss. 62(2)(a) to (h), as identified in the reasons below.

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

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

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

Schedule B of the application refers to Attachment B which contains a written description of the external boundaries of the land and waters covered by the application. Schedule B also contains a list of general exclusions, or areas within those boundaries excluded from the application.

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

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

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

Schedule C refers to Attachment C which contains an A3 colour map showing the external boundaries of the application area.

Searches: s. 62(2)(c)

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

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

Schedule D of the application states that no searches have been carried out by the applicant.

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

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

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

Schedule E refers to Attachment E, which contains a description of the native title rights and interests claimed in relation to the land and waters covered by the application. Reference is also made to the affidavits at Attachment F marked F(1) to F(12) as containing information relevant to the requirements of s. 62(2)(d). I am of the view that the description contained at Attachment E is sufficient and more than a statement to the effect that the native title rights and interests claimed are all 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.

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

Kiefel J in *Queensland v Hutchison* [2001] FCA 416 found that it was not enough to merely recite the assertions at subsections (i) to (iii) of s. 62(2)(e), and that what was required was a 'general description' of the factual basis for those particular assertions – at [17] to [25].

The Full Federal Court also commented on the requirements of s. 62(2)(e) in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*). Their Honours held:

> The fact that the detail specified by s 62(2)(e) is described as a 'general description of the factual basis' is an important indicator of the nature and quality of the information required by s. 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description to be true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality – at [92].

I note that as discussed above, the task at s. 190C(2) merely involves consideration of whether the information required is contained in the application, and does not involve any kind of merit

assessment. Consequently, I have assessed the sufficiency of the factual basis material in the corresponding merit condition at s. 190B(5) below.

Schedule F of the application refers to Attachment F which provides a general description of the factual basis for the particular assertions at s. 62(2)(e). Each of the assertions is addressed under a separate heading, and information pertaining to the native title rights and interests claimed is provided. Reference is also made to the affidavits at Attachments F(1) to F(12) as containing relevant factual basis material.

The description does more than recite the three assertions at s. 62(2)(e), and in my view meets the requirements of a 'general description' of the factual basis on which those assertions are made.

Activities: s. 62(2)(f)

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

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

Schedule G sets out details of activities currently carried out by the native title claim group members in relation to the area claimed. Reference is also made to Attachment M and Attachments F(1) to F(12) as containing information relevant to this condition.

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

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

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

Schedule H sets out the details of nine [9] previous native title determination claimant applications over part of the area covered by the application and states that all of these applications have been discontinued.

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

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

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

Schedule HA states that the applicant is not aware of any notifications given in accordance with s. 24MD(6B)(c).

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

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

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

Schedule I states that the applicant is not aware of any notifications under section 29 that have been given and that relate to the whole or part of the application area. There is nothing before me indicating that the applicant is aware of any notifications of this kind.

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

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

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

I note that the requirement that the Registrar be satisfied in the terms set out in s. 190C(3) is only triggered where another application meets all three of the conditions in subsections (a), (b) and (c) of that provision – see *Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*).

The geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services (GeoTrack: 2011/2314) (geospatial assessment), shows that there are no applications on the Register of Native Title Claims (the Register) covering all or part of the area covered by the current application.

I note that the relevant date for the purposes of subsection (b) is the date at which the current application was made, being 19 December 2011. The geospatial assessment indicates that as at 5 January 2012 no overlapping applications appeared on the Register. Subsequently, I have inferred that even if an overlapping application appeared on the Register at the date the current application was made, it has since been removed and therefore does not meet the condition at subsection (c), for it to be a 'previous application'.

Consequently, I have not considered the condition of s. 190C(3) any further.

Subsection 190C(4)
Authorisation/certification

> Under s. 190C(4) the Registrar/delegate must be satisfied that either:
> (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
> (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

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

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

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

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

(a) includes a statement to the effect that the requirement in s. 190C(4)(b) above has been met, and
(b) briefly sets out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

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

The application is not certified. Therefore the requirements of s. 190C(4)(a) do not apply and I must consider whether I am satisfied that the requirements of s. 190C(4)(b) are met.

The applicant's authorisation material

The applicant's authorisation material is contained at Attachment R and Schedule R of the application. Schedule R contains a statement asserting that the applicant is a member of the native title claim group and authorised to make the application, followed by a brief explanation of the grounds upon which this assertion is made.

Attachment R comprises 11 affidavits, marked R(1) through to R(11). Attachment R(1) is the affidavit of [*name removed*], Solicitor at NTSCORP, the applicant's representative (the Solicitor's affidavit). The Solicitor's affidavit contains statements pertaining to the arrangement of, and conduct at the authorisation meeting held by NTSCORP on the applicant's behalf at Grafton on 29 and 30 June 2011.

Notice of the authorisation meeting was given through public and personal notification. An advertisement for the meeting appeared in the Koori Mail, the Grafton Daily Examiner and the Northern Star, and these advertisements appeared more than two weeks before the date of the meeting, providing, in my view, sufficient warning to those interested in attending. While the adverstisement did not invite persons descended from a list of the claim group's apical ancestors, it did contain a clearly marked map of the application area, and invited all persons holding native title rights and interests in the area to attend – see the Solicitor's affidavit at [4] and [5].

Personal notification was achieved through NTSCORP, the legal representative for the applicant who convened the meeting, sending a notice advertising the authorisation meeting to all of those persons that NTSCORP had recorded as holding native title rights and interests in the application area. Phone calls were made and received by NTSCORP to and from a number of persons expressing their interest in attending the meeting – the Solicitor's affidavit at [10] and [11].

In addition to this, notices advertising the meeting were faxed to all of the relevant Aboriginal Land Councils and organisations in the application area for distribution and display – the Solicitor's affidavit at [9].

For those persons who indicated their intention to attend, NTSCORP provided assistance in the form of accommodation costs for those travelling long distances, booking and reimbursement of public transport costs incurred, fuel reimbursement for those travelling more than 50km in personal vehicles, and meals throughout both meeting days – the Solicitor's affidavit at [13].

Those who advised NTSCORP that they would be unable to attend the meeting also advised that their interests and point of view would be represented by other family members in attendance. These persons also stated that they were unopposed to a decision being made about authorising a native title determination application over the subject area and expressed their general support for filing a claim over the area – the Solicitor's affidavit at [12] and [14].

Membership of the claim group was also addressed at the meeting, and those in attendance unanimously resolved that the Western Bundjalung People claim group description is that which appears at Schedule A of the application – the Solicitor's affidavit at [21].

The information in the Solicitor's affidavit provides that the following resolution was unanimously passed by those in attendance, regarding the way in which decisions at the meeting were to be made:

> The Western Bundjalung People confirm that when making decisions of this kind (authorising a native title application and dealing with matters arising in relation to it) there is no particular process of decision-making under traditional laws and customs that MUST BE complied with by the Western Bundjalung People.
>
> Accordingly, the Western Bundjalung People adopt the following process of decision making for the purposes of the native title claim:
>
> 1. There will be a general discussion of issues;
> 2. The discussion will continue until there is general consensus;
> 3. A clearly worded motion reflecting the general consensus will be read to the meeting;
> 4. The motion must be moved and seconded by Western Bundjalung People before it is decided on;
> 5. The decision will then be made by Western Bundjalung People by a show of hands vote; and
> 6. A decision of the majority in relation to the motion shall be the decision of the Western Bundjalung People.

The Solicitor's affidavit then states that on 30 June 2011, the deponent witnessed the claim group members in attendance at the meeting use this method of decision-making to authorise the applicant for a native title determination application and to make all of the decisions at the meeting – at [25].

The remaining affidavits at Attachment R, marked R(2) to R(11), are sworn by each of those persons jointly comprising the applicant (Authorisation affidavits). All contain the same 17 paragraphs relating to that applicant person's knowledge and experience of the authorisation process employed for the Western Bundjalung application.

Information within the Authorisation affidavits provides that approximately forty [40] persons attended the meeting, and that these persons included members from each of the families who make up the native title claim group. They state that one of the first issues discussed at the meeting was whether those persons present were sufficiently representative of all the members of the native title claim group. A resolution was subsequently passed that the people in attendance were representative of all members of the Western Bundjalung People claim group and able to make decisions about the matters outlined in the meeting agenda – Authorisation affidavits at [5] and [6].

Consideration of the applicant's authorisation material

Where an application is not certified, s. 190C(5) also requires that the application contain certain statements and information pertaining to the authorisation process. In discussing the relationship between the two provisions, Mansfield J in *Doepel* stated: 'the interactions of s. 190C(4)(b) and s. 190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s. 190C(4)(b), but clearly [s. 190C(4)(b)] involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given' – at [78]. Subsequently, while an application may meet the requirements of s. 190C(5), it does not necessarily follow that the requirements of s. 190C(4)(b) will also be satisfied.

The requirements of s. 190C(5)

I have first turned to consider whether the application contains the information required by s. 190C(5).

A statement of the kind referred to in subsection (a) of s. 190C(5) is contained at Schedule R of the application. Schedule R also provides brief information pertaining to the meeting held in Grafton on 29 and 30 June 2011, convened for the purpose of authorisation of the application. Attachments R and R(1) to R(11) contain further information regarding the membership of the persons comprising the applicant in the claim group by their descent from named apical ancestors, and the process of decision-making employed by the claim group at the meeting to authorise the applicant to make the claim, and to deal with matters arising in relation to it.

I am satisfied that the application meets the requirements of s. 190C(5).

The requirements of s. 190C(4)(b)

There are two limbs that the applicant's authorisation material must address in order to meet the requirements of s. 190C(4)(b). The Registrar must be satisfied, firstly, that the applicant is a member of the native title claim group, and secondly, that the applicant is authorised by all the persons in the group to make the application and to deal with all matters arising in relation to it.

I note that in undertaking the task at s. 190C(4)(b), I am to be satisfied of 'the fact of authorisation by all members of the native title claim group' – *Doepel* at [78]. French J in the case of *Western Australia v Strickland* [2000] FCA 652 (*Strickland*) spoke similarly of the Registrar's role at s. 190C(4)(b), commenting that authorisation 'is a matter of considerable importance and

fundamental to the legitimacy of native title determination applications'. He found that 'it is not a condition to be met by formulaic statements in or in support of applications' – at [57].

Whether the applicant is a member of the native title claim group

In considering the first limb of s. 190C(4)(b), I have turned my mind to the information contained in the Authorisation affidavits, at Attachments R(2) to R(11). Each contains the following statement:

> They [the other applicant persons] are and I am members of the claim group through our descent from one or more of the apical ancestors named in Schedule A of the native title determination application – Authorisation affidavits at [14].

I have also turned my mind to the statement by each of the applicant persons in the affidavits accompanying the application for the purposes of s. 62(1)(a), that each of the applicant persons is a member of the native title claim group through their descent from one or more of the apical ancestors named in the claim group description at Schedule A.

It is my view that I am able to rely on the assertion made in the s. 62(1)(a) affidavits that the statements contained in the application are true – see *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [91] and [92], commenting on the task at s. 190B(5).

Consequently, I am satisfied that those persons jointly comprising the applicant are members of the native title claim group.

Whether the applicant is authorised by all the persons in the group

The note that follows the provision of s. 190C(4)(b) indicates that it is s. 251B that must guide the Registrar in a consideration of whether the second limb of the requirement has been met. Section 251B specifies that all the persons in the native title claim group must authorise the applicant to make an application in compliance with either of the processes set out in paragraphs (a) or (b). In examining the applicant's authorisation material, it is important that I identify the appropriate decision-making process and whether it was complied with – *Noble v Mundraby* [2005] FCAFC 212 (*Noble*) at [16].

The material before me at Attachment R indicates that it was by using a process agreed to and adopted by the persons at the authorisation meeting in Grafton on 29 and 30 June 2011 that the applicant was authorised to make the application and deal with matters arising in relation to it, and that there was no particular traditional decision-making process that had to be complied with by the Western Bundjalung People for decisions of such a kind – see the Solicitor's affidavit at [24] and [25].

Subsequently, I have turned my mind to consider what may be required to satisfy the Registrar that an applicant has been authorised by all the persons in the native title claim group, in accordance with s. 251B(b).

In relation to the process of decision-making in accordance with s. 251B where it is an agreed and adopted process, Logan J in *Fesl v Delegate of the Native Title Registrar* [2008] FCA 1469 (*Fesl*) distilled the following principles from previous authorities:

> (b) in those cases where there is no relevant traditional decision-making process, s. 251B does not mandate any one particular decision-making process, only that it be one that is agreed to and adopted by the person in the native title claim group...

(c) "agreed to and adopted by" imports the giving of all those whose whereabouts are known and have capacity to authorise a reasonable opportunity to participate in the adoption of a particular process and the making of decisions pursuant to that process;

(d) unanimous decision-making is not mandated;

(e) agreement to a particular process may be proved by the conduct of the parties even in the absence of proof of a formal agreement – at [71].

While I note that these comments were in relation to the authorisation of an Indigenous Land Use Agreement, I am of the view that they are also of relevance regarding claimant applications.

The process of decision-making agreed to and adopted by the persons at the meeting is clearly set out at the Solicitor's affidavit at [24] and in the Authorisation affidavits at [7]. The material before me pertaining to the conduct of the parties, asserted by [*name removed*] and by those persons comprising the applicant in attendance at the meeting, indicates that a general discussion preceded the passing of each resolution, and that all decisions were made in accordance with the process agreed to and adopted – see Authorisation affidavits at [6], [7], [8] and [9].

Regarding whether *all* of the persons within the native title claim group have authorised the making of the application, I refer to *Lawson v Minister for Land and Water Conservation (NSW)* [2002] FCA 1517 (*Lawson*) where Stone J held in relation to s. 251B(b) that it is not necessary for each and every member of the native title claim group to authorise, but rather '[i]t is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision making process' – at [25].

Based on the material before me, it is clear that NTSCORP went to significant lengths to ensure that notice of the authorisation meeting was provided to all members of the Western Bundjalung People. The meeting was widely notified, both personally and publicly, and assistance in the form of meals, accommodation and transport was offered by NTSCORP to those interested in attending. Whilst the apical ancestors in Schedule A were not included in the notice for the purpose of identifying those who were required to attend, I am satisfied that the map included on the notice, clearly marking the boundaries of and major towns within the claim area, ensured that all those who believed themselves to be holders of native title rights and interests in the area were made aware of the meeting on 29 and 30 June 2011. I have thus formed the view that all persons within the claim group were given a reasonable opportunity to participate in the decision-making process.

In addition to this, the Authorisation affidavits sworn by those persons comprising the applicant assert that a discussion took place and a resolution was subsequently passed at the meeting that those present believed themselves to be sufficiently representative of all members of the native title claim group – at [6].

In relation to the decision-making process agreed to and adopted pursuant to subsection (b) of s. 251B, I am of the view that it can be traced to a decision made by the claim group to adopt that process – see *Bolton v Western Australia* [2004] FCA 760 (*Bolton*) at [44]. The Solicitor's affidavit and the Authorisation affidavits clearly state that the persons present unanimously resolved to employ a majority decision-making process following a discussion of each issue – at [24] and [7] respectively.

I note that the material within the application does not include any information pertaining to any disputes or contested issues at the meeting, and that almost all of the decisions made at the meeting were reached by unanimous resolution. On this basis, and having received no adverse material to suggest otherwise, it is my view that the conduct of the parties as described in the Solicitor's affidavit, and in the Authorisation affidavits, indicates that this process was duly agreed to and adopted by the persons at the meeting in order to authorise the applicant to make the application and deal with matters arising in relation to it.

For these reasons, I am satisfied that the applicant has been authorised by all the persons in the native title claim group. The application meets the requirements of s. 190C(4)(b).

Merit conditions: s. 190B

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

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

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

I note the wording of the condition at s. 190B(2), that it is to the information required by ss. 62(a) and (b) contained in the application, to which I am to turn my mind – *Doepel* at [16]. The written description of the external boundaries of the application area appears at Attachment B to Schedule B of the application. This written description was prepared by the Tribunal's Geospatial Services and is dated 2 December 2011. The description specifically excludes the areas subject of the Bundjalang People 2 (NSD6107/98; NC98/19) and The Githabul Peoples (NSD6019/98; NC95/11) native title determination applications. A list of general exclusions, or areas not covered by the application, appears at Schedule B.

An A3 colour map also prepared by the Tribunal's Geospatial Services (dated 24 October 2011), showing the external boundaries, appears at Attachment C to Schedule C. The map is titled 'Western Bundjalung' and includes:

- the application area depicted by a bold blue outline;
- topographic background;
- scalebar, northpoint , coordinate grid and location diagram; and
- notes relating to the source, currency and datum of data used to prepare the map.

The use of general exclusion clauses at Schedule B to describe those areas not covered by the application, does not, in my view, offend s. 190B(2) – *Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*) at [50] to [55].

The geospatial assessment notes that there is one error, in the form of a typographical error, in the written description at Attachment B to Schedule B. Despite this, the geospatial assessment concludes that the map and description are consistent and identify the application area with reasonable certainty. I am similarly of the opinion that the error described is of a minor nature and does not prevent the identification of the application area on the surface of the earth with reasonable certainty.

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

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

> The Registrar must be satisfied that:
> (a) the persons in the native title claim group are named in the application, or

(b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

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

The description of the Western Bundjalung People native title claim group appears at Schedule A. As the persons comprising the claim group are not named, I note that it is s. 190B(3)(b) that applies.

In relation to the test at s. 190B(3), Mansfield J in *Doepel* held that the focus was whether the application enables the 'reliable identification' of the persons in the group, and was not to be upon the 'correctness of the description, but upon its adequacy' so that the members of the identified native title claim group can be ascertained – at [51] and [37]. Kiefel J in *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 (*Wakaman*) also commented that what was required at s. 190B(3) was 'an assessment of the sufficiency of the description of the group for the purpose of facilitating the identification of any person as part of the group' – at [34].

The description of the native title claim group at Schedule A appears as follows:

> The Western Bundjalung People are the native title claim group on whose behalf the Applicant makes this application. The native title claim group comprises all the descendants of the following apical ancestors:
>
> Herbert 'Hunter' Avery (who was born in Grafton circa 1881)
>
> King Bobby (who was born circa 1840s)
>
> Queen Jinny Little (who was born in Yugilbar in 1840)
>
> Richard 'Old Dick' Donnelly (who was born in Timbarra circa 1870)
>
> Jane 'Jenny' 'Barbin Boatshed' Brown (who was born in Baryulgil circa 1855)
>
> Thomas 'Tom' Donnelly (who was born in Tenterfield circa 1877)
>
> Thomas Gordon (who was born in Copmanhurst in 1870)
>
> Ethel Bawden (who was born in Yugilbar in 1884)
>
> Grace Kelly also known as Grace Lardner (who was born on the Orara River circa 1876)
>
> Mariah Little (who was born in Baryulgil circa 1855)
>
> William 'Billy' 'Charles' Charles (who was born circa 1860)
>
> Harry Joseph Mundine (who was born in Tabulam in 1868)
>
> Teresa Agnes 'Ponjam' Derry (who was born in Tabulam in 1872)
>
> Mick 'Bucky' Robinson (who was born in Timbarra/Tenterfield circa 1859)
>
> Kate Gaton (who was born circa 1870)
>
> Matilda 'Tilly' Gaton (who was born in Yugilbar in 1879)
>
> Harry Walker (who was born circa 1850)
>
> Jenny 'Ginny' Pearson (who was born circa 1860)
>
> Alice Tindal also known as Alice Brown (who was born in Lionsville circa 1870)
>
> William Pearson (who was born in Gordon Brook in 1872)

Descendants include persons who are descendants by incorporation and adoption according to traditional law and custom.

Schedule A then refers to Attachment A which sets out the following information:

> Adoption and incorporation are not open-ended or casual processes; they are acknowledged and practised in accordance with Western Bundjalung traditional law and custom.
>
> If an objective test for adoption is required, it can be tested for by the following features based upon Western Budjalung traditional laws and customs:
>
> - Has the person been included in the Western Bundjalung descent group by an adult member of the Western Bundjalung descent group who raised the child as one of their own? (This is commonly referred to as 'growing up' or being 'reared up' (by) that person).
> - During the time the child was growing up, did they identify as a member of the Western Bundjalung descent group and were they commonly identified as such by the other members?
> - Were they given the same rights within the descent group as other members? If so, this flows on to rights in land as well, since kin relations and relations in connection to country share a common structure – e.g. when one refers to 'my father('s) land', the relationship to that land is seen as of a similar order to, and derived from one's relationship to one's father.
> - As the child matured, did they become recognised as a member of the adopting adult's descent group, and eventually by the senior people of the Western Bundjalung native title community?
> - Has the adopted person closely associated with the descent group throughout their life, and held an active association with, and knowledge of the traditional country of the Western Bundjalung community, comparable to that of the rest of the Western Bundjalung community?
>
> Membership of the Western Bundjalung descent group also includes incorporation. 'Incorporation' here applies where the person's biological parentage belongs to a descent group outside the Western Bundjalung group. Incorporation is acknowledged by the Western Bundjalung under traditional law and custom. If an objective test for incorporation is required, it can be tested for by the following features based upon Western Bundjalung traditional laws and customs:
>
> - Has the person been incorporated into the Western Bundjalung descent group by an adult member of the group?
> - Did they identify as a member of that descent group, and were they commonly identified as such by the other members?
> - Were they given the same rights within the descent group as other members? If so, this flows on to rights in land as well, since kin relations and relations in connection to country share a common structure – e.g. when one refers to 'my mother('s) land', the relationship to that land is seen as of a similar order to, and derived from one's relationship to one's mother.
> - Were they recognised as a member of the incorporating adult's descent group, and eventually by the senior people of the Western Bundjalung descent group?
> - Have the incorporated person's descendants closely associated with the Western Bundjalung group throughout their life, and held an active association with, and knowledge of the traditional country of the Western Bundjalung community, comparable to that of the rest of the Western Bundjalung community?

I note that describing a native title claim group by way of reference to named apical ancestors is one method that has previously been accepted by the Court as satisfying the condition at s. 190B(3) – see *Gudjala People 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [27] to [34].

The application of rules or conditions by which claim group members can be determined was considered by the Court in the case of *Western Australia v Native Title Registrar* [1999] FCA 1591 (*WA v NTR*). Carr J held that while the application of the rules or conditions may require some factual inquiry, this does not mean that the group has not been described sufficiently clearly. His Honour referred to the finding in *Strickland*, where French J held (in relation to the definition of areas), that the Act is to be 'construed in a way that renders it workable in the advancement of its main objects' and that the requirements of the registration test were not to be 'elevated to the impossible' – *Strickland* at [55].

I note that the identification of persons falling within the description of the Western Bundjalung native title claim group provided at Schedule A and Attachment A would undoubtedly require significant factual inquiry. While biological descent provides a relatively objective means by which claim group members can be identified, the application of the description to determine group members also involves consideration of those who have been adopted and incorporated into the claim group, in accordance with traditional laws and customs. In practical terms this is likely to present certain challenges.

In line with French J's comments, however, and following from the authorities regarding claim group descriptions, I am satisfied that the applicant has provided a sufficiently clear description of the group, and that with some factual inquiry, by the application of the conditions of biological descent, and the rules of adoption and incorporation, it could be ascertained whether any particular person is a member of the group.

The application meets the requirements of s. 190B(3).

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

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

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

In undertaking the task at s. 190B(4), I note that it is to the contents of the application, and specifically the information required by s. 62(2)(d), that I am to turn my mind. Mansfield J in *Doepel* discussed the delegate's role at this condition and found that the test of identifiability was 'whether the claimed rights and interests are understandable and have meaning' – at [99]. His Honour also held that:

> It was a matter for the Registrar to exercise his judgment upon the expression of the native title rights and interests claimed.. It was open to the Registrar to read the contents of [the description] together, so that properly understood there was no inherent or explicit contradiction..' – at [123].

French J similarly found the test at s. 190B(4) to involve the making of an 'evaluative judgment' of the sufficiency of the native title rights and interests.

My consideration of the description before me at Attachment E to Schedule E notes that the Western Bundjalung People claim both exclusive and non-exclusive native title rights and interests. I also note that there are a number of qualifications included in the description, namely that those rights and interests claimed are exercisable in accordance with the laws of the State of New South Wales and of the Commonwealth (including the common law); subject to any rights conferred upon other persons pursuant to those laws; and, in accordance with the traditional laws and customs of the Western Bundjalung People.

I am of the view that a broad claim to exclusive native title rights, in the form of a right to possession, occupation, use and enjoyment as against the whole world, as made out in paragraph one [1] of Attachment E, does not offend the requirements of s. 190B(4) – *Strickland* at [60].

Subsequently, I have read the entire description before me, including the stated qualifications, and I am of the view that there is no inherent or explicit contradiction within that description. The rights and interests claimed are, in my view, understandable and have meaning. With reference to s. 223(1), I am also of the view that the rights and interests claimed can all be understood as native title rights and interests.

For these reasons, I am satisfied that the description of the native title rights and interests claimed is sufficient to allow the native title rights and interests claimed to be readily identified. The application meets the requirements of s. 190B(4).

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

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

The application **satisfies** the condition of s. 190B(5) because the factual basis provided is **sufficient** to support each of the particularised assertions in s. 190B(5), as set out in my reasons below.

I have considered each of the three assertions set out in the three paragraphs of s. 190B(5) in turn before reaching this decision.

The task at s. 190B(5)

In undertaking the task at s. 190B(5), I am of the view that there is a correlation that exists between the requirements of s. 62(2)(e) and s. 190B(5), such that an application and accompanying affidavit/s which 'fully and comprehensively' address all the matters in s. 62 could provide sufficient information to enable the Registrar to be satisfied of all the matters referred to in s.

190B' – *Gudjala FC* at [90]. Regardless of this correlation, I note that I am not restricted to the information contained within the application in reaching the required level of satisfaction at s. 190B(5) – *Doepel* at [16].

The case of *Doepel* discussed in some detail the role of the delegate at s. 190B(5). Mansfield J held that the delegate is to determine 'whether the asserted facts can support the claimed conclusions' and specifically, that the role is 'not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence' – at [17].

The nature of the information required to satisfy the condition at s. 190B(5) must be in 'sufficient detail to enable a genuine assessment', and be 'more than assertions at a high level of generality' – *Gudjala FC* at [92]. With this requirement for a genuine assessment in mind, I am of the view that the factual basis material must have relevance to the particular native title claimed, by the particular native title claim group over the particular land and waters of the application area – *Gudjala 2007* at [39].

Reasons for s. 190B(5)(a)

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

In considering the assertion at s. 190B(5)(a), Dowsett J in *Gudjala 2007* held that information regarding the present association of the claim group as a whole with the area may be required, although it is not a requirement that all members must have an association at all times, and that there has been an association between the predecessors of the group and the area over the period since sovereignty, or at least European settlement – at [52]. This part of the decision was not criticised by the Full Court on appeal and thus still provides relevant authority regarding the delegate's role at s. 190B(5).

French J's comments in *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) also provide some guidance regarding the task at s. 190B(5)(a), and suggest that broad statements that do not specify the nature and type of the asserted association, and do not link that association with the geographical particularity of the application area, may not provide the factual basis necessary to support the assertion – at [26].

The applicant's factual basis material – s. 190B(5)(a)

The applicant's factual basis material appears at Attachment F to Schedule F and in the affidavits of twelve claim group members at Attachments F(1) to F(12). I have also considered information at Schedules A and G as relevant.

Following the filing of the Western Bundjalung application, the applicant submitted additional material in the form of a report titled, 'Pre-contact sites summary and apical ancestor biographies' prepared by [*name removed*], a historian with NTSCORP, for the purposes of the Western Bundjalung application (the [*name removed*] report). The report is dated November 2011, and is divided into two sections: firstly, a description of archaeological evidence and research relating to sites within the application area that demonstrate indigenous occupation of the area prior to European settlement; and secondly, a summary of historical records and sources providing evidence of the family relations and bloodlines, places of birth and residence, and dates of significance in the lives of the apical ancestors named at Schedule A.

The birthplaces and places of residence of the apical ancestors at Schedule A (where known) and of the deponents of the affidavits at Attachments F(1) to F(12) support an association with various places within the Western Bundjalung application area. Whilst there are a number of these persons were born outside the application area, in places such as Casino or Grafton, this was often due to the fact that the closest hospitals were located in these towns, rather than there being any connection between the individual and the location – [*text removed*].

Having conducted my own research using the Tribunal's iSpatial View mapping database, I have learnt that almost all place names referred to in the applicant's factual basis material occur within, or on the border of the application area's external boundaries.

In addition to this, the factual basis material reveals that claim group members presently possess a strong knowledge of the area's boundaries and where Western Bundjalung country falls, which in my view suggests an 'association with the entire area claimed' – *Martin* at [26]. [*text removed*]

Not only do the deponents have a thorough knowledge of their country's boundaries, but they also possess a strong knowledge of significant sites throughout the application area, and continue to uphold and respect these places as important and/or sacred. [*text removed*]

The statements of the claimants' also suggest that there has been a physical association between claim group members and the application area since European settlement in the area. I am of the view that the factual basis material shows that this physical association is maintained today, as described in the affidavits and in Schedule G with reference to the various activities currently carried out by the Western Bundjalung People on the land and waters subject of the application.

The material similarly illustrates a spiritual association between the claim group members and the application area, [*text removed*].

The deponents of the affidavits at Attachment F demonstrate not only a thorough knowledge of the boundaries of the Western Bundjalung People application area, but also a knowledge of those Western Bundjalung families associated with the application area. The material suggests that different family groups have associations with different parts of the application area, but overall, it appears that it is the claim group as a whole, that has the asserted association, rather than merely the deponents and their families.

[*text removed*]

This strong knowledge and acceptance amongst the deponents of the particular Western Bundjalung families associated with different locations within the application area appears to derive from knowledge passed down by elders or the predecessors of the claim group members. The information within the affidavits at Attachment F demonstrates that knowledge of the association between these predecessors and the application area, extends as far back as first European settlement in the area.

[*text removed*]

As noted above in the excerpt from Attachment F(11) (at [21]), the association between the claim group members and the application area is based on a recognition that the ancestors of the claim group inhabited and, though deceased, continue to inhabit the area. In this way, and based on the above material, I am of the view that the association with the application area asserted by the Western Bundjalung people is an association that is shown to have continued between the

predecessors of the claim group members and the land and waters of the application area since prior to European settlement.

There are numerous references to the activities currently carried out by the deponents of the affidavits and their families on the application area, and that these are activities that have been passed down to them by, and were also carried out by their predecessors. [*text removed*]

The connection between members of the claim group and the application area, as being a traditional connection also held by their predecessors [*text removed*]

Based on this information contained in the applicant's factual basis material, I have formed the view that the assertion that the native title claim group have, and their predecessors had, an association with the application area, is sufficiently supported. The association is one that is both physical and spiritual in nature, and exists between the claim group as a whole, and the geographical particularity of the application area. The material also demonstrates that the predecessors of the deponents of the affidavits had this same association, and that it extends back to European settlement of the region.

I note that all of these elements are supported by the [*name removed*] report submitted by the applicant in addition to the factual basis material in the application. The report is discussed in more detail in my reasons at s. 190B(5)(b) below.

I am satisfied that the application meets the requirements of s. 190B(5)(a).

Reasons for s. 190B(5)(b)

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

Dowsett J's findings in the *Gudjala* decisions of 2007 and 2009, in my view, assist to clarify the nature and type of factual basis material that must be provided to support the assertion at s. 190B(5)(b). In *Gudjala 2007*, His Honour referred to the authority of *Yorta Yorta* in determining the nature and content of 'traditional laws and customs' and found that the following asserted factual information may be necessary to support an assertion that there exist traditional laws acknowledged by, and traditional customs observed by the native title claim group, giving rise to a claim for native title rights and interests:

- that the laws and customs observed have their source in a pre-sovereignty society and have been observed since that time by a continuing society – at [63];
- that there existed at the time of European settlement a society of people living according to a system of identifiable laws and customs, having a normative content – at [65] and [66]; and
- that explains the link between the claim group described in the application and the area covered by the application – at [66].

This part of the *Gudjala 2007* decision was not criticised by the Full Court on appeal, and hence in my view can still be considered a relevant authority in undertaking the task at s. 190B(5)(b).

Dowsett J again considered the kind of factual information that may be necessary to satisfy the Registrar at s. 190B(5)(b), in *Gudjala 2009*. His Honour's decision suggested that the following factors may guide the Registrar in assessing the asserted factual basis material:

- that the factual basis speaks to the existence of a pre-sovereignty society and identifies the persons who acknowledged and observed the laws and customs of the pre-sovereignty society – at [37] and [52];
- that if descent from named apical ancestors is the basis of membership of the group, that the factual basis demonstrate some relationship between those ancestral persons and the pre-sovereignty society from which the laws and customs are derived – at [40];
- that the factual basis contain some explanation as to how the current laws and customs of the claim group can be said to be traditional, and more than merely an assertion that the current laws and customs of the native title claim group are traditional laws and customs – at [52] and [69]; and
- that the factual basis contain some details of the claim groups' acknowledgement and observance of those traditional laws and customs pertaining to the claim area – at [74].

The applicant's factual basis material – s. 190B(5)(b)

Attachment F of the application, along with the affidavits sworn by members of the claim group at Attachments F(1) to F(12), provide insight and details regarding the traditional laws and customs acknowledged and observed by the claim group members, and regarding the society in existence at the time of European settlement in the area.

The Western Bundjalung pre-sovereignty society

The application at Attachment F asserts that prior to 26 January 1788 the ancestors of the Western Bundjalung People were in occupation of the application area, and that those persons exercised a system of traditional law and customs giving rise to native title rights and interests in the area. Attachment F also asserts that the native title claim group maintains a system of law and custom which has existed from prior to 26 January 1788 until the present day – Attachment F at [1], [2], [3] and [11].

A number of the deponents of the affidavits at Attachments F(1) to F(12) refer to the lifestyles and practices of their predecessors prior to European settlement, or at the time of European settlement of the application area. For example, [text removed] shows knowledge of the location and nature of campsites used by the Western Bundjalung people prior to European settlement. Similarly, [*text removed*], suggests that claim group members have a strong knowledge of the ways in which the lifestyles of their predecessors were affected by European settlement in the area, including details of those white settlers who were involved in that first contact period.

[*text removed*]

The Pagan's Flat massacre occurring around the mid 1800s is also spoken of a number of times throughout the factual basis material, [*text removed*].

In addition to the material contained in the application, as discussed above, the applicant submitted the [*name removed*] report. The report contains information relating to sites recorded within the application area as pre-dating European settlement of the area. Evidence from the application area relayed in the report includes rock art sites and charcoal drawings, axe grinding grooves, midden sites, bora rings, carved trees, stone arrangements and evidence of inhabited rock shelters and caves. Dates of the sites vary, with the earliest record being the 1st century. Other sites are dated to 3000 years ago, and to the 17th century.

System of traditional laws and customs

The factual basis material contained in the affidavits at Attachments F(1) to F(12) indicates the system of laws and customs is one that is based largely on familial ties and bloodline connections to the application area, and adherence to certain responsibilities and restrictions associated with those connections – [*text removed*].

The laws and customs observed by the claim group members appear to be founded on the connections of individual families to certain locations within the application area, with rights and responsibilities vested in accordance with these connections. This is apparent from the above and other statements made by claim group members within the factual basis material. [*text removed*]

This respect for land and the need to conserve its natural resources is another element of the laws and customs of the Western Bundjalung people referred to numerous times throughout the factual basis material – [*text removed*].

One way through which the laws and customs currently acknowledged and observed by the claim group members can be said to be traditional in their nature, and derive from a pre-sovereignty society is, in my view, in the strong reliance among the Western Bundjalung people on the inter-generational transfer of knowledge – [*text removed*].

Similarly, claim group members today pass on knowledge of the Western Bundjalung system of laws and customs to their children, [*text removed*].

Marriage and burial practices are another element of the system of laws and customs upheld by the claim group members, that are asserted to have derived from a pre-sovereignty society – [*text removed*]. Such laws and customs surrounding marriage and burials or funerals are spoken of with reference to the way in which the predecessors of the deponents carried out such ceremonies, and also spoken of with reference to the way in which these laws and customs are still maintained today.

[*text removed*]

Consideration

In considering the above material contained in the application, particularly whether it is able to satisfy me that this kind of factual information is sufficient to support the assertion at s. 190B(5)(b), I have referred to Dowsett J's findings in both *Gudjala 2007* and *Gudjala 2009*. For the reasons that follow, I am satisfied that the factual basis is sufficient in supporting the assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to their native title claim.

As to a pre-sovereignty society, there is little factual information aside from the general assertion at Attachment F that supports the existence of a specific Western Bundjalung society inhabiting the application area bound by adherence to a common system of laws and customs in 1788. Despite this, I am of the view that there is sufficient factual information supporting the existence of a society of Western Bundjalung People, inhabiting the application area, at the time of European settlement of the area, or first white contact. The claimants' thorough knowledge of their predecessors' lifestyles and specific historical events regarding those predecessors, including details of interactions with those first white settlers in the area, in my view is sufficient to support an assertion that the claim group and their predecessors are part of a Western Bundjalung society that has inhabited the area since European settlement.

I note that there is little information pertaining to the date at which European settlement occurred, however there is an indication that Pagan's Flat massacre, an event associated with the period of settlement, occurred in the early to mid 1800s. I also note that the information at Schedule A indicates that the majority of the apical ancestors, by which membership of the Western Bundjalung People native title claim group is determined, were born around the mid 1800s. Subsequently, I am of the view that the factual basis supports an assertion of a direct link between the apical ancestors and the Western Bundjalung society in existence at the time of European settlement, in that those ancestors were a part of that society.

Being of that view, I have also considered the factual information within the [*name removed*] Report, including records of sites indicating Indigenous occupation of the application area as early as the first century. I am of the view that this kind of factual information is sufficient to support an assertion of the existence of a pre-contact group of people inhabiting the application area, carrying out certain activities including ceremonies, camping, tool making, cooking and recording stories through painting or drawing. Read together with the general assertion at Attachment F that the ancestors of the Western Bundjalung People were in occupation of the application area prior to 26 January 1788, I have formed the view that the factual basis is sufficient to support the existence of a Western Bundjalung society pre-sovereignty.

Regarding whether the factual basis is sufficient to support an assertion that the laws and customs of the claim group are rooted in that pre-sovereignty society, I have considered the nature of the system of laws and customs asserted by the claim group. I note that the claimants' knowledge of their laws and customs is asserted to have been passed down to them by their predecessors, and that the claimants continue to impart knowledge of Western Bundjalung laws and customs to their children and grandchildren in the same way. In my view, the statements contained in the affidavits at Attachments F(1) to F(12), excerpted above, are sufficient to support this assertion.

I also note that many of the family names spoken of by the deponents as being Western Bundjalung family names are shared by the apical ancestors listed at Schedule A, and that the system of laws and customs is asserted to be based on bloodline connections held by certain families with certain locations within the application area. It is this bloodline and totemic relationship with the land and waters that is asserted to give rise to native title rights and interests in the application area – see Attachment F at [16]. In my view, the statements within the affidavits and the general statements at Attachment F comprising the relevant factual basis similarly are sufficient to support these assertions.

Accepting that the material is sufficient to support an assertion that laws and customs have been transmitted to the claim group members by intergenerational transfer of knowledge, and an assertion that the family names identifying the Western Bundjalung society today are the same as those names identifying the Western Bundjalung apical ancestors at the time of European settlement, I consider that the factual basis is therefore also sufficient to support an assertion that there is a direct link between the claimants' predecessors, occupying the application area at the time of European settlement, united by an adherence to a specific system of laws and customs, and the claim group members today, also associated with the application area, and bound by the same system of laws and customs as passed down to them by their predecessors. The strength of the claimants' knowledge regarding the system of laws and customs as acknowledged and observed by their predecessors similarly goes towards supporting such an assertion.

Having been satisfied above that there is sufficient factual basis material to support the existence of a Western Bundjalung pre-sovereignty society, I am of the view that the material is also sufficient to support an assertion that the system of laws and customs acknowledged and observed by the claim group is a traditional one, being rooted in a pre-sovereignty society.

Subsequently, I am satisfied that the factual basis material supports the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the Western Bundjalung People native title claim group that give rise to the native title rights and interests subject of the claim.

The application meets the requirements of s. 190B(5)(b).

Reasons for s. 190B(5)(c)

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

In reaching the required level of satisfaction that the factual basis is sufficient to support the assertion that the Western Bundjalung People have continued to hold native title in accordance with the traditional laws and customs, I have turned my mind to those factors considered relevant by Dowsett J in *Gudjala 2007* (not criticised by the Full Court), being that the factual basis is sufficient to support the assertion that there was a society that existed at sovereignty that observed traditional laws and customs from which the identified laws and customs derived, and that there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement – at [82]. The High Court in *Yorta Yorta* referred to the latter of these elements as being 'a system that has had a continuous existence and vitality since sovereignty' – at [47].

I have already discussed the nature of the laws and customs currently acknowledged and observed by the claim group members, and the way in which these can be seen as being derived from a system of laws and customs rooted in a pre-sovereignty Western Bundjalung society. In my view, the factual basis material does show that the current laws and customs have been passed down to the claim group members through the intergenerational transfer of knowledge, and that this has allowed claim group members to continue to adhere to and uphold laws and customs inherent to the cultural and spiritual identity of the Western Bundjalung people, as their predecessors did.

Factual basis material going towards the continuous existence and vitality of the system of laws and customs acknowledged and observed by the Western Bundjalung People, in my view includes a strong maintenance of the Bundjalung language dialect (see for example Attachment F(12) at [23] and Attachment F(3) at [16]), the fact that most of the claim group members still live within the application area and frequently hunt, fish and gather natural resources from the application area (see for example Attachment F(4) at [25] to [26]), and the fact that marriage and burial customs are still largely adhered to, including the custom that Western Bundjalung People are to be buried on country (see for example Attachment F(4) at [39]).

I note that there is also factual basis material that suggests there has been some change to the laws and customs upheld by the claim group members, as contrasted with the laws and customs upheld by the pre-sovereignty Western Bundjalung People. The factual basis material refers to

the arrival of white settlers in the area and the effect this had on the predecessors of the deponents, including forcing them to relocate and preventing them from speaking their language.

[*text removed*]

In addition to material pertaining to the impacts of European settlement of the application area on the Western Bundjalung People, the factual basis material also suggests the ways in which laws and customs have changed over time. [*text removed*]

Despite the fact that European settlement of the application area impacted the lifestyles and habits of the Western Bundjalung People, and despite the noted changes to the laws and customs acknowledged and observed by the claim group members as against those acknowledged and observed by their predecessors, I have formed the view that the factual basis is sufficient to support the assertion that the Western Bundjalung People have continued to hold native title in accordance with a system of traditional laws and customs. This assertion is supported by factual basis material that goes to demonstrating the strength of the prevailing system of laws and customs, and the connection between the claim group and their predecessors, including back to European settlement, as described in significant detail by the deponents.

The application meets the condition of s. 190B(5)(c).

Subsection 190B(6)
Prima facie case

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

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

In undertaking the task at s. 190B(6), I must have regard to the relevant law as to what is a native title right and interest, specifically the definition of s. 223(1). That is, I must examine each individual right and interest claimed in the application to determine if I consider, prima facie, that they:

- are possessed under traditional laws and customs acknowledged and observed by the native title claim group;
- are native title rights and interests in relation to the land and waters of the application area; and
- have not been extinguished over the whole of the application area, that is are recognised by the common law.

I note that there is no information before me suggesting that the native title rights and interests claimed in relation to the land and waters of the application area have been extinguished.

The wording of s. 190B(6) indicates that I am only required to be satisfied that *some* of the native title rights and interests claimed by the applicant can be, prima facie, established. A failure by the applicant to provide factual basis material in support of *all* of the rights and interests subject of

the claim will not necessarily result in a failure to satisfy this condition of the registration test – *Doepel* at [16].

I note that the basis of the test at s. 190B(6) is 'prima facie'. In understanding the meaning to be applied to this phrase, I have turned my mind to High Court's finding in *North Ganalanja Aboriginal Corporation v Queensland* [1996] HCA 2, where it was held that it was the ordinary meaning of the phrase, ' "at first sight; on the face of it; as appears as first sight without investigation"' that was relevant – at [615] to [616]. This approach was adopted in *Doepel* – at [134].

The rights and interests claimed by the Western Bundjalung People are listed at Attachment E to Schedule E, and include rights and interests of an exclusive and non-exclusive nature. I have considered each of these rights and interests separately below, including a consideration of whether each meets the definition of 'native title rights and interests' at s. 223(1).

Exclusive rights

The Western Bundjalung People claim the right to possession, occupation, use and enjoyment of the lands and waters of the application area, to the exclusion of all others. I note that the right is claimed subject to the laws of the Commonwealth and the State and is only claimed in those areas where exclusive native title can be recognised.

Where there is a sufficient factual basis to support the right, I am of the view that a claim to exclusive possession, as against the whole world, does not necessarily offend s. 190B(6), and may be established – see for example *Western Australia v Ward* [2002] HCA 28 (*Ward HC*) at [51]. The case of *Ward HC* considered the nature of a common law exclusive right to possess, occupy, use and enjoy land, and held that it found its expression in the 'core concept of traditional law and custom' to be 'asked permission' and 'to speak for country' – at [88]. The Full Court in the case of *Griffiths v Northern Territory* [2007] FCAFC 178 (*Griffiths*) also considered the nature of an exclusive native title right to possession and found that it was not to be compared with common law concepts of usufructuary or proprietary rights, but that it depended instead upon 'a consideration of what the evidence discloses about [the rights'] content under traditional law and custom' – at [71].

There are a number of statements made by claimants within the affidavits comprising the applicant's factual basis material at Attachment F, that speak to traditional laws and customs regarding permission to access country and the claimants' ability to speak for country. [text removed]

I have considered the nature of these statements and what they reveal about the content of the exclusive right claimed under the traditional laws and customs of the Western Bundjalung People. These statements indicate that rules regarding access by non-Western Bundjalung persons take the nature of 'protocols' within the claim group. The practices to be followed where non-Western Bunjalung persons come onto Western Bundjalung country are consistent across the information provided by each of the deponents which suggests to me that the right to exclude others from Western Bundjalung country and the right to grant permission to enter Western Bundjalung country is exercised in a systematic and somewhat formalised manner.

I also note that there is material indicating that institutions and persons external to the Western Bundjalung claim group, today acknowledge and give effect to the fact that the claim group

members speak for the land and waters of the application area – see excerpt of Attachment F(4) at [42] above.

In understanding the exclusivity that the claim group asserts over the application area, I refer to my reasons at s. 190B(5)(a), where I formed the view that the factual basis material was sufficient to support the assertion that the native title claim group and their predecessors, back to a time pre-dating sovereignty, have and had both a physical and spiritual association with the application area. This view was based on factual basis material pertaining to the claim group and their predecessors ongoing habitation of the application area, claimants' strong knowledge of their country's boundaries, and the assertion of the bloodline association or connection of certain families with specific locations within the application area giving rise to rights and interests in the land and waters.

The systematic nature of the protocols spoken of and asserted by the claim group, and the assertion that these have been passed down by the claimants' predecessors has allowed me to form the view that the claimed right to exclusive possession exists, prima facie, under the traditional laws and customs of the Western Bundjalung.

Having considered what the evidence discloses about the rights' content under those traditional laws and customs, I am of the view that a right held by the Western Bundjalung People, to possess, occupy, use and enjoy the application area, to the exclusion of others is, prima facie, established.

Non-exclusive rights

Right to access the application area

I note that paragraph [3] of Attachment E provides that the rights claimed in paragraph [2] of Attachment E, do not confer possession, occupation, use or enjoyment of the lands and waters of the application area to the exclusion of all others. There are numerous statements that indicate that, in accordance with Western Bundjalung traditional laws and customs, the claimants have a right to access the application area. [*text removed*]

The factual basis material also contains multiple references to claimants and their predecessors inhabiting and spending time carrying out activities at various locations throughout the application area, indicating that access to the application area has always been, and continues to be an accepted and exercised right.

I am of the view that a non-exclusive right to access the application area is, prima facie, established.

Right to use and enjoy the application area

In my view, the non-exclusive right to use and enjoy the application area is related to the right, prima facie, established above to access the application area. The claimants refer a number of times throughout the affidavits at Attachment F of the enjoyment and spiritual fulfillment that they receive from being on country. [*text removed*]

Again, I note that the right to use and enjoy the application area is claimed as a non-exclusive right. The material within the application, in my view, clearly demonstrates the claimants' use

and enjoyment of the land and waters of the application area, and that of their predecessors, as inherent to their daily living. Based on the material of this nature, I am of the view that the factual basis material, prima facie, establishes that the Western Bundjalung People possess a non-exclusive right to use and enjoy the application area.

Right to move about the application area

Similarly, having established, prima facie, a right to access, and a right to use and enjoy the application area, I am of the view that a right to move about the application area flows directly from the rights claimed above. The applicant's factual basis material contains numerous references to the claimants and their predecessors travelling throughout the application area for reasons including searching for food, participating in ceremonies, visiting people, and connecting with country and specific sites. [*text removed*]

Based on this material, I am of the view that the claimants have established, prima facie, in accordance with Western Bundjalung traditional law and custom, a non-exclusive right to move about the application area.

Right to camp on the application area

A right to camp on the application area, in my view, flows from a consideration of the material relating to the rights above. Clearly, the factual basis material goes to supporting the fact that movement throughout the application area was and is frequently undertaken, and this would have necessitated camping at locations throughout the application area during the journey. The factual basis material at Attachment F speaks repeatedly of the claimants and their predecessors camping in the bush while travelling within the application area. [*text removed*]

I am thus of the view that a non-exclusive right to camp on the application area is, prima facie established.

Right to erect shelters and other structures on the application area

Within the factual basis material, there are statements pertaining not only to traditional shelters and structures constructed by the claimants' predecessors, but also to temporary and more permanent structures constructed in present times by various claim group members on the application area. [*text removed*]

The material indicates that when camping, claimants still construct temporary bark shelters of the type described in the statement above. In addition to this, I note that the majority of the deponents still live on, or directly adjacent to, the application area, and many still have houses or property within the area. Based on this information, I am satisfied that the material within the application establishes, prima facie, a non-exclusive right to erect shelters and other structures on the application area.

Right to live being to enter and remain on the application area

In my view, the right to live, being to enter and remain on the application area is supported by and flows from the establishment, prima facie, of a number of the rights listed above. As discussed, the information before me suggests that the majority of the claimants still live at locations within the application area, and a number of the deponents refer to property owned by them at such locations. [*text removed*]

There are a number of statements within the material at Attachment F indicating that the claimants have long exercised a right to live on the application area. [*text removed*]

For these reasons, I am of the view that a non-exclusive right to live on the application area is, prima facie, established.

Right to hold meetings on the application area

Claimants' thorough knowledge of the location of special and significant sites within the application area, and the purpose for which these sites were established provides substantial information regarding various types of meetings that were, in previous times, held on Western Bundjalung country. Meetings took place for initiations, burials, corroborees and dispute resolution purposes. While the majority of this information speaks of such gatherings as a practice of their predecessors, there is also information supporting the fact that claimants currently hold a right to conduct meetings on country. [*text removed*]

Based on this information, I am of the view that a non-exclusive right to hold meetings on the application area is, prima facie, established.

Right to hunt on the application area

Almost all of the deponents of the affidavits at Attachments F(1) to F(12) speak of their past and present involvement in hunting on the application area. Claimants refer particularly to knowledge regarding methods of hunting, and methods of cooking the various animals collected. [*text removed*]

The amount of information contained within the application pertaining to the exercise of the right by the claimant's predecessors, and currently by the claimants, has allowed me to infer that the right exists under the traditional laws and customs of the claim group. Subsequently, I consider that a non-exclusive right to hunt on the application area is, prima facie, established.

Right to fish in the application area

Similarly, the deponents speak frequently of fishing and turtle diving at a number of waterways within the application area, both as kids, and presently as adults passing on knowledge and techniques to their children. [*text removed*]

From this information, I understand that the claimants' predecessors fished throughout the application area waters, and passed methods of fishing and knowledge of fishing locations onto their children, who continue to practice fishing in this way today. Subsequently, the right to fish has been and continues to be exercised by the claimants. The non-exclusive right to fish in the application area is therefore, in my view, prima facie, established.

Right to have access to and use the natural water resources of the application area

As discussed above, the claimants and their predecessors frequently accessed/access the waters of the application area to exercise their right to fish in accordance with Western Bundjalung traditional laws and customs. In addition to this, there are a number of statements within the factual basis material indicating that the claimants also access and use natural water resources of the application area for other purposes, including drinking water, cooking water, bathing and swimming. The material also indicates that this access and use has continued over a substantial period of time to the present day.

[*text removed*]

Subsequently, I have formed the view that a non-exclusive right to have access to and use the natural water resources of the application area is, prima facie, established.

Right to gather and use the natural resources of the application area

There is substantial information within the factual basis material pertaining to the claimants' use of natural resources within the application area. Statements from the affidavits at Attachment F indicate that the claimants gather flora and fauna for food, and also for various other purposes. For example, plants are used as medicine (see for example Attachment F(4) at [43]), ochre is used for painting (see for example Attachment F(5) at [35]) and parts of animals are used for jewellery and ceremonial objects (see for example Attachment F(3) at [19]).

[*text removed*]

I am of the view that the material indicates that the right to gather and use natural resources from the application area is one that has been practised by the claimants' predecessors, in addition to being exercised by the claimants presently, which in my view, gives rise to the inference that this right or interest exists or is possessed pursuant to the traditional laws and customs.

I am therefore of the opinion that the non-exclusive right to gather and use the natural resources of the application area is, prima facie, established.

Right to manage natural resources including the right to carbon

Within the affidavits at Attachment F, there are a number of statements that refer to the claim group members conserving natural resources within the application area. Deponents speak of not taking more fish and/or animals than what was necessary to feed themselves and that this practice was taught to them by their predecessors. [*text removed*]

Despite the inclusion of such statements within the factual basis material, I am of the view that the drafting of the right at Attachment E creates some difficulties which prevent me from being satisfied that such a right can, prima facie, be established. The rights at paragraph [2] of Attachment E are framed as non-exclusive rights and interests. Despite this I consider that both the 'right to manage natural resources' and 'a right to carbon', without any further qualification, indicate elements of control and ownership that are contradictory to a non-exclusive interest. Without exclusive ownership rights over the land and waters of the application area, it is difficult to imagine what the claimants' ability to manage the area's natural resources, including the right to carbon, would look like.

I am also of the view that there is a lack of factual basis material that goes towards establishing that the Western Bundjalung People have a right to carbon in accordance with their traditional laws and customs, hence cannot be satisfied that such a right is a native title right and interest as defined by s. 223(1). While the material talks briefly of the claimant's use of fire for various daily lifestyle and cultural practices, there is nothing to suggest a right to ownership or control of carbon resources is established, as the phrasing of the right suggests.

For the reasons above, I find that the right to manage natural resources including the right to carbon is not, prima facie, established.

Right to share and exchange resources

There are a number of references within the factual basis material that in my view demonstrate the claimants' practice, in accordance with Western Bundjalung traditional laws and customs, of sharing and exchanging resources taken from the application area. These statements suggest that claimants both share resources, particularly food, amongst themselves, but also trade and exchange resources with other neighbouring groups. [*text removed*]

Based on this information, I am of the view that a right to share and exchange resources as between claim group members, and also with other groups is, prima facie, established.

Right to participate in cultural and spiritual activities

The factual basis material speaks frequently of the involvement of claim group members and their predecessors in cultural and spiritual activities. These activities vary and include corroborees, marriages, burials, welcome to country practices and initiations. The following statements, in my view, demonstrate that both the claim group members' predecessors, and the claim group members currently, participate in cultural and spiritual activities:

> [*text removed*]

Subsequently, it appears from the material that this right, having been exercised by both the predecessors of the claim group and the claim group members today, is one that exists under the traditional laws and customs of the Western Bundjalung People. Therefore, I am of the view that the right is, prima facie, established.

Right to maintain and protect places of importance

The deponents of the affidavits comprising the factual basis material speak frequently and consistently about special or sacred places within the application area, and the rules and restrictions surrounding access to these places. Statements suggest that claimants seek to ensure particular places are not visited by people considered inappropriate in accordance with Western Bundjalung traditional laws and customs. There is also some indication that claimants want the location of these places and their meaning and significance to remain confidential. [*text removed*]

Enforcement and adherence to laws regarding sacred sites is shown to be a significant part of Western Bundjalung traditional laws and customs, and something that has been undertaken by the claimants' predecessors and passed down to the claim group members. In my view, the ability of claimants to exercise this right is inherent in their culture and identity.

Subsequently, I am of the view that a non-exclusive right to maintain and protect places of importance is, prima facie, established.

Right to conduct ceremonies and rituals including burials

Having formed the view above that a right to participate in cultural and spiritual ceremonies is, prima facie, established, I am of the opinion that a right to conduct ceremonies and rituals is closely related to the former right and hence there is little further from the factual basis material required to establish the latter. The excerpts from the material above indicate that both the claimants and their predecessors engaged in cultural and spiritual ceremonies and rituals on a regular basis.

This right at Attachment E does, however, specifically refers to burials and for that reason I have turned my mind to the material pertaining to claim group members' involvement and practice in

conducting burials. There are numerous references indicating that certain ceremonies and rituals carried out by the claimants' predecessors are maintained today, or otherwise adapted.

[*text removed*]

In my view this material is sufficient to establish, prima facie, the right to conduct ceremonies and rituals including burials.

Right to transmit traditional knowledge to members of the native title claim group

In my consideration of the material at Attachment F, I have formed the view that the claim group members have a detailed and thorough knowledge of Western Bundjalung traditional laws and customs, and that this knowledge has been predominantly imparted by their predecessors through an intergenerational transfer of knowledge, and through involvement in and observation of elders' lifestyles and rituals. [*text removed*]

The latter statement indicates that imparting traditional knowledge to younger generations is still practised by claim group members, and has been formalised into cultural programs for youth. The amount of material pertaining to the transmission of traditional knowledge from predecessors has allowed me to reach the view that had the claim group not continued exercising such a right, Western Bundjalung traditional laws and customs would not have survived with the strength that is evident in the factual basis material.

For these reasons, I am of the opinion that a right to transmit traditional knowledge to members of the native title claim group is, prima facie, established.

Right to speak for country

I am of the view that the final three [3] rights at Attachment E all involve a claim to similar rights and interests in relation to the application area and for that reason I have considered them collectively. Those rights are:

- the right to speak for and make non-exclusive decisions about the application area;
- the right to speak authoritatively about the application area among other Aboriginal People; and
- the right to control access to or use of the lands and waters within the application area by other Aboriginal People.

The rights are all framed as non-exclusive rights, yet in my view, each one asserts some form of control by the claim group members over the land and waters of the application area and how they are used. In this way, it appears that the applicant seeks the recognition of rights of the nature of exclusive rights and interests, in areas where exclusive native title cannot be recognised (as stipulated in paragraph [1] of Attachment E). Hence, there is an inherent contradiction in the way these rights have been framed.

The case law that addresses the tension between non-exclusive rights expressed in an exclusive manner suggests that such rights are unlikely to be upheld by the Court. In *Ward HC*, referring to a claim to a right to control access it was held that:

> It is necessary to recognise that the holder of a right, as against the whole world, to possession of land, may control access to it by others and, in general, decide how the land will be used. But without a right of possession of that kind, it may greatly be doubted that there is any right to

> control access to land or make binding decisions about the use to which it is put. To use those expressions in such a case is apt to mislead – at [52].

Similarly, in reference to the right to speak for country, the Court emphasised the exclusive nature of the right as follows:

> 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 possess, occupy, use and enjoy land to the exclusion of others – at [88].

The Court has, in certain cases, deviated from the conclusions reached in *Ward HC*. In *De Rose v South Australia* [2002] FCA 1342 (*De Rose*), O'Loughlin J indicated a willingness to recognise the non-exclusive right to grant and refuse access to the application area to Aboriginal persons governed by the laws and customs of the native title holders – at [553]. Similarly, in the consent decision of *Mundraby v Queensland* [2006] FCA 436 (*Mundraby*), the Court recognised the non-exclusive right to 'make decisions in accordance with traditional laws and customs concerning access thereto and use and enjoyment thereof by Aboriginal people' bound by the laws and customs of the native title holders – at [3].

I note that there are various statements within the affidavits at Attachment F indicating that the claimants possess some right to speak for country, and that in accordance with Western Bundjalung traditional laws and customs, claim group members acknowledge certain protocols and practices when members of other Aboriginal groups come onto or visit their country. The rights expressed in Attachment E before me, however, can be distinguished from those upheld in *De Rose* and *Mundraby* in that they seek to bind persons beyond the claim group, being all 'other Aboriginal people'. Both the decisions in *De Rose* and *Mundraby* recognise such non-exclusive rights where they are limited in their application to *only* those Aboriginal people bound by the traditional laws and customs of the claim group, that is, the claim group members themselves – at [553] and [3] respectively.

I find that this is not the case here, and for that reason, am compelled to follow the reasoning of the Court in *Ward HC*. In areas where exclusive possession cannot be recognised, I am not satisfied that the non-exclusive rights listed above are, prima facie, established.

Subsection 190B(7)
Traditional physical connection

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

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

Mansfield J in *Doepel* gave considerable guidance as to the role of the delegate at s. 190B(7), where he held that the task required that the delegate was to be 'satisfied of a particular fact or particular facts. It therefore requires evidentiary material to be presented' – at [18]. His Honour found, however, that such material was not to be subject of the focus that the Court employs in a determination, and that the purpose of s. 190B(7) is to impose 'some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration' – at [18].

The task also necessarily requires me to turn my mind to what meaning is to be applied to the phrase 'traditional physical connection'. This was discussed in the case of *Gudjala 2007*, where Dowsett J stated:

> The delegate considered that the reference to 'traditional physical connection' should be taken as denoting, by the use of the word "traditional", that the relevant connection was in accordance with laws and customs of the group having their origin in pre-contact society. This seems to be consistent with the approach in Yorta Yorta – at [89].

Subsequently, it is my view that in considering the applicant's material at s. 190B(7), I am to understand the word 'traditional' in light of the High Court's findings in *Yorta Yorta*, and consider whether the traditional connection asserted is in accordance with the laws and customs of the Western Bundjalung People who have their origins in a society existing at sovereignty. In addition to this, I note that the decision in *Yorta Yorta* indicates that 'traditional physical connection' may require an actual presence on the land and waters of the application area – at [184].

Material addressing s. 190B(7)

Schedule M of the application refers to the affidavits at Attachments F(1) to F(12) of the application as providing information pertaining to the traditional physical connection of the claim group members with any part of the land and waters of the application area. The applicant has stated that schedule N of the application, requiring details of any circumstances in which any member of the claim group has been prevented from gaining access to any of the land and waters of the application area, is not applicable.

In considering the terms of s. 190B(7), I note that the requirement is that at least one member of the claim group has had the necessary connection with any part of the application area. For this reason, while I have before me affidavits from 12 different claim group members, I have focused my attention on the information relevant to the connection of one claim group member only.

[*text removed*]

At this point, I consider it appropriate to refer to my reasons at s. 190B(6) above, where I formed the view that the right to hunt on the application area, the right to gather and use the natural resources of the application area, and the right to transmit traditional knowledge to members of the claim group were all rights that were capable of being, prima facie, established. In forming this view, I note that the rights claimed were found to be consistent with the definition of 'native title rights and interests' in s. 223(1), and hence, that one of the key characteristics of these rights, as currently exercised by the claim group members, is that they are rights that exist under the traditional laws and customs of the Western Bundjalung People.

I also refer to my reasons at s. 190B(5)(b) above, where I reached the view that the factual basis was sufficient to support the assertion that the laws and customs acknowledged and observed by the Western Bundjalung People today comprise a system of laws and customs that bound a group of people or society at the time of European settlement of the area.

[*text removed*]

I am of the view that the statements contained within the application can be accepted as true. [*text removed*]

In my view, the information contained in [*name removed*] affidavit therefore clearly demonstrates that he has had, and continues to have a traditional physical connection with Baryulgil and the surrounding region, within the application area.

The application meets the requirement of s. 190B(7).

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

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

Section 61A provides:

(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.

(2) If :

(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;

a claimant application must not be made that covers any of the area.

(3) If:

(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;

a claimant application must not be made in which any of the native title rights and interests confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.

(4) However, subsection(2) and (3) does not apply if:

(a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and

(b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

The application **satisfies** the condition of s. 190B(8). I explain this in the reasons that follow by looking at each part of s. 61A against what is contained in the application and accompanying documents and in any other information before me as to whether the application should not have been made.

Reasons for s. 61A(1)

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

In my view the application **does not** offend the provisions of s. 61A(1).

The geospatial assessment states that no determinations as per the National Native Title Register fall within the external boundary of this application as at the date of the assessment.

Reasons for s. 61A(2)

Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply.

In my view the application **does not** offend the provisions of s. 61A(2).

Schedule B of the application lists general exclusions, or areas within the external boundary of the claim area not covered by the application. Included at paragraph one [1] of this list is the following statement: 'The area covered by the application excludes any land and waters covered by past or present freehold title or by previous valid exclusive possession acts, as defined by section 23B of the *Native Title Act 1993* (Cth)'.

Reasons for s. 61A(3)

Section 61A(3) provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done, , unless the circumstances described in s. 61A(4) apply.

In my view, the application **does not** offend the provisions of s. 61A(3).

Schedule B of the application provides that 'exclusive possession is not claimed over areas which are subject to valid previous non-exclusive possession acts done by the Commonwealth, State or Territory.

Attachment E to Schedule E of the application confirms that the Western Bundjalung People only claim exclusive native title rights and interests conferring possession, occupation use and enjoyment of the lands and waters of the application area where exclusive native title can be recognised.

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

> The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:

(a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
(b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
(c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss. 47, 47A or 47B.

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

Reasons for s. 190B(9)(a):

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

Schedule Q provides that the application does not make any claim to ownership of minerals, petroleum or gas wholly owned by the Crown.

Reasons for s. 190B(9)(b)

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

Schedule P provides that the application does not make any claim to exclusive possession of any offshore place.

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

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

Paragraph seven [7] of Schedule B provides that the area covered by the application excludes land or waters where the native title rights and interests claimed have been otherwise extinguished.

[End of reasons]

Attachment A
Summary of registration test result

Application name	**Western Bundjalung People**
NNTT file no.	**NC11/5**
Federal Court of Australia file no.	**NSD2300/2011**
Date of registration test decision	**29 March 2012**

Section 190C conditions

Test condition	**Subcondition/requirement**		**Result**
s. 190C(2)			**Aggregate result:** **Met**
	re s. 61(1)		**Met**
	re s. 61(3)		**Met**
	re s. 61(4)		**Met**
	re s. 62(1)(a)		**Met**
	re s. 62(1)(b)		**Aggregate result:** **Met**
		s. 62(2)(a)	**Met**
		s. 62(2)(b)	**Met**
		s. 62(2)(c)	**Met**
		s. 62(2)(d)	**Met**
		s. 62(2)(e)	**Met**
		s. 62(2)(f)	**Met**
		s. 62(2)(g)	**Met**
		s. 62(2)(ga)	**Met**

Test condition	Subcondition/requirement		Result
		s. 62(2)(h)	Met
s. 190C(3)			Met
s. 190C(4)			Overall result: Met
	s. 190C(4)(a)		NA
	s. 190C(4)(b)		Met

Section 190B conditions

Test condition	Subcondition/requirement	Result
s. 190B(2)		Met
s. 190B(3)		Overall result: Met
	s. 190B(3)(a)	NA
	s. 190B(3)(b)	Met
s. 190B(4)		Met
s. 190B(5)		Aggregate result: Met
	re s. 190B(5)(a)	Met
	re s. 190B(5)(b)	Met
	re s. 190B(5)(c)	Met
s. 190B(6)		Met
s. 190B(7)(a) or (b)		Met
s. 190B(8)		Aggregate result: Met
	re s. 61A(1)	Met
	re ss. 61A(2) and (4)	Met

Test condition	Subcondition/requirement	Result
	re ss. 61A(3) and (4)	**Met**
s. 190B(9)		**Aggregate result:** **Met**
	re s. 190B(9)(a)	**Met**
	re s. 190B(9)(b)	**Met**
	re s. 190B(9)(c)	**Met**

[End of document]