National Native Title Tribunal

Registration test decision

Native title determination application	Cape York United Number 1 Claim
Applicant	Michael Ross, Silva Blanco, James Creek, Jonathan Korkaktain, Reginald Williams, Wayne Butcher, Clarry Flinders, Philip Port, Hogan Shortjoe
Federal Court No.	QUD673/2014
NNTT No.	QC2014/008

On 6 February 2015, I finished considering the claim made in the above claimant native title determination application in accordance with s 190A of the *Native Title Act 1993* (Cth) (the Act).[1] This document comprises a statement of my reasons for the decision on that day that the claim satisfies all of the conditions in s 190B (which deals mainly with the merits of the claim) and s 190C (which deals with procedural and other matters). Pursuant to s 190A(6) of the Act, the claim must therefore be accepted for registration.

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Susan Walsh, delegate of the Native Title Registrar (Registrar)[2]
11 February 2015

1 All references to legislative sections refer to the *Native Title Act 1993* (Cth), as in force on the day this decision is made, unless otherwise specified.

2 Pursuant to an instrument of delegation under s 99 of the Act dated 8 August 2014.

Introduction

[1] On 12 December 2014, the Registrar of Federal Court (Federal Court) provided a copy of the native title determination application and accompanying documents to the Native Title Registrar (Registrar) under s 63 of the Act. This has triggered the duty of the Registrar under s 190A(1) to consider the claim in that application for registration in accordance with the provisions of s 190A.

[2] The reasons that follow consider the claim against all of the conditions of ss 190B and 190C. I refer to ss 190A(6) which provides that the claim must be accepted for registration in light of my opinion that the claim satisfies all of the conditions of ss 190B and 190C.

[3] I have used my best endeavours to finish considering the claim by the end of four months after the notification day of 8 October 2014 specified in a notice given under s 29 of the Act for mining tenement EPM25682, as required by s 190A(2).

Information considered

[4] As required by s 190A(3)(a), I have had regard to the following information in considering the claim: information in the native title determination application and accompanying affidavits, provided to the Registrar by the Federal Court under cover of its letter dated 12 December 2014; and in the other documents provided by the applicant under cover of an email from the applicant's legal representative to the Registrar dated 22 January 2015 which comprised three affidavits from claim group members, **[Person 3 - name deleted]**, **[Person 2 - name deleted]** and **[Person 1 - name deleted]** (applicant's additional information).

[5] There is no information before me of the kind set out in s 190A(3)(b) (information obtained as a result of searches conducted of registers of interests for land or water maintained by the Commonwealth or State of Queensland). I note that the State of Queensland (state) was offered an opportunity to supply a submission and to consider and comment in relation to the applicant's additional information. The state informed the Registrar on 29 January 2015 that it did not require such an opportunity, thus there is no information before me of the kind set out in s 190A(3)(c).

[6] Under the concluding words of s 190A(3) (the Registrar may have regard to such other information as he considers appropriate), I have also had regard to information in an assessment and overlaps analysis by the Tribunal's Geospatial Services dated 5 January 2015.

190B Registration: conditions about merits of the claim

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

[7] The claim **satisfies** the condition of s 190B(2).

[8] Paragraph 190B(2) provides:

> The Registrar must be satisfied that the information and map contained in the application as required by paragraphs 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.

[9] Paragraphs 62(2)(a) and (b) provide that the application must contain the following details:

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

[10] Clause (a) of Schedule B states that the area covered by the application 'comprises all the parcels of land and waters and all other land and waters above the High Water Mark which are within the boundaries of the Cape York Representative Aboriginal/Torres Strait Islander Body Area (CYLC), as shown on the map at Attachment C, subject to clause (b)'. Clause (b) of Schedule B lists a number of specific areas at paras 5 to 8 that are not covered by the application, namely:

(a) the area subject to the QIA2001/001 (WACCCA) ILUA (para 5 of Schedule B);

(b) the areas subject to six native title determination applications listed in para 6 of Schedule B, 'as at the date the details of the claim were included on the Register of Native Title Claims (Register) or, in the case of an amended application, the date the Register was updated with details of the amended claim';

(c) the area subject to the QUD392/2014 Ankamuthi People #2 native title determination application, as made in the Federal Court on 29/7/14 (para 7 of Schedule B);

(d) the areas subject to 16 Federal Court native title determinations listed in para 8 of Schedule B.

[11] Schedule B states that the data used to compile the outer boundary (i.e. the CYLC representative body area and high water mark along the coast of Cape York Peninsular) is derived from RATSIB data compiled by the NNTT based on reference material sourced from FaHCSIA (as to the CYLC representative body area) and the definition of 'high water mark' found in the Land Act 1994 (Qld). The map in Attachment C depicts the application area bounded by a pink line and stippled pink overlay and also shows the WACCCA ILUA area, the six registered native title determination application areas and the 16 native title determinations areas outlined in green, grey and black respectively.

[12] In my view, using external data to identify the CYLC representative body area and the high water mark as reference points allows the outer boundary to be identified with reasonable

certainty. This written information about the outer boundary is complemented by the map in Attachment C which clearly shows the boundary as a bold pink line following the CYLC representative body boundary, the coastline and also a pocket of land at the tip of Cape York Peninsular that does not fall within the CYLC representative body area. The map also provides a coordinate grid, north point and scale bar. The quality of the map and identification of the datum used to compile it assists me to locate the outer boundary on the earth's surface.

[13] I also find that the information in paragraphs 5 to 8 provides a sufficient degree of certainty as to those areas within the outer boundary that are not covered by the application. The identified areas are referenced to Tribunal and Federal Court data and applicable Register entries. The boundaries for the identified areas have been mapped and labelled on the map in Attachment C (with the exception of the Ankamuthi #2 area). Stating that it is only the areas 'subject to' such applications etc. is sufficiently clear, in my view, to clarify that if there are areas within the outer boundary of the named ILUA, the native title determination applications or native title determinations that are not claimed/covered or where the Court made no determination, then these areas, are not excluded from the current application, absent their exclusion under the provisions of paragraphs 1 to 4 of Schedule B (discussed below at [15]).

[14] I accept that there is a need to access other data and records to ascertain the areas subject to the identified things, i.e. the ILUA register entry for the WACCCA ILUA, the information found within the Ankamuthi #2 application, the entries on the RNTC for the six identified native title determination applications and the NNTR entries for the 16 determination areas so listed. However, I am of the view that the areas subject to the identified applications etc. are capable of being ascertained with a reasonable degree of certainty because the information provided in the application directs me to the relevant external sources. The information also fixes a date for the relevant source, namely the date/dates of:

(a) registration of the WACCCA ILUA;

(b) filing of the Ankamuthi #2 application in the Federal Court;

(c) entry onto the RNTC of the six registered native title determination applications or amendments thereof; and

(d) the determination by the Court for the 16 identified native title determinations.

[15] It remains for me to consider the sufficiency of the description provided of any other areas where native title is extinguished because of the operation of the Act or equivalent state legislation. This is found in paragraphs 1 to 4 of clause (b) of Schedule B in the form of a generic exclusion of any other areas, where such areas are covered by the kinds of acts where native title is extinguished and this cannot be disregarded. This final leg of the description employs the

terminology of the Act and equivalent state legislation to exclude areas within the boundaries affected by acts that have extinguished native title (e.g. 'category A past acts' and 'previous exclusive possession acts, as defined in s 23B'), save where such extinguishment is to be disregarded under ss 47, 47A or 47B of the NTA. Nicholson J in *Daniel for the Ngaluma People & Monadee for the Injibandi People v Western Australia* [1999] FCA 686 (*Daniel*) was satisfied that a generic description of internal excluded areas such as that contained in this application met s 62(2)(a)(ii), if the applicant is not in possession of the facts relating to extinguishment to more particularly delineate the internal excluded areas. In *Strickland v Native Title Registrar* (1999) 168 ALR 242; [1999] FCA 1530 at [51] to [52] (*Strickland*), Justice French agreed with the decision in *Daniel* in the context of the Registrar's assessment of a generic description of internal excluded areas against the requirements of s 190B(2).

[16] I note that the applicant states in Schedule D that no searches have been conducted on behalf of the native title claim group to determine the existence of any non-native title rights and interests in the application area. There is no information before me to indicate that the applicant is in possession of tenure information which would enable the more precise identification of areas within the boundaries covered by the kinds of acts described in paragraphs 1 to 4 of Schedule B. Given that the proceedings are at an early stage, I am of the view that the generic description of the internal excluded areas is sufficient for the purposes of s 190B(2).

Conclusion

[17] For the reasons above, I am satisfied that the information in Schedule B and the map in Attachment C is sufficiently clear to allow the areas over which native title rights and interests are claimed to be identified with reasonable certainty.

Section 190B(3): Identification of native title claim groups

[18] The claim **satisfies** the condition of s 190B(3).

[19] Paragraph 190B(3) provides:

> (3) 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.

[20] Schedule A of the application provides the following description of the persons in the native title claim group:

> The members of the native title claim group in aggregate comprise the descendants (including by adoption in accordance with traditional laws and customs) of the persons identified in the table at Attachment A (Apical Ancestors).

[21] Attachment A contains the names of the 734 apical ancestors for the native title claim group. In some cases further identifying information is provided, such as an alternative name by which the ancestor is known, a place with which they are particularly associated and other identifying information (e.g. the name of an ancestor's child or sibling).

[22] Carr J found in *Ward v Registrar, National Native Title Tribunal* (1999) 168 ALR 242; [1999] FCA 1732 (*Ward v Registrar*) that the task for the Registrar under s 190B(3)(b) is 'largely one of degree with a substantial factual element'—at [27]. I refer also to the decision by Carr J in *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 at [63] to [69] (*Western Australia v Registrar*) that:

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

[23] I am of the view that ascertaining the members of the claim group depends on showing descent from a named ancestor or ancestors, which may include adoption under the traditional laws and customs of the native title claim group. In relation to adoption, para 55 of Schedule F provides an explanation of the process by which it occurs within the native title claim group. It seems that the membership of the native title claim group has been the subject of significant research and inquiry, as evidenced by statements to this effect in Schedule F and the detailed list describing the apical ancestors provided in Attachment A. It follows in my view that the description is sufficiently clear for the purposes of this condition as it provides the 'substantial factual element' and a clear basis for a 'factual inquiry' of the kind discussed by Carr J in *Ward v Registrar* and *Western Australia v Registrar* respectively.

190B(4) Identification of claimed native title

[24] The claim **satisfies** the condition of s 190B(4).

[25] Paragraph 190B(4) provides:

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

[26] Paragraph 62(2)(d) provides that the application must contain:

> a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests), but not merely

consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

[27] The description of the claimed rights is found in Schedule E (refer to my reasons at s 190B(6) below for the text of the description). The description sets out a claim 'to possession, occupation, use and enjoyment of the area as against all others' where there has been no extinguishment of native title or any extinguishment must be disregarded and which is not subject to the public right to navigate or fish. For all other areas, the claim is for rights to access, remain on and use the area and its resources and to protect places, areas and things of traditional significance on the area. Paragraph 8 of Schedule E states that any reference to 'resources' does not include minerals, petroleum or gas wholly owned by the Crown.

[28] In *Northern Territory v Doepel* (2003) 133 FCR 112; (2003) 203 ALR 385; [2003] FCA 1384 (*NT v Doepel*), Mansfield J agreed with the Registrar that s 190B(4) requires a finding as to 'whether the claimed native title rights and interests are understandable and have meaning'—at [99]. I am of the view that the description in this case is sufficient to allow the native title rights and interests claimed to be readily identified. The claimed rights have been clearly and comprehensively described in a way that does not infringe s 62(2)(d). Further, the description is meaningful and understandable, having regard to the definition of the expression 'native title rights and interests' in s 223 of the Act.

[29] Whether I consider that the claimed rights can be established prima facie is the task at s 190B(6), discussed below.

190B(5) Factual basis for claimed native title

[30] The claim **satisfies** the condition of s 190B(5).

[31] Paragraph 190B(5) provides:

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

[32] Following Mansfield J at [17] of *NT v Doepel*, I understand that my assessment is to 'address the quality of the asserted factual basis for [the] claimed rights and interests … but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests.' I understand that it 'is not for the Registrar to test whether the asserted facts will or

may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts'—*Northern Territory v Doepel* at [17]. This was endorsed by the Full Federal Court in *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317; [2008] FCAFC 157 (*Gudjala 2008*) at [83].

[33] The Full Court in *Gudjala 2008* also considered the interaction between s 62 (which prescribes that an application must contain a certain level of information) and s 190A (which obliges the Registrar to consider the sufficiency of information contained in an application against the conditions of s 190B). The Full Court held that:

> … the statutory scheme appears to proceed on the basis that the application and accompanying affidavit, if they, in combination, address fully and comprehensively all the matters specified in s 62, might provide sufficient information to enable the Registrar to be satisfied about all matters referred to in s 190B. This suggests that the quality and nature of the information necessary to satisfy the Registrar will be of the same general quality and nature as the information required to be included in the application and accompanying affidavit—at [90].

[34] The Full Court considered the nature and quality of the information required for the purposes of s 190B(5), having regard to what is required for the purposes of s 62, in particular the details required by s 62(2)(e). Subparagraph 62(2)(e), which is worded similarly to s 190B(5), requires a general description of the factual basis for the assertion that the claimed native title rights and interests exist and for the particular assertions of ss 62(2)(e)(i) to (iii)). The Full Court 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 are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim—at [92] (underlining added).

[35] The Full Court observed that if the primary Judge 'approached the material before the Registrar on the basis that it should be evaluated as if it was evidence furnished in support of the claim … then it involved error'—at [93]. The Full Court found that the primary Judge erred in his approach to the information in an anthropological report within the application. The error being that the primary Judge was 'critical of, and in many respects did not accept, the opinions expressed ... which, if accepted as a recitation of facts, went a considerable way towards

establishing the factual basis asserted by the applicant in relation to the various matters referred to in s 190B(5)'—*Gudjala 2008* at [93]–[94] (underlining added).

[36] Although the Registrar must not be critical of, nor must he refuse to accept, the facts provided in support of the assertions, there must be more than a mere restatement of the claim. Thus, I am of the view that the Registrar is required to consider whether:

(a) the information provided is more than merely assertive; and

(b) there are sufficient and specific facts which support the assertions.

[37] This was explained by Dowsett J in *Gudjala People #2 v Native Title Registrar* (2009) 182 FCR 63; [2009] FCA 1572 (*Gudjala 2009*):

> … it would not be sufficient for an applicant to assert that the claim group's relevant laws and customs are traditional because they are derived from the laws and customs of a pre-sovereignty society, from which the claim group also claims to be descended, without any factual details concerning that pre-sovereignty society and its laws and customs relating to land and waters. Such an assertion would merely restate the claim. There must be at least an outline of the facts of the case—at [29].

[38] Another illustration of the point that the information provided about the factual basis must rise above a restatement of the claim or mere assertions is found in a decision by Cowdrey J in *Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal* [2012] FCA 1215 (*Anderson*). Cowdrey J found that the 'preponderance of the evidence contained within the application is assertive and does not assist in building the factual basis necessary for assessing the application'—at [48].

[39] In *Northern Territory v Doepel*, Mansfield J approved the Registrar's focus on each of the three particular assertions, when considering s 190B(5) overall. His Honour found that if the claim did not provide a sufficient factual basis for any one or more of the three assertions, it would follow that the factual basis was likewise insufficient to support the general assertion that the claimed native title rights and interests exist within the head of s 190B(5)—at [130]. I have thus structured my reasons by looking at each of the three particular assertions of ss 190B(5)(a) to (c).

Information considered

[40] The general description of the factual basis is provided in Schedule F of the application. Additional information pertaining to the factual basis is found in three affidavits by claim group members (who are also part of the applicant) **[Person 1 - name deleted]**, **[Person 3 - name deleted]** and **[Person 2 - name deleted]**. I note also that each of the nine persons comprising the applicant state their belief in the truth of the statements in the application.

Subparagraph 190B(5)(a)

[41] The assertion in s 190B(5)(a) relates to the association of the native title claim group and that of their predecessors with the area covered by the application.

General principles

[42] I note that the Full Court in *Gudjala 2008* found that there was error in Dowsett J's approach to the factual basis materials in *Gudjala People # 2 v Native Title Registrar* [2007] FCA 1167 *(Gudjala 2007)*.[3] However, the Full Court did not criticise those aspects of his Honour's decision as to what a sufficient factual basis for the assertion of s 190B(5)(a) must address.[4] It follows in my view that the findings by Dowsett J in *Gudjala 2007* as to what a sufficient factual basis must address guide my consideration. Dowsett J found that a sufficient factual basis for the assertion of s 190B(5)(a) must address that 'the claim group as a whole presently has such association'—at [52] (underlining added). His Honour identified that this does 'not mean that all members must have such association at all times. However, there must be evidence that there is an association between the whole group and the area. Similarly, there must be evidence as to such an association between the predecessors of the whole group and the area over the period since sovereignty'—at [52]. The Full Court clarified that the relevant time for the reckoning of association is European settlement of an area, if later than sovereignty.[5]

[43] I understand that it is not a requirement that the factual basis address the asserted association by the native title claim group and their predecessors with every single place within an application area, nor is it a requirement that the factual basis address an association with the area by all claim group members at all times since before sovereignty or European settlement of an area. Nonetheless, very general assertions and/or significant gaps as to an association:

(a) with the whole area covered by an application; and
(b) over the period since sovereignty or European settlement,

will tell against the overall sufficiency of the factual basis for the assertion of s 190B(5)(a).[6]

Consideration

[44] I note that the area over which an association is asserted is the land and waters of approximately 79,680 sq km from about 20km north of Mossman to about 70km south of Bamaga within the Cape York Peninsular (CYP) region of northern Queensland (referred to hereafter as the 'claim area') up to the high water mark. The claim area does not include areas within CYP that are subject to a registered WACCCA ILUA and a number of existing native title determination applications and Federal Court native title determinations (refer to my reasons

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3 *Gudjala 2008* at [93]–[96]

4 *Gudjala 2008* at [69]–[70]

5 *Gudjala 2008* at [96]

6 For these propositions, I refer to *Martin v Native Title Registrar* [2001] FCA 16 (French J) at [24]–[26] (*Martin*); *Corunna v Native Title Registrar* [2013] FCA 372 (Siopis J) at [31], [37], [39] and [45] (*Corunna*); *Gudjala FC* at [92]–[96]; *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (Dowsett J) at [52] (*Gudjala 2007*) [with which the Full Court in *Gudjala FC* did not disagree] and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (Dowsett J) at [29] (*Gudjala 2009*).

above at s 190B(2) for these details). It is said that the association by the native title claim group and their predecessors is derived from their observance of the traditional laws and customs of a wider regional society which existed and still exists over the whole of CYP from before sovereignty until the present. The facts provided in relation to this assertion are:

(a) Observations made before and shortly after sovereignty establish that the claim area was widely inhabited by Aboriginal people, citing the observations of Dutch explorers along the west coast of Cape York Peninsular (CYP) in the 17th century, the observations of Captain Cook, Joseph Banks and Captain Bligh along the east coast in the 18th century and the observations of Matthew Flinders in 1802 as he sailed down the western side of CYP—para 5.

(b) Sustained contact by the European settlers with the predecessors of the native title claim group occurred differentially across the claim area from the 1860s (referred to as 'effective sovereignty'), with the establishment of pastoral stations (starting with the Jardine brothers, who established Somerset station following an overland journey with cattle there in 1864), the discovery of gold in the Coen area, the establishment of the Mitchell River mission in 1902, *beche-de-mer* fishing along the east coast, the manning of lightships along the eastern inner marine channel and the overland telegraph line in the 1880s—paras 6 and 7.

(c) However for much of the claim area and the Aborigines there, the impact of these activities must not be overstated, citing Archibald Meston in 1896 (Protector of Aborigines) who said that 'from Newcastle Bay south to Princess Charlotte Bay [they] ... are still in their original condition ... There is no settlement whatever, nor is there a single white man resident over the whole of that extensive territory, except for a few miners on one locality ... the tribes to the westward [of the east coast], between the coast and the telegraph line, are still absolutely wild, and ... free from any intercourse or contamination by white men ... the whole western coast north from the Mitchell to the Jardine River [is] in absolute possession of the wild tribes'—at para 8.

(d) 'The organised presence in the claim area of Aboriginal People has long been acknowledged and recorded by early observers and by ethnographic, linguistic and anthropological researchers, some of whom worked with or otherwise encountered predecessors of the native title claim group, including' Thomson, McConnel, Sharp, Alpher, Crowley, Sutton, Chase, Thompson, Laade, Fuary and Smith—para 9.

(e) Many members of the native title claim group and their predecessors were born on or in the vicinity of the claim area and live or have lived there in permanent communities such as Laura, Coen, Lockhart River, Kowanyama, Pompuraaw, Aurukun, Weipa, Napranum, New Mapoon, Old Mapoon, Umagico, Bamaga, Injinoo, Seisia, Hopevale, Cooktown, Embley River, Daintree River and Cape Bedford—paras 12 and 13.

(f) There are semi-permanent camps and outstations with established dwellings and/or other light structures on or in the vicinity of the claim area at places such as Wathanhiin, Barrow Point, Port Stewart, Ettatapuma, Breeza Plains, Bathurst Head, Fairview, St George River, King Vale, Billy Boil , Normanby, Shiptons Flat, Starcke, Kulpa, Puntimu, Theetinji, Moojebba, Batavia Downs, Rokeby Downs, Silver Plains, Wa Tyne, Pennefather, Camp Chivaree, Merapah Station, Shelfo, Wonya Bore, Marina Plains, Lily Vale, Glen Garland, New Laura, Battle Camp, Melsonby, Killarney, New Dixie, Crosby, Strathmay, Captain Billy Landing, Namaleta Creek, Second Beach Camp, Umayngulunu/Virilya Point, Top Jardine Crossing, Ussher Point and Chuulangun. These places are and have been used by members of the native title claim group and have also been used by their predecessors—para 14.

(g) Many predecessors of the native title claim group, including many of the apical ancestors, have been buried on the claim area—para 15.

(h) Many members of the native title claim group have been recognised or are shortly to be recognised as holding native title rights and interests in areas immediately adjoining the Claim Area, referring to the registered native title determination applications and native title determinations listed in Schedule B of the application—para 16.

[45] These facts are fleshed out in the affidavits by **[Person 1 - name deleted]** (14/01/15), **[Person 3 - name deleted]** (22/01/015) and **[Person 2 - name deleted]** (26/01/15).

[46] **[Person 1 - name deleted]** states that he is a member of the Cape York United Number 1 claim native title claim group and one of the persons who comprise the applicant. I provide a summary of his information below, noting that the text in parenthesis is my assessment of the location of places within the claim area discussed by **[Person 1 - name deleted]**. **[Person 1 - name deleted]** states:

(a) his clan group is Kunjen and Olkola and he is descended from **[Person 4 - name deleted]** , a named apical ancestor for the claim—paras 2 and 3;

(b) he was born in Coen (a town located relatively centrally within the claim area) in 1951, where he grew up until going to Brisbane for high school. He lived briefly in Cairns before returning to Coen. He is Olkola through his mother who was born in Alice River country, which lies in Olkola country between Oriners and Seftons homesteads and is within the claim area (in its southern reaches). Olkola country runs right down to the Palmer River (proximate to southern boundary of the claim area)—paras 4 to 6, 9;

(c) he has lived and worked in Dixie, Strathleven, Alice River and King Junction stations (in the south of the claim area) and he and his brothers have mustered all that Olkola country—para 10;

(d) his first cattle job was up in Walverton in Kaanju country where he worked with a Kaanju man doing core drilling work. **[Person 1 - name deleted]** names the parents of his Kaanju work mate, saying that they are Aboriginal elders from the Kaanju and Lama Lama clans from that area. **[Person 1 - name deleted]** tells of his other work on the claim area, droving bullocks from Merluna station (where a lot of the old people are from) down to Aurukun (on the west coast) and then back to Coen and where he got a job at Glen Garland station. When the land was turned over to pastoral leases, working for the pastoralists was the only way to get back on country. This way, **[Person 1 - name deleted]** learned a great deal from the elders that worked on Olkola country; they taught you about country on your days off and this is how **[Person 1 - name deleted]** learnt about that country—paras 11, 20;

(e) he gets his rights to country from his **[Dreaming name– name deleted]** dreaming; his totem is **[Totem 1 – name deleted]** which came from his grandmother and mother. **[Dreaming name – name deleted]** Mob was all mum and grandma's country and they are the traditional owners of that country, sometimes called Alice River mob. His mother was the boss of the **[Dreaming name– name deleted]** story and died last year, aged 94 years. The story has been put onto him by his mothers and all his brothers and sisters to look after that country. They have secured legal rights to Glen Garland station and Kalpowar, in Olkola country via transfer from the old ATSIC and handover through the Queensland state's land dealing process respectively—paras 7, 12, 17;

(f) his mother told him that his great grandfather was buried on **[Place name – deleted]** country in 1912 and where she was born in 1918 and stayed there until she was 7 or 8 years old (1924 – 1925). They mined for gold there and once the pastoral leases came in they started moving the traditional people out. Some were shot while others started working with the pastoralists or with the miners. They started moving north to Musgrave and old Bamboo station; a lot of the old Olkola people moved there as well. Those that weren't shifted to Palm Island or Yarrabah moved to the Mitchell River mission, while others went to the Edward River mission—para 13;

(g) his mother was picked up by the trooper police, because of her fair skin, and taken to Coen where she grew up. She worked on pastoral stations around the claim area. She spent time at Yarrabah mission (south of Cairns). **[Person 1 - name deleted]**'s dad shifted her up to Oyala Thumotang national park (north west of Coen) where his Dad was born and grew up. Those stolen from their country will often return after many years; there is a place for them and the connection is still there, but they must learn from those who remained and by guided before being welcomed back—paras 14–15;

(h) the Kunjen-Olkola and the Olkola speak nearly the same language, although you can hear differences. South-east of Olkola is the Sunset Yalanji whose language is quite

different. As you travel north from Sunset Yalanji you enter Kuku Possum country, who are part of Olkola and their talk is really close. From there you get to Kuku-Thaypan (*Aalye*). North-east of the *Aalye* mob along the seaward side you run into Lama Lama people, who all talk Olkola—para 16;

[47] **[Person 3 - name deleted]** states that he is a member of the Cape York United Number 1 claim native title claim group and one of the persons who comprise the applicant. I provide a summary of his information below, noting that the text in parenthesis is my assessment of the location of places within the claim area discussed by **[Person 3 - name deleted]**. **[Person 3 - name deleted]** states that:

(a) he was born in Coen in 1949 and is descended from an apical ancestor named in the application. He is Ayapathu on his father's side and Wikiyan and Wik Mungkan on his mother's side; this gives him rights to country on both sides. He was an applicant on the Wik and Wik Way claims. His totem is the **[Totem 2 – name deleted]** and this comes down to him from his great great grandparents on his father's side. Through his mother's side his totem is the **[Totem 3 – name deleted]** —paras 2, 3, 4, 7, 8;

(b) he moved from Coen when 10 years old and was transferred to a mission school in Aurukun as there were no schools for full blood Aboriginals in Coen at the time. He worked in jobs around Aurukun, and then travelled south driving heavy equipment west of Rockhampton for nearly three years before returning to Aurukun. He moved to Pormpuraaw (on the west coast, south of Aurukun) and from 1982 onwards who worked at Strathmay, Strathburn, Strathgordon, Southwell and Merluna stations (to the north of the areas discussed by **[Person 1 - name deleted]**). He has lived also at Kowanyama (on the south-western coast) with a lady there, with whom he had three children—paras 5, 6;

(c) his parents, uncle, maternal grandmother and siblings are buried on their mother's Wikyan country, around **[Place name 2 – deleted]** and **[Place name 3 – deleted]**—paras 9–10;

(d) as well as having lived and worked at all those pastoral stations, he frequently visits Puntimu outstation, on Ayapathu country to keep an eye on things and for peace and quiet. Outstations are a place where the spirits are strong and it is important when visiting with strangers to call out to the spirits and baptise the strangers with water or underarm sweat. His elders taught him these ceremonies when growing up and he teaches is children and grandchildren these things. Now their outstations have little sheds with water tanks and solar panels making it easier to live out there all year round. *Puntimu* is Ayapathu language for the Big Stewart River, associated with the **[Dreaming story 1 – name deleted]**, recounted by **[Person 3 - name deleted]**. Its importance is such to Ayapathu people that it is forbidden for anyone to go fishing there. *Mi–luna* is the language name for little Stewart Creek River, associated with the **[Dreaming story 2 – name deleted]**, another important dreaming place for the Ayapathu—paras 12, 13, 23–26;

(e) Ayapathu country lies in a broad section of country running from Silver Plains, Kulla & Oyala Thumotang national parks, Kendall River & Southwell homesteads, north of

the Edward River and around through the Kulla Land Trust lands; they border Olkola, Lama Lama and Wik lands. To the west his mother's Wikiyan country lies roughly between the Kendall, Holroyd and Edward River areas (in the central-western reaches of the claim area)—paras 14, 15;

(f) there are enough people around still who knows who speaks for particular areas; he has lived, worked and travelled throughout his father's country and some of his mother's; he has responsibility for the area around Southwell station as that is the place his totem **[Totem 2 – name deleted]** is said to come from; and he shares responsibility with his siblings for the **[Totem 4 – name deleted]** area near Holroyd River, close to Eddy Holroyd's outstation—para 18;

(g) the Olkola, Ayapathu and Ayapakan languages are not far from each other. When the old people lived together they would speak both Olkola and Ayapakan as they used to intermarry, but are nonetheless regarded as separate languages. He started to speak Wik Mungkan when he lived in Aurukun; he heard Ayapathu spoken fluently by the old people when working on Merluna station. He grew up hearing his father speaking Ayaputhu so it came back to him pretty quickly. He speaks and understands many of the languages of CYP, and his kids in Aurukun speak Wik Naithan and Wik Mungkan and also understand Ayapathu and Ayapakan—paras 19 to 22.

[48] **[Person 2 - name deleted]** states that he is a member of the Cape York United Number 1 claim native title claim group and one of the persons who comprise the applicant. I provide a summary of his information below, noting that the text in parenthesis is my assessment of the location of places within the claim area discussed by **[Person 2 - name deleted]**. **[Person 2 - name deleted]** states:

(a) he is descended from a named ancestor and was born in Aurukun in 1955. He was reared by his adoptive father and mother, who were Wik Ngathandk and this is his language group, from his mother's maternal side and a language spoken by both his mum and dad. Different dialects are spoken in different places, e.g. Timber country and Beachside people, with Wik Mungkan as the common language—paras 2 to 4;

(b) his totems are the **[Totem 5 – name deleted]** and **[Totem 6 – name deleted]**, from his father's side and these guide his law and custom—para 5;

(c) he has lived his whole life in Aurukun (on the western Cape, in Wik country), apart from a brief stint completing a welding course in Brisbane. His father was a real bushman from Kendall River (on the western Cape) but was brought to Aurukun with many Wik people from all over Wik country in the 1920s. The missionaries tried to stop them practising the law and customs of the old people but they did it in secret anyway. Mr McKenzie, the first missionary, went to a Wik initiation conducted by the Winchinum people responsible for the township, which is where the Wik determination was held in the hall there. His father told him these stories—paras 6, 7;

(d) his primary rights to country are derived from his adoptive father, yet he also speaks for his mother's country. His father's country is Kendall River and his mother's country is the Knox River (to the north of Kendall, on the western Cape). Cape Keerweer (on the western Cape) is the country of his biological father, but he can't

speak there; he was told of his father by two old traditional ladies who looked after him whilst growing up—para 8;

(e) he visits Kendall River outstation, occupied by people from the southern side of Holroyd River. This and other outstations serve as a place for people to get back to their homelands—paras 9 to 12;

(f) he is the chairman of the prescribed body corporate that runs the native title for the Wik and Wik Way traditional owners and they consult local owners who speak for particular tracts of country before making decisions that might affect them. He is recognised as a leader and elder for Wik country, however, if someone was doing something on the Kendall and Knox Rivers his family look to him to speak for them and get information to find out what is planned for those areas—paras 21–25.

[49] In my view, the information provided speaks of an enduring association with a physical and spiritual dimension over the entire period since before European settlement until the present with a sufficiently wide geographic compass that appears to relate to the claim area as a whole. The three persons referred to above given content and substance to the asserted facts within Schedule F concerning association as observed from the earliest days of the explorers and then later by post-settlement ethnographers and anthropologists. They describe a web of connections with country that traverses many parts of the claim area and which appears to have been practiced and then passed to them by their forebears, some of whom were living in traditional ways at the time of sustained European settlement, which for many places did not occur until the early decades of the 20th century. I note also that there are many within the native title claim group who have achieved determinations by the Federal Court that native title exists in significant tracts of country particularly along the western coast within the outer claim boundary shown on the map in Attachment C.

[50] Having regard to all of the information, I am **satisfied** that the factual basis is sufficient to support an assertion that the native title claim group have, and their predecessors had, an association with the area.

Subparagraph 190B(5)(b)

[51] The assertion in s 190B(5)(b) relates to the existence of traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests.

General principles

[52] In my view, the factual basis for this assertion must address that the native title rights and interests find their source in 'traditional' laws and customs, having regard to s 223(1)(a), which provides that for rights to be 'native title rights and interests' they must 'be possessed under the traditional laws acknowledged, and traditional customs observed' by the relevant Aboriginal peoples or Torres Strait Islanders. Therefore, I must pay attention to the High Court's decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; (2002) 194 ALR 538;

[2002] HCA 58 (*Yorta Yorta*) as to what will amount to 'traditional' laws and customs: see Dowsett J at [26] of *Gudjala 2007*. This aspect of Dowsett J's decision was not criticised by the Full Court in *Gudjala 2008*, who noted that one question, amongst others, that needs to be addressed is whether 'there was, in 1850–1860[7], an indigenous society in the area, observing identifiable laws and customs'—at [96].

[53] The following is a brief synopsis of my understanding of the case law which has developed around the requirement in s 223(1)(a) that native title rights and interests in relation to land and waters must be possessed under 'traditional' laws and customs:

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

(b) a society is a body of people united in their acknowledgement and observance of laws and customs with normative content;

(c) the acknowledgement and observance of the laws and customs of the pre-sovereignty normative system must have continued 'substantially uninterrupted' in each generation from sovereignty until the present time;

(d) it is this continuity in the acknowledgement/observance of traditional laws and customs, rather than continuity of a society, which must inform the inquiry as to whether the native title is possessed under 'traditional' laws and customs;

(e) change or adaptation of traditional law and custom may be acceptable; however, the trial court needs to carefully consider whether it points to a cessation or substantial interruption of the normative system, such that the laws and customs currently acknowledged and observed are no longer traditional; i.e. they are not the laws and customs of the normative system at sovereignty.[8]

[54] I note again that my consideration of the factual basis is to assume that the asserted facts are true and is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may be ultimately adduced to establish the asserted facts—*Doepel* at [17]. Nonetheless something more than 'assertions at a high level of generality' is required—*Gudjala 2008* at [92].

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7 I note that this was the period during which the area covered by the Gudjala People's application was settled by the Europeans.

8 In addition to *Yorta Yorta*, I refer to the following decisions by the Full Court, which have considered what is required under s. 223(1) in light of the principles laid by the High Court: *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442; [2005] FCAFC 135 (*Alyawarr FC*), *Risk v Northern Territory of Australia* (2007) 240 ALR 75; [2007] FCAFC 46 (*Risk*) and *Bodney v Bennell* (2008) 167 FCR 84; [2008] FCAFC 63 (*Bennell FC*).

[55] In my view, one of the things that a sufficient factual basis for this assertion must address is that the laws and customs currently acknowledged and observed have 'their source in a pre-sovereignty society and have been observed since that time by a continuing society'—*Gudjala 2007* at [63]. His Honour accepted that 'this did not require that the apical ancestors themselves comprised a society'—*Gudjala 2007* at [63]. Although the Full Court found error in Dowsett J's evaluation of the factual basis materials, the Full Court did not overturn his Honour's summary of the *Yorta Yorta* principles and findings as to what a sufficient factual basis must address—see *Gudjala 2008* at [71]–[72]. I note also that the Full Court agreed with Dowsett J that one question which a sufficient factual basis must address is whether 'there was, in 1850–1860*, an indigenous society in the area, observing identifiable laws and customs'—*Gudjala 2008* at [96]. (*1850-1860 was the period of European settlement of the area covered by the Gudjala application).

Consideration

[56] The general description of the factual basis for the assertion that there exist traditional laws and customs giving rise to the claim to native title rights and interests, including the identity of the society that related to the claim area as a whole before sovereignty and since is found in paragraphs 17 to 61 of Schedule F.

[57] On the question of the Indigenous society from which the current observance of traditional laws and customs stems, Schedule F states that:

(a) at the heart of the asserted traditional laws and customs is an acknowledgement and observance by the native title claim group and their predecessors of laws and customs which govern who are the 'right' people for, or the customary 'owners' of, that area. Schedule F asserts that by these laws and customs 'their presence in and occupation of the area is and has been proprietarily correct; as is and has been their control, management, protection, and use and enjoyment of the area, its resources and its places and things of traditional significance'—para 17;

(b) at sovereignty, predecessors of the claim group inhabited and occupied the claim area and shared a system of laws and customs—para 18;

(c) this shared system of laws and customs extended to all of the apical ancestors and may also have extended to other Indigenous people from neighbouring areas—para 19;

(d) the apical ancestors are descended from the indigenous people inhabiting and occupying the claim area, are known to be from the claim area at or about effective sovereignty and were members of a single society, as are the members of the native title claim group and their predecessors—paras 20 and 21;

[58] The applicant asserts that, in approaching questions about society and the acknowledgement and observance of traditional laws and customs, the following contextual matters and informing principles must be taken into account:

(a) on CYP, the variety and abundance of fresh water and foods is generally significantly greater in the land and waters close to the coastline, than for inland areas;
(b) consequently coastal areas were and are generally more densely populated and otherwise utilised and property was and is demarcated more closely among and between local groups in those areas;
(c) further, contact with neighbouring groups was and is generally more regular and frequent than in the less resource rich inland areas;
(d) CYP Aboriginal people share and have always shared this environment;
(e) the practical requirements for survival and sociality in this environment significantly influence, and have always influenced, the daily lives and the way of life and beliefs of the people of the claim area; affect the nature and extent of traditional laws and customs and the manner of their acknowledgement and observance; and affect the intensity of the exercise of rights and interests possessed under traditional laws and customs—at paras 22 to 24.

[59] On the question of the content of the asserted traditional laws and customs, Schedule F states that:

(a) the traditional laws and customs under which rights and interests are possessed are based on a body of socio-territorial principles. In different contexts, members of the native title claim group may identify themselves using different levels of social inclusiveness, in particular:
    (i) a wider regional level at which a shared body of laws and customs is held (regional level);
    (ii) a language-labelled or toponymic group level whose members assert rights and interests in country associated with a language or named place and through which they claim a common identity (sub-regional level);
    (iii) the localised descent group level whose members assert strong forms of rights and interests *vis a vis* other members of the wider language or toponymic group (local level);
    (iv) the company group level formed through an aggregation of localised descent groups sharing close kinship relationships and geographical proximity within the same drainage basin (company level)—para 26;
(b) the primary area of attachment and proprietary connection of members of the native title claim group is at the local level or, where applicable, the company level—para 27.

[60] Schedule F states that rights and interests possessed by a person:

(a) at the local level - in a local area of land and waters (local area) – is through membership of a group by descent, ideally from a male person acknowledged to be from the local area, but also affording recognition to members of other lines of

descent, and now increasingly on the basis of cognatic descent from a person; acknowledged to be from the local area (including by child adoption) (local group);

(b) at the company level – in an area of land and waters associated with local groups sharing close kinship relationships and geographical proximity within the same drainage basin that have been aggregated (company area) – is through membership of one or more of such local groups or of the aggregated group by descent from a person acknowledged to be a member of such group or groups (including by child adoption) (company group);

(c) at the sub-regional level - in an area of land and waters associated with (or shared by) a language or named place (sub-regional area) – is through membership of a group (sub-regional group) by descent from a person acknowledged to be a member of the group (including by child adoption);

(d) also at the local level - in other local areas (whether or not of the same sub-regional area) – is through other descent relationships with a person who is or was a member of another local group, in particular through the relationships of a person with his or her mother, father's mother and mother's mother (i.e., a person may be a member of more than one local group and more than one regional sub-group);

(e) also at the local level - in the local area of a formerly neighbouring or nearby local group – is through a process of succession which operates when a local group becomes extinct or so reduced in numbers that it is no longer able to function independently—para 28.

[61] Schedule F states that the rights and interests possessed under traditional laws and customs are to:

(a) speak for land and waters;
(b) control the access to and use of land and waters by others;
(c) have access to, remain on and use the land and waters;
(d) access and take the resources of the land and waters; and
(e) protect places, areas and things of traditional significance on the land and waters—at para 29.

[62] It is said in Schedule F that:

(a) the rights and interests are thus possessed by the members of the native title claim group in their respective local, company and/or sub-regional areas; and in aggregate extend to the whole of the Claim Area—para 30;
(b) these rights are generally thus possessed at the local level by local groups and at the company level by company groups—para 31;
(c) in relation to matters otherwise affecting multiple local areas or sub-regional areas, the rights and interests are exercised by the local groups and/or sub-regional groups affected by the matter—para 32.
(d) no land or waters in the Claim Area is vacant or without persons who possess rights and interests therein under the traditional laws and customs—para 34;

(e) the language or toponymic group label associated with some areas or places in the Claim Area may be shared or even uncertain, even where the position of a local group is well settled—para 35;
(f) some areas within the Claim Area may be shared or held jointly by more than one local group and/or associated with more than one sub-regional group—para 36.

(g) the land and waters of different groups under the traditional laws and customs is often not to be understood as delineated by a fine line 'boundary' of the kind that generally defines the subject matter of real property under the non-Indigenous property laws of Australia. Rather, 'boundaries' may be imprecise or loose and may be constituted by zones in which the interests of the respective neighbouring groups merge. The location of boundaries between neighbouring groups may be the subject of dispute between them as a result of traditional practices within the land tenure system which have always allowed for demographic shifts and ensuing processes of managing resource control within boundary areas—para 36.

[63] Schedule F provides a comprehensive description of the asserted traditional laws and customs as they pertain to the possession of rights and interests by the members of the native title claim group in relation to the land and waters of the claim area, including the following:

(a) *speaking for country* —this is not necessarily equal and undifferentiated amongst the members of the claim group; rather, authority is conceded to one or more members of the relevant localised grouping, having regard to things such as age, gender, social or ritual knowledge and seniority, the extent to which they actively look after, protect and use the area or have done so in the past and the extent to which a person asserts such authority—para 37;

(b) *control and regulation of access*

(i) ideally strangers must ask permission to access land and waters and their resources from those who are recognised as possession rights and interests and having authority in relation to these things. Permission may be refused or restrictions placed on access. Who is or is not a stranger is itself governed by laws and customs pertaining to social, cultural and geographical closed and distance between the persons concerned—para 38;

(ii) visitors who are not strangers (e.g. spouses and other long-term Indigenous residents) ordinarily have permission to access land and waters and to hunt, fish or gather there and are ordinarily expected to know or at least to ask about significant sites and rules pertaining to these things, including being accompanied there by a person with rights, knowledge or authority there—para 39;

(c) *access generally*

(i) the claim group members ordinarily have access to land and waters beyond the particular areas in which they possess rights at the local level for hunting, fishing and gathering there (with permission, whether express, implied or continuing), though they are expected to comply with any local restrictions and requirements relating to access to particular sites and areas—para 40;

(ii) access to some sites and areas is restricted on the basis of seniority, gender or ritual knowledge and authority and also subject to behavioural requirements such as providing a warning of approach to the place, cleaning or clearing around it and the presence of the spirits of recently deceased persons—paras 41 and 42;

(d) *protecting and looking after country*—the persons possessing rights in an area of land or waters have responsibilities and rights to 'look after', care for, protect and maintain the area, including its important sites and spiritual features, including story places and burial places. The extent of responsibility permitted and expected to be exercised by a person is qualified on the basis of seniority, gender and ritual knowledge and authority—paras 43 and 44;

(e) *other traditional laws and customs*—there are other traditional laws and customs that are part of the context in which those laws and customs under which rights and interests are possessed including cosmology, kinship and marriage, child adoption, ceremonies and ritual, language and decision-making—paras 45 and 46;

(f) *cosmology*

(i) the claim group members hold beliefs about Ancestral Beings who are responsible for the existence and form of the landscape and for the Law, including that the creative travels of the ancestors established current social, territorial and ritual relationships across the entire society and continue to be a presence and influence on that landscape—para 47. Access to some knowledge is restricted on basis of gender, age and ritual status, it being generally the case that older persons are seen as the carriers and custodians of such knowledge and younger persons will defer to them—para 48;

(ii) there is belief in particular mythologies (some of which extend to the Torres Strait, some of which are regional, sub-regional and local respectively), including narratives about: Iiwayi, the Crocodile ancestor, who travelled through Northern Kaanju, Kuuku Ya'u and Wuthathi countries; Karnkarn, the Fish Hawk ancestor; Kurambilla, the Grasshopper ancestor; Chevri/Shiveri who travelled from the northern CYP to the Torres Strait; and various snakes, including the Rainbow Serpent—at para 49;

(iii) country is believed to be protected and "policed" by the spirits of the predecessors of the native title claim group which are believed to still reside there. There are spiritually dangerous places and potentially

dangerous spiritual forces in the Claim Area. These places and forces are commonly seen as benign to those with a recognised right to belong to the particular area, but dangerous to strangers—para 50;

(g) *kinship and marriage*—a person is enabled to relate to all persons in his or her social universe through a relatively limited number of kin terms, each of which applies to a relatively large number of persons who are deemed to be 'alike' (kinship system). A person should behave towards all persons to whom a particular kin term applied in the same manner. Forms of behaviour to which the kinship system has application include deference to older kin, marriage and avoidance of certain contact with certain affinal kin, in particular, between a man and his mother-in-law. Marriage should be avoided between people who are considered to be too closely related—paras 51 to 54;

(h) *Child adoption*—a person may become a member of a local group by adoption as a child by a member of a local group. Where this occurs, the child will have the same rights, interests, identity and responsibilities, as persons who are members of the group by biological descent. Adoption typically, though not necessarily, occurs within extended family groups, and therefore tends to reinforce existing ties of kinship and identity between close relatives, rather than recruiting previously unrelated persons to the group—para 55;

(i) *Ceremonies and rituals*—members of the claim group conduct ceremonies relating to:

(i) inducting children into country and kin networks;

(ii) marking the coming of age of young men;

(iii) increasing the availability of various bush and marine foods;

(iv) inducting strangers into country; and

(v) funerals and burials of deceased people—para 56

(j) *Language*—claim group members believe that language identities were imparted by travelling Ancestral Beings to country across the claim area and subsequently to their predecessors who emerged from that country. Despite substantial linguistic differences between the languages associated with the claim area, multi-lingualism has enabled language speakers to communicate with each other—paras 57 and 58;

(k) *Decision-making*

(i) making decisions about land and waters in the Claim Area depends upon the area the subject of, or affected by, the decision, so that decisions affecting only one local area are made by the members of the relevant local group who have authority to speak for the area. Where a matter affects a small number of local areas, decisions are made jointly by the members of the relevant local groups who have authority to speak for the affected local areas. Where a matter affects a larger number of local areas, decisions are made by the members of the relevant local groups who have authority to speak for the affected local areas—para 59;

(ii) senior women generally preside over issues that are the business of women and senior men generally preside over issues that are the business of men. In combination with this differentiation on gender grounds, there

are many areas of community life where men and women participate on the basis of their interdependent roles within the community—para 60.

[64] Schedule F states that these traditional laws and customs are given normative force:

(a) through spiritual or mythological beliefs and kinship relationships;

(b) by respect for the authority and guidance of elders and social pressure, a fear of being ostracised or otherwise by punishment by elders or spiritual or mythological forces for breach—para 61.

[65] It is claimed in Schedule F that the members of the native title claim group:

(a) are biologically and socially recognised descendants of the apical ancestors and of their predecessors at sovereignty—para 62;

(b) and their predecessors, have at all times since sovereignty been a body (or part of a broader body) of persons united in and by their acknowledgement and observance of the traditional laws and customs, particularly those described in Schedule F, which they have done without substantial interruption as handed down generation by generation to the native title claim group—paras 63 and 64;

(c) and their predecessors, have at all times since sovereignty substantially maintained a connection with the area by the traditional laws and customs, particularly those described in Schedule F and have possessed the rights and interests in the claim area under those laws and customs—paras 65 and 66.

[66] I am of the view that Schedule F sets out the necessary facts and the applicant's additional information fleshes out those facts to provide a sufficient factual basis for the assertion that there exist traditional laws and customs that give rise to the claim to native title rights and interests. In my view, each deponent provides evidence of a shared system of traditional law and custom in relation to the claim area whereby rights in relation to land and waters are generated at a number of levels, with the strongest rights to speak for country arising at a company level for example, Olkola, Ayapathu or Wik) and local descent group level (e.g. *Kurumbila*). Further, the deponents provide evidence of continuity in the acknowledgement and observance of the traditional laws and customs over the period since sovereignty or European settlement. It is clear from their evidence that the strongest rights in country are generated via descent from people particularly connected to local areas and the totems and Dreamings associated there, however, the company and subregional levels also generate rights in relation to land and waters. I refer particularly to the following evidence:

[Person 1 - name deleted]*'s affidavit (14/01/2015)*

[67] In my view, **[Person 1 - name deleted]** comprehensively describes a system of traditional law and custom in relation to the claim area whereby the Aboriginal people of CYP are part of a single or shared system whereby rights are generated at a number of levels, with the strongest rights to speak for country arising at a company level (in his case Olkola) and local descent group level (in his case **[Dreaming name 1 – name deleted]**)—para 49.

[68] **[Person 1 - name deleted]** states that:

(a) he has particular rights to speak for the country in the southern-central reaches of the application area known as Alice River country and this stems from a line of descent back to his maternal grandmother, **[Person 4 - name deleted]** and his great-grandfather, the latter having been buried on **[Place name 1 –deleted]** country in 1912. **[Person 1 - name deleted]** has a belief in the ownership of a totem being the **[Dreaming name 1 – name deleted]** and he says that he gets his rights to country from the **[Dreaming name 1 – name deleted]** dreaming, of which his Mum was boss until she died last year at the age of 94—paras 7, 12, 13 and 17.

(b) there are different languages and groups across the regions of the claim area, including Olkola (to which he belongs), Kunjen-Olkola, Kuku Possum, Kuku Thaypan, Lama Lama and Ayapathu. He notes the differences between these groups and the general areas they speak for. He says that Lama Lama have the **[Dreaming story 3 – name deleted]** Dreaming and a boss for that story and he can't just go there and would need to be accompanied by a traditional owner for that country. [**Person 1 - name deleted]** says that these groups are related and have the same customs, but they each have their own areas where the Dreaming comes from and their own specific responsibilities—paras 16 and 31;

(c) the claim group are involved in discussions and negotiations between various sub or local groups as to their respective boundaries based on a common understanding that goes back to the dreaming stories and custodians thereof, including what was shared country (such as the old people of the Ayapathu and the Olkola camping along the river and sharing that place)—para 38.

[69] **[Person 1 - name deleted]** speaks eloquently of a life-time spent on the Claim Area fighting to assert his legal rights to the country of the Olkola people and of his use of those lands under the traditional laws and customs of his old people. These laws and customs regulate how to access the country of others, including seeking permission from the local or family group for a particular area and avoiding places that have been shut down to mourn the passing of an Elder—paras 50 and 55. **[Person 1 - name deleted]** talks about certain ceremonial activity that must be done when hunting particular species, including the **[Dreaming story 4 – text removed]** - para 57.

[70] **[Person 1 - name deleted]** describes how:

(a) how hunting and gathering of food follows cycles that were taught to them by their parents and grandparents; for example, they known when long-neck and short-neck turtles are at their fattest. There are signs in the bush that tell them which foods are good to eat at that time, e.g. when the bloodwood and boxwood flowers bloom, there will be bush honey. In the wet season the bream are getting and the crocodile lays his eggs before the flood. At saltwater time (the dry season) the mullet starts to run and the turtle fattens up. They change their diet according to these cycles and are taught

also to preserve food and not to be wasteful. These are old cultural patterns that he has followed throughout his life—para 62;

(b) they still burn the landscape; it helps them to get their food. They used to burn a little area at certain times and then the new shoots would attract the wallabies for hunting or drive a goanna up a tree and make him easier to catch. Although they don't this as much as the old people, they still do it sometimes and work it into their land management programs of which burning is an important part—paras 63 to 65;

(c) the Olkola have organised their relationship to country with an Aboriginal Corporation that calls on two people from each of the main story places on Olkola country, being the **[Dreaming story places – names removed]**. When issues relate to particular country, the responsible families tell them what to do. It is **[Person 1 - name deleted]**'s job as chair of the Olkola Aboriginal Corporation to implement their recommendations—para 48;

(d) he has worked closely with an anthropologist to identify boundaries, consult with family groups, build infrastructure and set up the Corporation and its board of directors in a way that reflects the interests of the clan groups involved. Through the State land dealing process his people have been handed back a good part of their country, and he holds his head high because he did what his elders asked of him when they put his family in charge of that country—paras 17 to 19.

[71] **[Person 1 - name deleted]** states that he and others in the claim group never lost the connection to the country of their old people; they were able to keep the connection by working on the pastoral stations set up in the old days and learnt a great deal from the elders that worked with them. **[Person 1 - name deleted]** passes his knowledge in the same way, now that they have the freedom to take the young people there—para 21.

***[Person 3 - name deleted]**'s affidavit (22/01/2015)*

[72] **[Person 3 - name deleted]** likewise provides details of his acknowledgement and observance of traditional laws and customs whereby his descent from ancestors and membership of clan or descent groups has generated rights in the country associated with the Ayapathu and Wikyan lands of his ancestors, on the western coast of CYP. **[Person 3 - name deleted]** states that:

(a) his rights to country within the claim area stems from his Ayapathu father and Wikyan mother. His Ayapathu country is in the central-western reaches of CYP where his Dreaming story comes from. Ayapathu country lies in a broad section of country and borders the Olkola, Lama Lama and Wik lands. His mother's Wikyan country is to the west between the Kendall, Holroyd and Edward River areas—paras 8, 14 and 15;

(b) there are enough of the old people around still who knows who speaks for particular areas. He has worked, lived and travelled throughout his father's country and some

of his mother's country—para 16. He has responsibility of the area around Southwell station as that is the place of his totem, the **[Totem 2 – name deleted]**. He is also responsible for the **[Totem 3 – name deleted]** totem area, near the Holroyd River, which he shares with his brothers and sisters—paras 17 and 18;

(c) they are working on setting up an Ayapathu corporation so that land council and government know who to contact for particular areas of country. As some people do not have much family left they are looking at using the corporation to look after their country once they pass away, to ensure that once it becomes vacant other families can move into care for it—paras 28 and 29;

(d) there are areas of land were more than one group of families exercise responsibility, once such place is **[Place name 4 – deleted]** —para 30;

(e) he underwent an initiation ceremony at about 17 years of age at Aurukun where they taught him how to live in the bush, collect food and look after himself. A big *kanya* or humpy was erected where they were kept all morning, they would hunt in the afternoon using a spear and boomerang and at night, they would be taught the dreamtime stories—para 36.

[Person 2 - name deleted]*'s affidavit (21/01/2015)*

[73] **[Person 2 - name deleted]** also provides details of his acknowledgement and observance of traditional laws and customs whereby his descent from ancestors and membership of the Wik Ngathangk group has generated rights in the country associated with the Wik and Wikway lands of his ancestors, on the western coast of CYP. He states that:

(a) he gets his primary rights to country from his adoptive father but he also speaks for his mother's country too. His parents are Wik Ngathandk. His father's country is the Kendall River and his mother's is the Knox River. He recognises that Cape Keerweer (on the western coast, to the north of the Kendall and Knox Rivers) is his biological father's country but can't speak for that country—paras 3, 7 and 8;

(b) he was taken out on country by his eldest brother and uncle; the latter taught him a great deal about his Kendall River country and he has in turn taken his children out there to teach them about it and its special places, like **[Dreaming story 5 – text removed]**—paras 14 to 16;

(c) when approaching sites in the company of strangers they have to be 'blessed' with water from the creek and then coated with underarm sweat so that the spirits can recognise that they have someone entering their country. That is the belief of the old people and **[Person 3 - name deleted]** believes it too—para 17;

(d) in the old days, the traditional owners would send a messenger (or *Thaipantu*) to go ahead and talk to the family with responsibility for a particular tract of land, before

others would enter that land. Aboriginal people have to ask for permission to enter his people's land. This was the job of the *Thaipantu* but now a phone call will ensure this custom is observed—paras 18, 27;

(e) The *Thaipantu* help him negotiate communications with poison family members, as they did with his mother and father—para 19;

(f) following the Wik determinations the Ngan Aak Kunch prescribed body corporate was appointed for the Wik traditional owners and he is chairman. This body corporate will consult with family groups who have responsibility for and speak for local areas of country and won't make decisions without consulting and getting their consent; the Wik people are very clear on who speaks for which country and getting consent is very important. Without it Ngan Aak Kunch will not sign off on an agreement or make an official decision about that country—paras 22 to 24;

(g) there are shared areas where more than one group exercises responsibility and in these situations each side has to be consulted, e.g. if an activity affects Kendall River country then those people up and down the river need to be consulted—para 20;

(h) where a family line dies or where responsible family have been removed, rights to and responsibilities for it is passed onto the closest family, firstly the father's family and if not possible then the mother's family; this is how succession works—para 26;

(i) permission to enter country can be denied, especially for funerals. He recalls the closure of a place for the funeral of one of the old people and white people wrongfully accessing the area through the back road—para 30;

(j) access is regulated by age and knowledge of country; generally speaking older men don't allow younger men to go to certain places and they don't have the necessary traditional knowledge and respect for country. If he is asked for permission to visit their traditional country, he will refer them firstly to his older brother or, if he is not available, to his second elder brother as the elders of their clan. **[Person 2 - name deleted]** says that he can identify sacred sites and 'poison' country—paras 31 to 33;

(k) protecting and looking after country involves passing on his knowledge of story and dreaming places to the next generation who need that traditional knowledge to make their way in the Wik world—para 34;

(l) three of his brothers went through traditional initiations; he remembers listening to the low growl of the *borara*, a sort of stick that is whirled around in the air. This involved being out for a month. Initiations stopped around the time he went through the law, by that time it was not like his brothers' ceremony. His initiation lasted a day and during that day they sang many songs in language—para 35;

(m) he still observes customs associated with selecting marriage partners, ritual avoidance relationships, death and burial rites, although rituals around these things have changed since the time of the old people—paras 38 to 51.

[74] I am mindful that it is not appropriate to require evidence to a standard which would be required at the trial of the proceedings. I am of the view that the evidentiary affidavits by the three men discussed above provide a sufficient factual basis, when read with the comprehensive description of the factual basis in Schedule F of the application. Each of the deponents speaks eloquently to the matters asserted in Schedule F concerning the continuity over time of a shared system of traditional law and custom whereby rights are generated at a variety of levels but most strongly at a local level whereby local family or descent groups speak for areas of country passed down to them over the generations. There is detailed information about the acknowledgement and observance of common laws and customs relating to seeking permission to enter the land of another group, of teaching the young about country and its stories and places, about initiations being undertaken in recent memory and about a web of relationships across the claim area whereby particular groups speak for particular areas.

[75] Having regard to this information, I am satisfied that the factual basis is sufficient to support the assertion that the relevant laws and customs, acknowledged and observed by this society, have been passed down through the generations, by word of mouth and common practice, to the current members of the claim group, and have been acknowledged by them without substantial interruption.

190B(5)(c)

[76] I am **satisfied** that the factual basis is sufficient to support an assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs. I rely on my reasons above for the assertion of s 190B(5)(b) setting out why I was satisfied that the factual basis is sufficient to support an assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claim to native title rights and interests. The information there referred to is likewise sufficient, in my view, to support a sufficient factual basis for the assertion that the claim group have continued to hold the native title in accordance with their traditional laws and customs.

190B(6) Prima facie case

[77] The claim **satisfies** the condition of s 190B(6).

[78] Paragraph 190B(6) provides:

> The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.
> Note: If the claim is accepted for registration, the Registrar must, under paragraph 186(1)(g), enter on the Register of Native Title Claims details of only those claimed native title rights and interests that can, prima facie,

be established. Only those rights and interests are taken into account for the purposes of subsection 31(2) (which deals with negotiation in good faith in a "right to negotiate" process) and subsection 39(1) (which deals with criteria for making arbitral body determinations in a "right to negotiate" process).

[79] I refer to my reasons above at s 190B(4) where I found that the description of the claimed native title rights and interests is sufficient to allow the claimed rights to be readily identified. That description is in the following terms:

> **Native title where traditional rights are wholly recognisable**
> 1. Paragraph 2 applies to every part of the Claim Area:
> (a) where there has been no extinguishment to any extent of native title rights and interests or where any such extinguishment is required to be disregarded pursuant to ss 47, 47A or 47B of the NTA; and
> (b) which is not subject to the public right to navigate or the public right to fish.
> 2. Where this paragraph applies, the native title rights and interests possessed under traditional laws and customs confer possession, occupation, use and enjoyment of the land and waters as against all others.
> **Native title where traditional rights are partially recognisable**
> 3. Paragraph 4 applies to every part of the Claim Area to which paragraph 2 does not apply.
> 4. Where this paragraph applies, the customary rights and interests possessed under traditional laws and customs that are able to be and should be recognised by the common law of Australia being the (non-exclusive) rights to:
> (a) have access to, remain on and use the land and waters;
> (b) access and take the resources of the land and waters; and
> (c) protect places, areas and things of traditional significance on the land and waters.
> **Area covered by the native title and who holds the rights**
> 5. Each of the native title rights and interests referred to in each of paragraphs 2 and 4 exist in relation to the whole of each part of the Claim Area to which those paragraphs respectively apply and is held by the members of the native title claim group subject to and in accordance with traditional laws and customs.
> **Activities currently carried on**
> 6. Activities in exercise of the native title rights and interests referred to in Schedule E are all such activities as are contemplated by those rights and interests, and include the activities identified in Schedule G.
> **Rights and interests subject to laws of Australia**
> 7. The members of the native title claim group acknowledge that their native title rights and interests are subject to and exercisable in accordance with valid and current laws of the Commonwealth of Australia and the State of Queensland, including the common law.
> 8. In this Schedule, "resources" does not include such minerals, petroleum or gas, if any, as are, under the laws of the Commonwealth or the State of Queensland, including the common law, as at the date of this application, wholly owned by the Crown.

Possession, occupation, use and enjoyment as against all others (the exclusive right).

[80] I consider that, prima facie, the exclusive right can be **established** noting that it is not claimed where extinguishment that cannot be disregarded has taken place, nor is it claimed over areas subject to the public right to navigate or fish.

[81] In *Western Australia v Ward* (2002) 213 CLR 1; (2002) 191 ALR 1; [2002] HCA 28 (*Ward HC*), the majority considered that the 'expression "possession, occupation, use and enjoyment ... to the exclusion of all others" is a composite expression directed to describing a particular measure of control over access to land' and conveys 'the assertion of rights of control over the land'—at [89] and [93]. The Full Court reviewed the case law in *Griffiths v Northern Territory* (2007) 243 ALR 7 (*Griffiths FC*) about what was needed to prove the existence of exclusive native title in any given case and found that it was wrong for the trial judge to have approached the question of exclusivity with common law concepts of usufructuary or proprietary rights in mind:

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

[82] *Griffiths FC* indicates at [127] that what is required to prima facie establish the exclusive right under the condition of s 190B(6), is to show how, under traditional law and custom, being those laws and customs derived from a pre-sovereignty society and with a continued vitality since then, the group may effectively 'exclude from their country people not of their community', including by way of 'spiritual sanction visited upon unauthorised entry' and as the 'gatekeepers for the purpose of preventing harm and avoiding injury to country'. The Full Court stressed at [127] that:

> [It is also] important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people.

[83] The material I have considered which prima facie establishes the existence of this right is found in the affidavits of the three claim group members discussed above in my reasons under s 190B(5). Each person talks in great detail about a right to speak for country, which also includes a right to refuse entry or to only allow entry when accompanied by a traditional owner and after ceremonial activity such as calling out to the old people and blessing visitors with water and under-arm sweat. The deponents describe knowing the special places and stories associated with their country, including the travels of Ancestral Beings, hunting and fishing there, practising burial rites, living there in communities and on outstations. There is evidence of a rich ceremonial life associated with the claim area and its special places and a wide web of relationships whereby country is protected and there is consultation and consent before decisions are made that might affect an area or rights in that area. I refer to my examination of the three affidavits above in my reasons at s 190B(5) for the details of this information.

Non-exclusive rights:

[84] For the reasons given above in relation to the exclusive right, I am also of the view that three rights listed in para 4 of Schedule E can be **prima facie established**. Additionally, there are many references in the material to the prima facie existence of these non-exclusive rights.

Conclusion

[85] To conclude, as all of the claimed rights can be established prima facie, I find that the requirements of this condition are satisfied.

190B(7) Physical connection

[86] The claim **satisfies** the condition of s 190B(7).

[87] Paragraph 190B(7) provides:

> 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 have been expected currently to 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 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.

[88] The claim **satisfies** the condition of s 190B(7).

[89] That there are members of the claim group with a previous and current traditional physical connection with parts of the area is found in the affidavits by three members of the native title claim group, **[Person 1 - name deleted]**, **[Person 3 - name deleted]** and **[Person 2 - name deleted]**. I refer to my reasons at s 190B(5) above examining the evidence of a lifelong association and connection with their local areas (around the western and central parts of CYP) which has both a physical dimension and appears to be grounded in a common system of traditional law and custom whereby they have inherited rights and responsibilities for country within the claim area from their parents and grandparents.

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

[90] The claim **satisfies** the condition of s 190B(8).

[91] Paragraph 190B(8) provides:

> The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that, because of section 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.

61A(1): No claim to areas covered by determinations of native title

[92] I have undertaken a search of the Tribunal's Geospatial database which reveals that no part of the application area is also covered by a previous native title determination. I note that although there are 16 native title determinations which fall within the area, Schedule B states that any areas subject to those determinations are not covered by the application.

61A(2): No claim to areas covered by previous exclusive possession acts

[93] Schedule B clearly states that the application does not include any such areas (refer to my reasons at s 190B(2) above).

61A(3): No claim to areas covered by previous non-exclusive possession acts

[94] The claimed rights and interests described in Schedule E are clearly framed so that exclusive possession is only claimed in relation to areas where no such acts have been done or if claimed, any extinguishment by such acts must be disregarded under ss 47, 47A or 47B of the Act.

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

[95] The claim **satisfies** the condition of s 190B(9).

[96] Paragraph 190B(9) provides:

> The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:
>
> a. to the extent that the native title rights and interests claimed consist of or include ownership of minerals, petroleum or gas—the Crown in right of the Commonwealth, a State or a Territory wholly owns the minerals, petroleum or gas; or
> b. to the extent that the native title rights and interests claimed relate to waters in an offshore place—those rights and interests purport to exclude all other rights and interests in relation to the whole or part of the offshore place; 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 subsection 47(2), 47A(2) or 47B(2)).

[97] Statements in para 8 of Schedule E and Schedule Q make it clear that no claim is made to any minerals, petroleum or gas owned by the Crown, in satisfaction of s 190B(9)(a). The claimed rights and interests are framed in such a way that they do not purport to exclude all other rights in relation to any offshore places (see Schedule E) but in any event I note that the application does not extend to offshore places, with the outer boundary coinciding with the High Water Mark, as defined by the *Land Act 1994 (Qld)*. Finally, the application and accompanying documents do not disclose, and I am not otherwise aware that, the native title rights and interests claimed have otherwise been extinguished. The claim satisfies s 190B(9)(c).

190C Registration: conditions about procedural and other matters

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

[98] The claim **satisfies** the condition of s 190C(2).

[99] Paragraph 190C(2) provides:

> The Registrar 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.

[100] In my view, the application contains all details and other information, and is accompanied by the affidavit, required by ss 61 and 62. My reasons for this now follow.

61(1) Applications that may be made

[101] Item (1) of the Table in s 61(1) provides that a native title determination application, for a determination of native title under s 13(1), may be made by *'a person or persons authorised by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the*

common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group'.

[102] I note that whether or not the person or persons claiming to be authorised by a 'native title claim group' as that term is defined in s 61(1) (see s 253) is, in fact, so authorised cannot be determined by the Court until it is determined that there are persons holding the particular native title claimed—see *Harrington-Smith (No 9)* at [1186]–[1193]. I note also that s 190C(2) does not permit the Registrar to undertake any merit or qualitative assessment against the requirements of s 61(1). In this regard, I refer to the consideration by Mansfield J in *NT v Doepel* as to the nature of the task at s 190C(2) in relation to the details required by s 61(1), in light of the NTG submission that there was information before the Registrar which called into question whether the claim group description provided could ever satisfy the requirements of s 61(1), to which his Honour responded:

> I do not need to refer to that material for the purpose of considering the Territory's submission. Section 190C(2) directs attention to the contents of the application and the supporting affidavits. It seeks to ensure that the application contains `all details' required by s 61. There is obviously good reason why that should be so. If the application did not contain the required information, for example as to the composition of the native title claim group, the subsequent determination of the application would be difficult. And the identity of those on whose behalf the claimants would enjoy procedural rights under subdiv P of Div 3 of Pt 2 of the NT Act upon registration of the claim would be unclear. It also ensures that the claim, on its face, is brought on behalf of all members of the native title claim group: see e.g. *Edward Landers; Quall v Native Title Registrar* [2003] FCA 145 (*Quall v NTR*)—at [35].
>
> In my judgment, s 190C(2) relevantly requires the Registrar to do no more than he did. That is to consider whether the application sets out the native title claim group in the terms required by s 61. That is one of the procedural requirements to be satisfied to secure registration: s 190A(6)(b). If the description of the native title claim group were to indicate that not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group, then the relevant requirement of s 190C(2) would not be met and the Registrar should not accept the claim for registration—at [36].

[103] In my view, the limited circumstances which may permit the Registrar to assess the details do not arise in this case as there is nothing on the face of the application to indicate that 'not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group'—at [36].

61(3) Applicant's name and address for service

[104] Part A, item 1 and Part B of the Form 1 contains the statement of the names of and the address for service of the persons who are the applicant.

61(4) Applications authorised by persons

[105] Section 61(4) provides that a '*native title determination application that persons in a native title claim group authorise the applicant to make must: (a) name the persons; or (b) otherwise describe the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons'*. Schedule A contains a description of the persons in the native title claim group.

[106] Dowsett J held in *Gudjala 2007* that the task at s 190C(2) in relation to s 61(4) is merely to assess that the persons are named or a description provided and whether those details are sufficient is the task of the corresponding merit condition in s 190B(3)— at [31] and [32].

s62(1)(a) Affidavits in prescribed form

[107] There are affidavits from the nine persons who comprise the applicant and they contain the statements required by this section.

62(2)(a) & (b) Information about the boundaries of the area covered by the application and any areas within those boundaries not covered and map showing the boundaries

[108] The required details are found in Schedule B and a map showing the boundaries is provided in Attachment C.

62(2)(c) Searches of non-native title rights and interests

[109] Schedule D states that the no searches of the relevant kind have been carried out by or on behalf of the native title claim group. Section 62(2)(c) only requires the disclosure of details and results of searches conducted by or on behalf of the native title claim group; the express statement in Schedule D that this is yet to occur meets the requirements of this section.

62(2)(d) Description of the native title rights and interests claimed in relation to particular land or waters

[110] Schedule E contains a description of the claimed native title rights and interests. See my reasons above at s 190B(4) which analyses the adequacy of the description and finds it be sufficient to allow the rights claimed to be readily identified. It follows in my view, for the reasons outlined above, that the description does not consist of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

62(2)(f) Activities

[111] These details are provided in Schedule G.

62(2)(e) General description of factual basis on which it is asserted that the native title rights and interests claimed exist and for the particular assertions of ss 62(2)(e)(i) to (iii)

[112] This is provided in Schedule F.

62(2)(g) Other applications

[113] Schedule H states that there are no other overlapping applications.

62(2)(ga) s24MD(6B)(c) notices

[114] Schedule HA states that there are no such notices, of which the applicant is aware.

62(2)(h) s29 notices

[115] These details are provided in Attachment I.

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

[116] The claim **satisfies** the condition of s 190C(3).

[117] Paragraph 190C(3) provides:

> The Registrar 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. an entry relating to the claim in 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 consideration of the previous application under section 190A

[118] The Geospatial report shows that there are no previously registered native title determination applications that cover the whole or part of the area covered by the application. I note the express exclusion within Schedule B of a number of native title determination applications that fall within the outer boundary. The requirement to consider members in common does not therefore arise.

190C(4) Identity of claimed native title holders

[119] The claim **satisfies** the condition of s 190C(4).

[120] Paragraph 190C(4) provides, relevantly to this application:

> The Registrar must be satisfied that either of the following is the case:
>
> a. the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part; 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.

[121] My consideration is governed by s 190C(4)(a) as the one representative body for the application area has certified the application. This is the signed certification dated 11 December 2014 by CYLC in Attachment R of the application. For the certification to satisfy the requirements of s 190C(4)(a) it must comply with the provisions of s 203BE(4)(a) to (c). I note that it is not the task of the Registrar under s 190C(4)(a) to look behind a certification, nor is he required to be satisfied that the applicant is authorised—see *Northern Territory v Doepel* at [79] to [82].

[122] It is my view that the certification complies with s 203BE(4)(a) as it contains the required statement of the representative body's opinion that all persons in the native title claim group have authorised the applicant to make the application and deal with all matters in relation to it and all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

[123] It is my view that the certification complies with s 203BE(4)(b) as it briefly sets out the reasons for being of the above opinion. The certificate states that:

> (a) CYLC has performed its facilitation and assistance functions pursuant to s 203BB of the NTA to assist members of the native title claim group in a wide range of matters over a number of years, including the native title determination applications and native title determinations identified in Schedule B of the application;

(b) CYLC has undertaken substantial anthropological, archival, historical and field research in relation to land or waters within the CYLC area. Out of this research has come a large body of anthropological reports, by numerous anthropologists. CYLC has reviewed anthropological materials held by CYLC as to the composition of the native title claim group;

(c) CYLC published notices of authorisation meetings in towns and communities across the claim area in a variety of regional newspapers and the Koori Mail. CYLC also sent a total of 3,463 notices of authorisation meeting to all persons on its database as having native title rights and interests in CYP; 989 letters to prescribed bodies corporate across CYP; 37 letters to organisations across CYP asking that the authorisation meeting notice be displayed on community notice boards; 36 letters to Land Trusts across CYP and 8 letters to NTRBs in Queensland and Torres Strait attaching a copy of the notice;

(d) the authorisation meetings took place between 14 July and 14 November 2014 at 23 locations across the CYP and these meeting were attended by 571 members of the native title claim group;

(e) CYLC staff conducted a registration process at the commencement of each meeting which involved the provision of information by each attendee, including group/country, ancestor (father), ancestor (mother) and other information;

(f) the authorisation meetings resulted in the authorisation of the applicant to make the proposed native title determination application under a decision-making process that was agreed to and adopted by the persons in the native title claim group.

[124] Section 203BE(4)(c) requires the representative body to, 'where applicable, briefly set out what the representative body has done to meet the requirements of s 203BE(3)'. Section 203BE(3) requires the representative body to make all reasonable efforts to achieve agreement between competing claimants and to minimise the number of overlapping applications over an area of land and waters. As I have discussed in my reasons above at ss 190B(2) and 190C(3), the area description has been drafted to exclude any pre-existing native title determination applications over the broader reach of CYP, hence it is my view that this requirement does not apply.

[125] The certificate contains the statements and brief reasons for holding the opinion identified in s 203BE(2)(a) and (b), thus complying with s 203BE(4).