National Native Title Tribunal

Registration test decision

Application name	Jirrbal People #4
Name of applicant	Angela Braun, Elizabeth Cashmere, Bradley Go Sam, Kathleen Haines
NNTT file no.	QC2015/014
Federal Court of Australia file no.	QUD983/2015

I have considered this claim for registration against each of the conditions contained in ss 190B and 190C of the *Native Title Act 1993* (Cth).

For the reasons attached, I am satisfied that each of the conditions contained in ss 190B and 190C are met. I accept this claim for registration pursuant to s 190A of the *Native Title Act 1993* (Cth).

Date of decision: 9 February 2016

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Heidi Evans

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 20 November 2015 and made pursuant to s 99 of the Act.

Edited Reasons for decision

Introduction

[1] This document sets out my reasons, as the delegate of the Native Title Registrar (the Registrar), for the decision to accept the claim for registration pursuant to s 190A of the Act.

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

Application overview and background

[3] The Registrar of the Federal Court of Australia (the Federal Court) gave a copy of the Jirrbal People #4 claimant application to the Registrar on 23 October 2015 pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

[4] Given that the claimant application was made on 22 October 2015 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

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

[6] The application is the fourth native title determination application brought by the Jirrbal People native title claim group. The Federal Court has made positive determinations of native title in favour of the group over areas adjacent to the current application area, in the Jirrbal People applications QUD6001/2003 (Jirrbal People #1), QUD41/2004 (Jirrbal People #2) and QUD42/2004 (Jirrbal People #3).

Registration test

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

[8] Pursuant to ss 190A(6) and (6B), the claim in the application must be accepted for registration because it does satisfy all of the conditions in ss 190B and 190C.

Information considered when making the decision

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

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

[11] The information and documents that I have considered in reaching my decision are set out below:

- Form 1 and accompanying documents filed in the Federal Court 22 October 2015;
- additional material provided directly to the Registrar by cover letter of 23 October 2015, consisting of:
    - i) affidavit of Ernest Brian Grant, affirmed 9 September 2015;
    - ii) affidavit of Bradley Go Sam, affirmed 10 September 2015; and
    - iii) report entitled, 'Jirrbal People Application Report', prepared by Ophelia Rubinich of September 2015.
- Geospatial assessment and overlap analysis (GeoTrack: 2015/2118) dated 27 October 2015.

[12] I have not considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK of the Act.

[13] Also, I have not considered any information that may have been provided to the Tribunal in the course of mediation in relation to this or any other claimant application.

Procedural fairness steps

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

[15] On 27 October 2015, I caused an officer of the Tribunal to write to the State, and to the representative body for the area of the application, namely the North Queensland Land Council (NQLC), providing a copy of the application. The State was also offered the opportunity to make submissions in relation to the registration testing of the claim by 13 November 2015. By email of 10 November 2015, the State requested an extension of time of one week to make submissions, by 20 November 2015. Noting the State set out clear reasons for the request, and that I considered the request reasonable in light of those reasons, I granted the request on the basis that it was appropriate to do so in the circumstances.

[16] Also on 27 October 2015, I caused the Tribunal officer to write to the Court, advising of the proposed date by which a registration test decision would be made.

[17] On 23 October 2015, the applicant provided directly to the Registrar for consideration in relation to the registration testing of the claim, additional material comprising of two affidavits sworn by members of the claim group, and a report prepared by an anthropologist, dated September 2015. On 27 October 2015, therefore, the Tribunal officer wrote to the applicant, advising that the additional material was to be provided to the State pursuant to the requirements of procedural fairness, and on that basis, seeking the applicant's confirmation of whether it asserted that the additional material was confidential in nature. The letter advised the applicant that confidentiality conditions could be imposed upon the State and its use of the material where the material was inherently confidential. By email of that same date, the applicant's legal representative responded, advising that all of the additional material was confidential, and consequently, that the State should be required to sign the relevant confidentiality undertakings. Having considered the content of the additional material, I was satisfied that it was confidential in nature, and that confidentiality conditions should be imposed.

[18] The Tribunal officer wrote to the State again on 27 October 2015, therefore, briefly describing the additional material provided by the applicant, and requesting that the State sign the attached confidentiality undertakings in order that the State be supplied with the material. By email of 2 November 2015, the State advised that it did not wish to receive the confidential material, and that it would not be making a submission in relation to the registration testing of the application.

[19] By email of 24 November 2015, in relation to the copy of the application filed in the Court on 22 October 2015 and provided to the State on 27 October 2015, the State advised that it had completed its review of the application and elected not to provide any submissions in relation to the application of the registration test to the claim.

Procedural and other conditions: s 190C

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

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

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

[21] In reaching my decision for the condition in s 190C(2), I understand that this condition is procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss 61 and 62. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s 190C(2)— *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (Doepel) at [16] and also at [35] to [39]. In other words, does the application contain the prescribed details and other information?

[22] It is also my view that I need only consider those parts of ss 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s 190C(2)). I therefore do not consider the requirements of s 61(2), as it imposes no obligations of this nature in relation to the application. I am also of the view that I do not need to consider the requirements of s 61(5). The matters in ss 61(5)(a), (b) and (d) relating to the Court's prescribed form, filing in the Court and payment of fees, in my view, are matters for the Court. In my view, they do not require any separate consideration by the Registrar. Paragraph 61(5)(c), which requires that the application contain such information as is prescribed, does not need to be considered by me under s 190C(2). I already test these things under s 190C(2) where required by those parts of ss 61 and 62 which actually identify the details/other information that must be in the application and the accompanying prescribed affidavit/documents.

[23] Below I consider each of the particular parts of ss 61 and 62, which require the application to contain details/other information or to be accompanied by an affidavit or other documents.

Native title claim group: s 61(1)

[24] A description of the native title claim group appears in Schedule A of the application. At s 61(1), I understand that it is only where, on its face, the description contained in the application indicates that not all the persons in the native title claim group are included, or where the group described is only a sub-group of the actual native title claim group that the requirement will not be met – *Doepel* at [36].

[25] I have considered the description before me and in my view, there is nothing within that description that suggests that certain persons have been excluded, or that the group described is only a sub-group of the native title claim group.

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

Name and address for service: s 61(3)

[27] The names of the persons comprising the applicant appear immediately above Part A of the Form 1. The address for service for the applicant appears at Part B.

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

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

[29] The task at s 61(4) requires only that I am satisfied that the information prescribed is contained in the application. It does not permit me to consider the correctness of that information – see *Wakaman People 2 v Native Title Registrar* [2006] FCA 1198 (*Wakaman*) at [34]; *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [31] and [32].

[30] As above, a description of the native title claim group is contained in Schedule A.

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

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

[32] The application is accompanied by four affidavits, one sworn by each of the persons comprising the applicant. Each of those affidavits is signed, dated and has been competently witnessed. The affidavits all contain the same ten paragraphs. Having considered those paragraphs, I am satisfied that they address the matters prescribed by ss 62(1)(a)(i) to (v).

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

Details required by s 62(1)(b)

[34] Subsection 62(1)(b) requires that the application contain the details specified in ss 62(2)(a) to (h), as identified in the reasons below.

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

[35] A written description of the boundaries of the application area is contained in Attachment B to Schedule B. Schedule B lists those areas within the boundaries that are not covered by the application by way of general exclusion clauses.

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

[36] A map showing the external boundaries of the application area is contained in Attachment C to Schedule C.

Searches: s *62(2)(c)*

[37] Information about searches conducted by the applicant appears at Schedule D of the Form 1.

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

[38] Schedule E contains a description of the native title rights and interests claimed in relation to the land and waters of the application area. It is more than a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or have not been extinguished, at law.

Description of factual basis: s *62(2)(e)*

[39] A general description of the factual basis on which it is asserted that the native title rights and interests claimed exist is contained in Schedule F.

Activities: s *62(2)(f)*

[40] The activities currently undertaken by the members of the native title claim group in relation to the land and waters of the application area are listed in Schedule G.

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

[41] Schedule H contains information about the existence of other applications that overlap the current application.

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

[42] Information about this type of notice appears in Schedule HA.

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

[43] Information about s 29 notices appears in Attachment I to Schedule I.

Conclusion

[44] The application contains the details specified in ss 62(2)(a) to (h), and therefore contains all details and other information required by s 62(1)(b).

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

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

[45] It is only where there is a previous application that satisfies all of the criteria prescribed by ss 190C(3)(a), (b) and (c) that the requirement for me to consider the possibility of common claimants is triggered – see *Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9]. Consequently, I have first turned my mind to whether there is a previous application that covers the whole or part of the area covered by the current application.

[46] The geospatial assessment and overlap analysis (geospatial assessment) prepared by the Tribunal's Geospatial Services in relation to the map and description of the agreement area contained in the application (GeoTrack: 2015/2118, dated 27 October 2015), states that there are no applications that overlap the current application.

[47] As the criterion at subsection (a) is not satisfied, I have not turned to consider the remaining criteria, and am satisfied that there is no previous application for the purposes of s 190C(3).

[48] The application satisfies the condition of s 190C(3).

Subsection 190C(4)
Authorisation/certification

Under s 190C(4) the Registrar/delegate must be satisfied that either:

(a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or

(b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

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

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

a) where there is a process of decision–making that, under the traditional laws and customs of the persons in the native title claim group, must be complied with in relation to authorising things of that kind—the persons in the native title claim group . . . authorise the person or persons to make the application and to deal with the matters in accordance with that process; or

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

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

(a) includes a statement to the effect that the requirement in s 190C(4)(b) above has been met, and

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

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

[50] Schedule R states that the application is not certified. Consequently, it is the requirement at s 190C(4)(b) of which I must be satisfied.

[51] Where the application is not certified, I note that s 190C(5) imposes further requirements. Section 190C(5) is set out above. Having considered the information contained in the application, I am satisfied that it contains the required statement (s 190C(5)(a)), and that it briefly sets out the grounds upon which the Registrar can consider that the requirement regarding authorisation has been met (s 190C(5)(b)).

[52] In *Doepel*, describing the difference between the requirements of certification and authorisation, Mansfield J held that 'in the case of subs (4)(b), the Registrar is to be satisfied of the fact of authorisation by all members of the native title claim group' – at [78]. His Honour further held that 'the interactions of s 190C(4)(b) and s 190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see whether the necessary authorisation has been given' – at [78].

[53] The authorisation material contained in the application is at Schedule R, and also in an affidavit sworn by a member of the claim group, at Attachment R. In addition to the statement required by s 190C(5)(a), Schedule R provides that the applicant was authorised 'in accordance with a decision-making process mandated by the laws and customs of the claim group for authorising things of this kind'. The note that follows s 190C(4)(b), referring to the definition of 'authorise' at s 251B, in my view, demands that the authorisation material address the decision-making process by which the applicant gained authority from the members of the claim group.

[54] As above, the material states that the process of decision-making used to authorise the applicant was one mandated by their traditional laws and customs. It is my view, however, that while the process used may have possessed aspects of decision-making pursuant to Jirrbal traditional laws and customs, the process was, in fact, one agreed to and adopted by the persons in attendance at the meeting. In reaching this view, I have considered the meeting minutes at annexure 'MJB 10' of the affidavit at Attachment R. As set out in those minutes, Resolution 2 of the meeting provided:

The Jirrbal People will use the following process for making decisions at this meeting:

- a proposed decision will be put in the form of a clearly worded resolution;

- the resolution will be read out to the meeting;
- the resolution must be moved and seconded before being considered;
- Jirrbal elders and their families will consider whether they support the resolution and will vote on the resolution by a show of hands;
- a count will be undertaken by the Chairperson (or their delegates) of those in favour, those against and those who wish to be recorded as abstaining; and
- the Chairperson will ensure that a record is made of the count if a clear majority is not apparent.

[55] The meeting minutes provide that this resolution was moved, seconded, and unanimously passed by the persons in attendance. On the basis of this information, I consider that the persons in attendance agreed to and adopted a process of decision making by way of majority vote, and that the process was, therefore, one in accordance with s 251B(b) of the Act. I accept that the information before me suggests that pursuant to Jirrbal traditional laws and customs, decisions about land business were to be made by elders and their families, with that decision binding the whole group. In my view, however, this is merely one aspect of the decision-making process which took place, and the actual process used was, in fact, collectively agreed to by the persons in attendance at the meeting.

[56] In *Wharton on behalf of the Kooma People v State of Queensland* [2003] FCA 790 (*Wharton*), Emmett J held that s 251B(b) did not require that all the members of the relevant native title claim group be involved in making the decision. His Honour affirmed the finding of Stone J in *Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of NSW* [2002] FCA 1517 (*Lawson*), finding that 'it is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process' – *Wharton* at [34].

[57] Having considered the information before me regarding the way in which the authorisation meeting was notified, it is my view that the members of the Jirrbal People native title claim group were given every reasonable opportunity to participate in the decision to authorise the applicant. From the affidavit at Attachment R, I am aware that the meeting was notified both publicly and personally. The affidavit provides that a notice advertising the meeting was placed in three separate publications that circulate in the area where Jirrbal people reside, some two and a half weeks prior to the date of the meeting. That notice, along with a fact sheet about the proposed claim, were mailed to 147 persons whose details appeared in a register maintained by Wabubadda Aboriginal Corporation (WAC) (the registered native title body corporate for the Jirrbal People determinations of native title). In addition, the affidavit states that the notice was posted on WAC's website, and 40 copies of the notice were handed out at the Cairns Indigenous Art Fair, where Jirrbal people were in attendance. The affidavit further provides that the

deponent of the affidavit and other Director's of WAC's Board told their families and other Jirrbal people about the upcoming meeting.

[58] While the copy of the notice included in the material states that financial assistance to travel to the meeting would not be provided, it is my understanding that a significant number of the native title claim group continue to reside in the region surrounding the location of the meeting. Having considered the terms of the notice, I consider that it clearly states the purpose of the meeting, and identifies the area to be covered by the claim, such that members of the group could make a considered decision whether or not to attend. The terms of the notice invites '[t]he Jirrbal People, who are the descendants of the following apical ancestors', and then sets out the native title claim group description for the application.

[59] At the meeting, as set out in the affidavit at Attachment R, upon arrival Jirrbal persons were required to register, identifying the relevant apical ancestor from whom they are descended. Such persons were given a red arm band which entitled them to vote. The meeting minutes confirm that only those persons with red arm bands took part in the voting at the meeting on 8 August 2015.

[60] In light of this information before me, therefore, I consider that sufficient notice of the meeting was provided, and that the members of the group were given every reasonable opportunity to participate in the decision-making process.

[61] Where a meeting forms the basis of the applicant's authority from the native title claim group, the decision in *Ward v Northern Territory* [2002] FCA 171 provides some guidance as to the nature of the material necessary to satisfy the requirement at s 190C(4)(b). In that case, O'Loughlin J found that the information before him about the relevant meeting was 'wholly deficient'. His Honour posed the following questions, finding that the material should address at least the 'substance' of the questions – at [25]:

> …Who convened it and why was it convened? To whom was notice given and how was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded? – at [24].

[62] I consider the material within the application speaking to authorisation is of a relatively detailed nature. Having considered the full extent of that information, I am of the view that it does address the substance of the questions posed by O'Loughlin J in *Ward*. In addition to the information discussed above, annexed to the affidavit at Attachment R are copies of the meeting minutes, attendance sheets, agenda, notice for the meeting, and the PowerPoint presentation

given at the meeting. The affidavit provides that an independent chairperson was elected at the commencement of the meeting, and the minutes clearly describe the resolutions that were passed during the course of the meeting, including that the persons named immediately above Part A of the Form 1 were authorised to be the applicant.

[63] Resolution 6 of the meeting minutes provides that the Jirrbal People authorised five persons to be the applicant for the claim. Resolution 7 then sets out the terms by which those persons were authorised. I note that the application has been brought by only four of the persons listed in Resolution 7 of the minutes. The applicant's legal representative advised by letter of 23 October 2015 that the fifth individual, **[name deleted]**, was unwilling and/or unable to sign an affidavit for the purposes of s 62(1)(a), and on that basis, in accordance with the terms of the authority given by the group at the meeting, the application was brought by the remaining four persons. To this effect, point (ii) of Resolution 7 states '[i]f an Applicant is unable or unwilling to continue to act as an applicant whether as a result of death, ill-health or any other reason, the remainder of the Applicants continue to be authorised to act on behalf of the claim group until the Applicant comprises of less than three remaining persons in which case replacements will be authorised by the claim group at an authorisation meeting'.

[64] Consequently, I am satisfied that despite the willingness or capacity of **[name deleted]** to act as an applicant person, the remaining four persons are authorised by all of the persons in the native title claim group to make the application, and to deal with all matters arising in relation to it.

[65] For the reasons set out above, I am satisfied that the requirements set out in s 190C(4)(b) are met.

Merit conditions: s 190B

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

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

[66] As above, a written description of the external boundaries of the application area is contained in Attachment B to Schedule B. Attachment B is entitled, 'Jirrbal People 4 – External boundary description' and describes the application area by a metes and bounds description referring to Lot on Plans, topographic features and coordinate points. Attachment B specifically excludes the land and waters subject to various native title determinations and native title determination applications.

[67] Schedule B sets out a list of areas that fall within the external boundaries that are not covered by the application. These areas are described by way of general exclusion clauses, which in my view, is sufficient for the purposes of s 190B(2) – see *Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*) at [50] to [55].

[68] Attachment C to Schedule C is a colour copy of a map titled 'Jirrbal People 4' prepared by the Tribunal's Geospatial Services and dated 25 September 2015. The map includes:

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

[69] The geospatial assessment provides that the map and description are consistent and identify the application area with reasonable certainty. I have considered the information before me about the area covered by the application and agree with this assessment. Consequently, I consider that the information is sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

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

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

> The Registrar must be satisfied that:
> (a) the persons in the native title claim group are named in the application, or
> (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[71] In *Doepel*, Mansfield J held that the focus of s 190C(3) is 'whether the application enables the reliable identification of the persons in the native title claim group' – at [51]. His Honour further held that the Registrar was not permitted to consider the correctness of the description, or whether the named or described persons do, in fact, qualify as members of the native title claim group – at [37]. This finding was affirmed by Kiefel J in *Wakaman* – at [34].

[72] A description of the native title claim group appears at Schedule A. That description appears as follows:

> The claim group are persons:
>
> 1. who are recognised by other members of the claim group as being descended (which may include by adoption) from a deceased person who they recognise as having been a member of the Aboriginal landholding group for the application area depicted in ATTACHMENT "C" ("an apical ancestor"); and
>
> 2. who identifies himself or herself as being a descendant of an apical ancestor.
>
> It is accepted that adoption may take place and where adoption has occurred it confers upon the adoptee the right to identify as a member of the claim group.
>
> The following deceased persons are recognised as having been apical ancestors from whom claim group members are descended:
>
> [*list of named individual ancestors and ancestor couples*]

[73] It is my understanding of the description that there are two rules, or two criteria, which must be satisfied in order for an individual to be identified as a member of the native title claim group. Firstly, they must be recognised by other persons within the group as being descended from one of the apical ancestors listed, and secondly, they must identify themselves as a descendant of one of these persons. In my view, these two criteria are somewhat subjective. That is, they rely on the opinion of the individual being identified, and on the opinion of others within the group. However, the fact that the starting point in relation to the application of both criteria is whether a person is a descendant of one of a list of specific named apical ancestors, in my view, overcomes any ambiguity or uncertainty that may result from relying on personal opinions. In other words, as the starting point is whether an individual is a biological or adopted descendant of one of the named apical ancestors, I consider this to provide an objective reference that ensures the persons comprising the native title claim group can be identified with sufficient clarity.

[74] In *Western Australia v Native Title Registrar* [1999] FCA 1591 (*WA v NTR*), Carr J held that it did not matter that some factual inquiry was necessary in applying specified criteria or rules to determine the members of a native title claim group, nor did it prevent the description from being sufficiently clear for the purposes of s 190B(3) – at [67]. In that case, Carr J considered a

description involving similar criteria, including that persons were descended from named apical ancestors either by biological means, or by adoption. His Honour held that the description met the requirement at s 190B(3).

[75] In my view, there is nothing controversial or ambiguous in the description of the group before me. I am satisfied that by starting with a particular person, and applying the specified criteria, with some factual inquiry, the members of the native title claim group could be identified. Consequently, I am satisfied that the persons in the group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[76] The application satisfies the condition of s 190B(3).

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

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

[77] In *Doepel*, Mansfield J upheld the approach of the Registrar's delegate who had found that the 'test of identifiability' was whether the claimed rights and interests are 'understandable and have meaning' – at [99]. In assessing the application against the requirement at s 190B(4), the Registrar's delegate had also had regard to the definition of 'native title rights and interests' at s 223(1) of the Act, and considered whether the rights and interests before him were, in fact, 'native title rights and interests' as defined. In my view, however, such a task is more appropriate at the further merit condition of s 190B(6), regarding whether each of the rights and interests claimed can be, prima facie, established. While I have had regard to that definition in my consideration here, I have not undertaken an assessment of each individual right or interest against the requirements of the definition.

[78] In discussing the correct approach at s 190B(4), Mansfield J held that 'it was a matter for the Registrar to exercise his judgment upon the expression of the native title rights and interests claimed', and that '[i]t was open to the Registrar to read the contents of Schedule E together, so that properly understood there was no inherent or explicit contradiction in Schedule E' – at [123].

[79] Noting the wording of s 190B(4), the focus of my consideration is the description of native title rights and interests required to be contained in the application pursuant to s 62(2)(d). This description appears in Schedule E. Paragraph [1] is a claim to a right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world. In my view, such a broad claim does not offend the condition at s 190B(4) – see *Strickland* at [60].

[80] Paragraph [2] of Schedule E lists nine non-exclusive rights and interests. Paragraphs [3] and [4] of Schedule E provide further clarification and some qualifications in relation to the rights and

interests claimed, including that those rights and interests are subject to the valid laws of the State and the Commonwealth.

[81] I have considered the rights and interests set out in Schedule E, and am of the view that they are understandable and have meaning. I have read the contents of the Schedule together, including the stated qualifications, and am satisfied that there is no inherent or explicit contradiction in the description. Consequently, I am satisfied that the description contained in the application is sufficient to allow the native title rights and interests to be readily identified.

[82] The application satisfies the condition of s 190B(4).

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

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

[83] In undertaking the task at s 190B(5), I am not confined to the information contained in the application – *Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*) at [62]. In *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala 2008*) the Full Federal Court discussed the correlation between the requirement at s 62(2)(e), that the application contain a description of the factual basis upon which it is asserted the claimed native title exists, and the requirement at s 190B(5). The Full Court held that where an application is able to 'fully and comprehensively' address all of the matters prescribed by s 62, it could 'provide sufficient information to enable the Registrar to be satisfied about all matters referred to in s 190B' – at [90].

[84] As to the nature of the information required to satisfy the Registrar for the purposes of s 190B(5), the Full Court held that the general description required to be contained in the application must 'be in sufficient detail to enable a genuine assessment of the application by the Registrar', and be 'something more than assertions at a high level of generality' – at [92]. The Full Court emphasised, however, that the applicant is not required to provide evidence of the type necessary to prove 'directly or by inference the facts necessary to establish the claim' – at [92]. In this way, I understand that it is not my role to approach the material as if it were evidence furnished in support of the claim, and that I am able to rely on the statement contained in the s

62(1)(a) affidavits sworn by the applicant persons in accepting the information within the application as true – see *Gudjala 2008* at [91] to [93].

[85] It is my understanding of the case law surrounding s 190B(5), that a sufficient factual basis able to satisfy the requirement is one which speaks to the particular native title, claimed by the particular native title claim group, over the particular land and waters subject of the application – see for example *Gudjala 2007* at [39].

[86] I consider each of the three assertions set out in the three paragraphs of s 190B(5) in turn in my reasons below.

Reasons for s 190B(5)(a)

[87] The assertion at s 190B(5)(a) is that the native title claim group have, and their predecessors had, an association with the area. It is my understanding that the factual basis must speak to an association with the whole of the area, and broad statements that lack geographical particularity will not be sufficient in satisfying the requirement – *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) at [26].

[88] In *Gudjala 2007*, in an aspect of the decision not criticised on appeal by the Full Federal Court, Dowsett J's comments indicate that the factual basis material at s 190B(5)(a) may need to address the following:

- the way in which the claim group as a whole presently has an association with the area, although it is not a requirement that all members must have such an association at all times;
- that there has been an association between the predecessors of the whole group and the area over the period since sovereignty – at [52].

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

[89] The applicant's factual basis material is contained in Schedule F of the application. In addition to that information, on 23 October 2015, the applicant provided directly to the Registrar, for consideration by his delegate in applying the conditions of the registration test, material comprising of two affidavits sworn by members of the claim group, and a report entitled, 'Jirrbal People Application Report', by Ophelia Rubinich dated September 2015 (the report).

[90] I have summarised below the information within that material that I consider speaks to the assertion at s 190B(5)(a).

- archaeological evidence from sites in the vicinity of the application area indicate the region was occupied 40,000 years ago – Schedule F at [2];
- effective settlement of the area, involving an influx of mining and the establishment of pastoral stations in the area, took place around 1865 to 1870 – Schedule F at [4];

- prior to this, the application area remained substantially untouched by non-indigenous people, even after sovereignty was declared in 1788 – Schedule F at [3];
- explorer Ludwig Leichardt in May 1845 observed people living in gunyahs about 50km south east of Cameron Creek on the southern border of the application area – Schedule F at [3];
- in 1848 Edmund Kennedy observed Aboriginal people at the mouth of the Tully River , and on his journey inland through Jirrbal country to the head of Blunder Creek, and along Wild River – Schedule F at [3];
- in 1875, Mulligan encountered 'townships', including groups of well-thatched gunyahs near Herberton – Schedule F at [3];
- in 1882 to 1883 Carl Lumholtz encountered Aboriginal people around the Cardwell Range in the lower Herbert River area – he also recorded evidence of landholding during his stay with Jirrbal people in 1897 along the Herbert River – Schedule F at [3];
- Missionary John Gribble in 1891 noted in his diary the 'Je-bul' of Liverpool Creek, in the vicinity of the application area – this was the first historical mention of the Jirrbal people – Schedule F at [3];
- a map prepared as part of a report by Parry-Okeden on his tour of Aboriginal camps and settlements in north Queensland, shows Jirrbal country as covering the application area stretching from Herberton to the Lower Tully River – Schedule F at [6];
- the presence in the claim area of Aboriginal people organised at local, sub-regional and regional levels, united by the socio-linguistic identity 'Jirrbal' has been noted from early observers to contemporary ethnographic, linguistic and anthropological experts – Schedule F at [7];
- members of the claim group and their forebears have maintained their connection and association with the claim area from settlement of the area to the present day by being continuously present in the application area, and regularly conducting activities including using the resources of the claim area for their nourishment, trade and for other beneficial purposes – Schedule F at [8];
- members of the claim group and their forebears were born on the claim area, either live on or have lived on or nearby the claim area, including in towns such as Herberton, Atherton, Malanda, Millaa Millaa, Ravenshoe, Irvinebank, Watsonville, Innot Hot Springs, Mt Garnet, Cardwell, Tully, Mourilyan and Innisfail – Schedule F at [9];
- many members of the claim group and their predecessors lived and worked on pastoral properties, reserves and bush/mining camps within or nearby the application area such as Mandalee Station, Woodleigh Station, Tirrabella Station, Woorooa Station, Kirrima Station, Gunawarra Station, Fringford Station, Yabbon Station, Ranga Station, the Herberton Reserve, Kara, Kaban, Tumoulin, Evelyn, Newelton/Mowbray Falls, and Murray Upper/Jambun – Schedule F at [9];
- senior members of the claim group and their forebears recall living at seasonal camps along the Herbert River, Dry River, Wild River, Murray River, Nettle Creek, Woolamin Creek, Mowbray Creek, Cameron Creek, Sunday Creek, Jarra Creek, Tully River, Echo Creek and Davidson Creek – Schedule F at [9];
- predecessors of the claim group, including some of the apical ancestors, were buried on the claim area – Schedule F at [10].

[91] In addition to this, the report provides information relevant to an association of some of the apical ancestors of the native title claim group to the application area. In doing so, the report states that it relies upon the expert genealogical report by Glass (2010). I note that the report does not speak to all of the apical ancestors listed at Schedule A, however, the report states that the information provided is merely an example of such evidence relating to the persons identified as the apical ancestors of the native title claim group – at [238]. The report further concludes that from the expert report by Glass, it is clear that there were Jirrbal ancestors who were associated with country in the application area around the time of settlement in the area, circa 1865 to 1870.

[92] The report provides information relevant to the assertion at s 190B(5)(a), in relation to the following apical ancestors listed in Schedule A:

- Bulbulyarraman aka Willie Mango or his wives Nellie and Calida;
- Joe Robinson or Eva Robinson;
- Polly Robson;
- Polly Robinson (aka Polly Ingham) or her husband Mick Robinson;
- King Sandy Maynard or his wife Annie Thomas;
- Nellie Williams and her sister Ethel Perrott;
- Wanmal and Yugibidjal.

[93] The report provides the place of birth and/or area with which the ancestor is recorded as being associated with, and the year of birth, for almost all of the above ancestors. The year of birth for the ancestors ranges from 1859 to 1886. The places of birth and/or places with which the ancestor is recorded as being associated, include Davidson Creek, Davidson Falls, the Murray River, Tully, Tully Falls, the Tully River, the Wild River, the Dry River, the Herbert River, the Beatrice River, Wooroora Station, Ravenshoe, Woodleigh, Innot Hot Springs, Herberton, Silver Valley, Moomin, the Kirrama Range, Evelyn, Nigger Creek, Wondecla and Kara.

[94] The two affidavits sworn by members of the claim group, provided as additional material, also contain substantial information I consider relevant to the assertion at s 190B(5)(a). Below, I have reproduced a number of excerpts from the affidavits, which are an example of this type of material.

[95] One claimant states:

> Through my Dad, I am a descendant of Polly Robinson nee Go Sam. She is my great grandmother. She was a full blood Jirrbal woman who is named as an apical ancestor on the Jirrbal claims which went to determination. The Robinson family had several brothers who were born and lived on Jirrbal country in the Eastern Shed of the Great Dividing Range. Their family run went from Moomin, Herberton, Silver Valley, Brownsville, Innot Hot Springs and further south to the Kirrima Range. The Robinson brothers were traditional Jirrbal warriors. One of them became a Black Tracker and worked for the police around Herberton, Silver Valley and Ravenshoe area. I was told this by my Dad – affidavit of Bradley Go Sam at [11].

[96] And further states:

> Dad was in his early twenties when he met my mother and they had their first child soon after, my older brother **[name deleted]**. He was born in 1954 at Herberton [sic] Dad took **[name deleted]** to Woolamin Creek after he was born. Mum and Dad had eight more children: **[names deleted]**. Like **[name deleted]**, each one of us was taken back as babies to grow up on our tribal lands on the One Mile and Woolamin Creek area of Silver Valley. For example, I remember Dad discovered a tin lode on Mowbray Creek on **[name deleted]** first birthday which he named "*The Happy Birthday*" – affidavit of Bradley Go Sam at [31].

[97] And further states:

> Dad has showed members of my family a sacred place at the Mowbray falls. That part of the creek holds permanent water and has always been a place where Jirrbal camped. We have taken care of that area for a long time […] There are also art sites at the top of the Mowbray Falls, nearby the Silver Valley Homestead, which are very important to my family. Dad showed them to us and now that Dad has gone, my oldest brother **[name deleted]** is the custodian of the sites at Mowbray Falls – affidavit of Bradley Go Sam at [50].

[98] And further states:

> My brothers and sisters are still very much connected with our tribal land. I visit and camp out on Woolamin Creek once a week, enjoying the peace and quiet, and getting in touch with the spirit world. I always visit the *Guligimbilbugan* area to make sure no people harm or destroy that place. My youngest brother **[name deleted]** also goes out bush a lot, camping and living off the land, cooking the day's catch of fish and turtle on the coals of the fire – affidavit of Bradley Go Sam at [73].

[99] Another claimants states:

> From Millaa Millaa to the head of Jarra Creek, the divide between the Johnston and Tully Rivers is the boundary between Mamu and Jirrbal. There is a site close to the boundary on the Tully River called *junyagunaray*. My mother's half-brother, **[name deleted]**, took me to *junyagunaray*, pointed up the hill from there and told me Mamu were over the ridge. Jones Lagoon (*Jalum*) is a pivotal point. Girramay, Gulnay and Jirrbal meet there. It is about 10km west of Euramo. Our boundary with Gulnay runs from the Walter Hill Range, down across the lowlands to the Murray River, which my mum said was the boundary with Girramay. From there, our boundary in the south-east with Girramay and Wurungu follows the Kirrama Range, over to and along Cameron Creek to just north of Glen Ruth station, and then on to Herbert River. The western boundary follows the Herbert River up to just north of Tirrabella, with Jirrbal country on the eastern side of the river. From there, the boundary goes pretty much dead north, taking in Mandalee station and Innot Hot Springs. From there, it again goes northwards towards to the Great Divide, taking in Nettle Creek, the Wild River and Silver Valley. The Great Dividing Range and the Herbert River are our western boundaries with Mbarum and Wurungnu people – affidavit of Ernest Grant at [7].

[100] And further states:

Yalgays are important to Jirrbal people because they are used to travel between places within our country. They linked each family's area or runs to the ones next door. *Yalgays* were also the ways that our people travelled from one seasonal campsite to another. They often go to significant sites and were the paths our people took to attend *brun* (gatherings and ceremonies). Some of the yalgays that I know about are:

- one from Tully Falls up the ddilgarin track to Koombooloomba Pocket to the upper Tully river and Echo Creek;
- one from Davidson Creek to Kirra
- one from Koolmoon Creek to the lower Tully River;
- one from Malaan to the lower Tully river;
- one that goes between King Ranch and Ravenshoe;
- one that goes down past the Beatrice River over the range and into the lowlands;
- one that goes past the Crater, across Nigger Creek, along Spring Creek, then branches out with one on the eastern side of Bluff Creek running straight across to Kaban, past Tumoulin, straight through the scrub east of Evelyn, then across Digellan Creek and over to Koombooloomba and the second which went to the west of Bluff creek along to Ravenshoe *buya* ground – affidavit of Ernest Grant at [38].

[101] And further states:

In the early nineties right through to the end of that decade, I took **[name deleted]** and **[name deleted]** out bush to show me places on Jirrbal country. Annexed to this my affidavit and marked EBG32 is a photo of me, **[name deleted]** and **[name deleted]** taken at Jumbun, during the 1990's. What they told me about our land strengthened the knowledge I had already. Some of the places we went to were: Wooroora station; Kara; Woodleigh; Innot Hot Springs; Mandalee station; gibalagi-jirinji-jidungi (Arthur's Seat); all around Wild River; Kirrama station; Blencoe Falls and Glen Ruth Station – affidavit of Ernest Grant at [77].

My consideration – s 190B(5)(a)

[102] Having turned my mind to the material before me that speaks to the assertion at s 190B(5)(a), excerpts of which are provided above, I have formed the view that I am satisfied the material is sufficient to support the assertion that the members of the native title claim group have, and the predecessors of those persons had, an association with the land and waters of the application area.

[103] Regarding an association of the predecessors of the group with the area at sovereignty, the factual basis material includes a number of references to historical sources that record information about the indigenous persons occupying the application area around and prior to early European settlement times (namely 1865 to 1870). In my view, the historical records referred to demonstrate that there was a group occupying the area, using its resources and holding meetings and gatherings in the area. From the information before me, I understand that Aboriginal persons occupying an area in the vicinity of the application area were first identified as Jirrbal in 1891 by Missionary John Gribble.

[104] The material also contains information about the apical ancestors of the native title claim group, including where those persons were born, where they had their children, and the general locations they were recorded as being associated with. I note that I do not have information pertaining to all of the apical ancestors listed at Schedule A, however I accept that the information provided in the application and additional material is an example of the information pertaining to each of the apical ancestors identified. From the information and through my own research, I am also aware that the native title claim group claim rights and interests across a large region of north east Queensland, and that it is reasonable to infer that not all of the apical ancestors were associated with all parts of what is identified as traditional Jirrbal country.

[105] From the information about the apical ancestors that is before me, including their birth dates, I understand the apical ancestors are asserted as having occupied the application area in the decades immediately following settlement of the area, and that some were living in the area at the time at which settlement was occurring. For example, King Sandy Maynard is stated as being born in the region of Tully (immediately adjacent to the application area), and associated with Ravenshoe (within the application area). In addition to this, statements made by claimants within the material suggest that they have an understanding of the particular country that their predecessors (including the apical ancestor from whom they are descended) occupied and held rights and interests in – see for example affidavit of Bradley Go Sam at [11] (excerpted above).

[106] It is my view, therefore, that the factual basis is sufficient to support an assertion that there was an association of the predecessors of the native title claim group with the area at and prior to European settlement.

[107] As above, statements made by claimants speak in some detail of the intervening generations from settlement in the area down to the members of the native title claim group today, and the way in which the persons comprising those intervening generations occupied and used the application area. For example, one claimant states that:

> Great granny [apical ancestor] Polly [Robinson] married a Chinaman by the name of Go-Sam. Granddad **[name deleted]** took the name Go-Sam but his father was a European by the name of **[name deleted]**. **[name deleted]** was in the Mowbray Creek and Silver Valley area [within the application area] at the time of **[name deleted]**'s birth. I was told this by a member of the **[name deleted]** family who were [*sic*] pioneering family from Ravensoe. **[name deleted]** was a well-known stockman from the early pioneering days who worked on cattle properties on Jirrbal country such as Woorooa [within the application area]. According to **[name deleted]**, Granddad **[name deleted]** was born on the Mowbray Creek area, near where the Mowbray Falls are. Annexed to this my affidavit and marked BSG3 is a photo of the Mowbray Falls, taken in the 1970's when my father took an archaeologist there to inspect an important site - affidavit of Bradley Go-Sam at [15].

[108] In light of the material of this nature before me, I have formed the view that the factual basis is sufficient to support an association of the predecessors of the group with the area over the period since European settlement.

[109] Regarding an association of the members of the native title claim group presently with the area, I consider that it is clear from the statements made by claimants that today they continue to spend time on the application area, camping, passing on knowledge about their country to their children and taking and using the natural resources of the area. Claimants also speak of the way in which they continue to discharge their responsibilities to care for and protect their country from harm. For example, one claimant speaks of the camp that his family maintains at One Mile Creek where he took each of his children when they were young to familiarise them with their country. He also speaks of taking his boys fishing at least once a week when they were young, at Woolamin Creek and the Wild River (both located within the application area).

[110] In addition to this, Schedule F states that members of the group have been born at, lived and worked at places within and adjacent to the application area, and that they continue to live and work at those places today. Places referred to include Herberton, Atherton, Millaa Millaa, Ravenshoe, Irvinebank, Watsonville, Innot Hot Springs and Tully (all within or adjacent to the boundaries of the application area).

[111] Consequently, I consider that the factual basis is sufficient to support an assertion of an association of the members of the claim group today with the application area.

[112] In my view, the material before me is of a relatively detailed nature, referring to numerous place names and sites where the members of the claim group and their predecessors have spent time, camping, holding ceremonies and using resources of the area. Sites referred to include those that have a spiritual significance for the members of the claim group, such that I consider the association asserted to be both physical and spiritual. I have considered those sites and places spoken of within the material, and with the assistance of an officer of the Tribunal's Geospatial Services, I have had those locations mapped in relation to the boundaries of the application area. From this exercise, I have formed the view that the material does speak to an association of the group and its predecessors with the entirety of the area claimed.

[113] I am, therefore, satisfied, that the native title claim group have, and the predecessors of those persons had, an association with the land and waters of the application area.

[114] The requirement at s 190B(5)(a) is met.

Reasons for s 190B(5)(b)

[115] The assertion at s 190B(5)(b) speaks to traditional laws and customs giving rise to the claim to 'native title rights and interests'. I consider, therefore, that the assertion is to be

understood in light of the definition of that term at s 223(1) of the Act. Subsection (a) of the definition provides that such rights and interests are 'possessed under the traditional laws acknowledged and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders'. Noting the similarity between this definition and the assertion at s 190B(5)(b), it is my view that my task here can be guided by the leading authority in relation to s 223(1), namely the decision of the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (*Yorta Yorta*).

[116] In *Yorta Yorta*, the High Court held that not only was a traditional law or custom one which has been handed down from generation to generation of a society by word of mouth and/or common practice, but that the word 'traditional' carries with it two particular elements in its meaning – at [46]. Firstly, the origin of the content of the law or custom must be found in the normative rules of a society that existed prior to sovereignty – at [46]. Secondly, the system of laws and customs under which rights and interests are possessed must have had a 'continuous existence and vitality since sovereignty' – at [47].

[117] In *Gudjala 2007*, Dowsett J sought to summarise the principles from *Yorta Yorta* and apply them to the task at s 190B(5)(b) – at [26]. His Honour's comments, not criticised by the Full Court on appeal, indicate that the factual basis may be required to address the following:

- that there existed at the time of European settlement a society of people living according to a system of identifiable laws and customs, having a normative content – at [65];
- that the laws and customs currently observed have their source in a pre-sovereignty society and have been observed since that time by a continuing society – at [63];
- an explanation of the link between the claim group described in the application and the claim area, which process may involve 'identifying some link between the apical ancestors and any society existing at sovereignty' – at [66] and see also at [81].

[118] In *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*), Dowsett J again revisited the requirement at s 190B(5)(b) and gave further guidance regarding the requirements of the factual basis, namely that it may need to:

- identify the persons of the pre-sovereignty society who acknowledged and observed laws and customs;
- explain how the current laws and customs of the claim group can be said to be traditional (that is, the laws and customs of a pre-sovereignty society relating to rights and interests in land and waters), and do more than merely assert that current laws and customs are traditional – at [52], [55], [69] and [72].

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

[119] I have summarised below the information before me (in addition to that information set out above in relation to s 190B(5)(a)) that I consider speaks to the assertion at s 190B(5)(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.

- European settlement of the area took place in around 1865 to 1870 – Schedule F at [4];
- the native title claim group are descended from the Aboriginal people who inhabited and occupied the area at sovereignty – Schedule F at [15];
- various historical sources record the presence of, and activities conducted by the Aboriginal persons occupying the area prior to and around the time of European settlement – Schedule F at [3] and [5];
- the native title claim group and their forebears are a discrete landholding group who, together with neighbouring groups, constitute a regional society with shared laws and customs – Schedule F at [12];
- shared laws and customs include those relating to social organisation, recruitment of members, authority and decision-making, spiritual beliefs and ceremony, regulating access by outsiders and the transmission of traditional knowledge – Schedule F at [12];
- under the traditional laws and customs of the regional society, the native title claim group are the landholding group for the claim area identifying with the socio-cultural label 'Jirrbal' – Schedule F at [13];
- pursuant to those laws and customs, they have and continue to exercise rights to possess, occupy, use and enjoy the claim area and its natural resources – Schedule F at [13];
- these rights are held concomitantly with responsibilities to preserve and protect the claim area and regulate the access, use and enjoyment of it by others – Schedule F at [13];
- the traditional laws and customs described have normative force based upon: spiritual and mythological beliefs, the group's kinship system, reverence for forebears, legitimacy of traditional rights in land conferred in accordance with laws and customs, adherence to traditional authority structures, fear of social isolation or punishment for transgressing laws and customs – Schedule F at [27];
- Jirrbal people primarily assert proprietary rights and interest at a local level, identifying as members of a particular family or descent group associated with certain parts of the application area – Schedule F at [20] and [21];
- the possession of rights in country is determined by descent, with preference towards descent from a male ancestor – Schedule F at [21];
- at a sub-regional level, in the context of interactions with members of neighbouring groups, members of the claim group identify with the socio-linguistic label 'Jirrbal' – Schedule F at [20];
- at a regional level, in the context of interactions with members of other groups whose country does not adjoin the claim area, members of the group may identify using environmental referents relevant to a broader group of persons with shared laws and customs – Schedule F at [20];
- traditional laws and customs confer rights in land held locally and at the sub-regional level to speak for country, regulate access to and use of Jirrbal country by others, access occupy and remain on the application area, access take and use the natural resources of the area, and preserve and protect significant places, areas and things – Schedule F at [24];
- claimants believe particular spirit beings, including the spirits of their ancestors inhabit the application area and monitor the conduct of claim group members, inflicting punishment on

persons who fail to adhere to laws and customs surrounding proper access to and use of particular sites and places – Schedule F at [37];

- the right to speak for certain areas or places on country is held by authoritative members of the claim group who are usually elders of one or more local groups – Schedule F at [28];
- the claim group observes spiritual beliefs and practices relating to ancestral beings whose activities are understood as occurring in the *djudjaba* (the 'dreamtime' or time before living memory) – Schedule F at [37];
- members believe *djudjuba* beings enacted the traditional laws and customs, established the social, environmental and ceremonial relationships within the regional society, and named and formed the geographical features of the application area – Schedule F at [37];
- knowledge about the *djudjuba* and other cultural information is generally held by elders as the custodians of the knowledge – the transmission of this knowledge is at the discretion of each individual elder, however there are normative principles governing the choice of the 'right' person and their readiness to receive this information – Schedule F at [38].

[120] Statements made by members of the claim group also provide details surrounding the laws and customs acknowledged and observed by the group. For example, one claimant states:'

> My parents taught me to believe that all people have a spirit. They told me that when we die, our spirit returns to the country where we belong. They told me that the spirits of our ancestors remain in our country, watching and protecting it. They recognise you if you are from the country and will make sure you are safe. Being on our country is good for us. That is not the case, if you are not from our country. To be safe, people from outside our country should be accompanied by a Jirrbal person or have their blessing if they want to go on our land – affidavit of Bradley Go Sam at [59].

[121] And further states:

> Dad and **[name deleted]** taught me about Jirrbal people, our land and our customs. For example, it was either Dad or **[name deleted]** who taught me traditional Jirrbal stories such as one about mugay (the carpet snake); one about yugurr (the barramundi); stories about the origin of water and fire; and a story about how Innot Hot Springs were made by *bajigal* (the sea turtle) – affidavit of Bradley Go Sam at [61].

[122] And states:

> I was taught from very early on to always respect my Elders. By watching how my Dad treated **[name deleted]**, I learned that this applies to all Jirrbal people. When **[name deleted]** came to see us, Dad gave him the old Ford Falcon that I used to drive. Dad gave **[name deleted]** my work when he was with us so I had to find some other work for a while. That is the Jirrbal way: respect and honour your Elders because they are our leaders and knowledge holders. They tell us who we are related to which is important when you are choosing a partner. Our Elders have the authority to make decisions and represent the Jirrbal in discussions with other tribes – affidavit of Bradley Go Sam at [69].

[123] Another claimant states:

> Dad told me that he also spent time as a young boy at Kaban, which is on the Tableland. In those days, he told me, his tribe moved back and forth between camps they had at Kaban, Tumoulin, Woorooa and Mandalee. Kaban is up from Tumoulin, where my parents were married. Dad told me that there was a big Jirrbal camp near Kaban and a *buya* ground at Tumoulin which was used for ceremony – affidavit of Ernest Grant at [11].

[124] And states:

> Protecting Jirrbal country from harm is part of our responsibilities as traditional custodians. Over the years, I have tried many times to stop cultural sites being harmed and tried to prevent damage to Jirrbal country generally. For example, I tried to get the Indigenous Land Corporation to buy the Fishtail area at King Ranch. I did everything I could to try and get it. Gulnay tried to claim King Ranch. This was blocked by Jirrbal because it is in our country. It broke our hearts for them to try to take the property. The erosion there now is terrible. Ecological places are so important. The lagoons are now full of mud but they used to be full of tiny fish, the bottom of the food chain, and then huge barramundi further down the Murray River and Davidson Creek, but not now. For example, Balara Swamp is just inside the southernmost Jirrbal boundary and is one place where the little fish were. It has been ruined by bad land management and ecological vandalism – affidavit of Ernest Grant at [63].

My consideration – s 190B(5)(b)

[125] The test at s 190B(5)(b) is whether I can be satisfied that the factual basis is sufficient to support an assertion 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. Dowsett J, in *Gudjala 2007* found that the starting point was the identification of a society of people in the area at the time of European settlement, living according to laws and customs of a normative content – at [65] and [66].

[126] The factual basis provides that the members of the native title claim group are the descendants of the Aboriginal persons who inhabited and occupied the application area at sovereignty. The material states that those persons were first identified using the socio-linguistic label 'Je-bul' in 1891, by Missionary John Gribble. As above, the report asserts European settlement of the area to have occurred in 1865 to 1870, marked by an influx of mining activity in the area, and the establishment of pastoral stations. The information about the apical ancestors named in Schedule A provides that the birth dates of those persons ranges from 1859 to 1886. In this way, I accept the material to assert that the apical ancestors were members of the relevant society at European settlement, or that they were persons born into that society in the decade or so following settlement.

[127] Regarding the laws and customs of a normative content acknowledged and observed by the society in the area at settlement, the historical sources referenced in the factual basis material

provide the following information about the Aboriginal persons occupying the application area around the time of first exploration and settlement of the area:

- those persons freely used the natural resources of the area for various purposes, including food, shelter, weapons, and implements;
- those persons camped and gathered, often in large numbers, on the application area, including for ceremony;
- camping sites were often located beside waterways;
- camping patterns were seasonal – groups would travel across and throughout the application area following clearly delineated tracks, to other sites;
- fire was used to cook food and to burn country for regeneration;
- those persons had an understanding of land rights and interests, and had knowledge of which persons or groups owned various parts of the region including the application area;
- those persons sought to protect their country, attacking intruders where they felt threatened – see for example the report at p 100; and
- those persons shared a strong mythology and/or spiritual beliefs regarding certain powers and forces within the landscape – see for example the report at p 103.

[128] In addition to this, in their affidavits, members of the claim group share their knowledge of the apical ancestors who were present in the application area around the time of settlement, and certain aspects of the system of laws and customs acknowledged and observed by those persons. For example, one claimant speaks of his great grandmother, Polly Robinson, telling his father shortly before she passed away, that the Silver Valley area, including Woolamin Creek, One Mile Creek and Mowbray Creek, was his 'tribal ground', and that 'he must care and protect for that country just like her brothers did' – affidavit of Bradley Go Sam at [14]. That claimant also speaks of apical ancestor Bonnell Logan, who had a 'King Plate for the Evelyn area' – at [40].

[129] Another claimant expresses his knowledge of the way in which apical ancestor, Nellie Mango, reared his mother, after her own mother died while she was still an infant. The claimant states that Nellie and Willie Mango also grew up other Jirrbal people who were related to them, but who were not their biological children. He explains that 'this is an example of traditional kinship responsibilities' – affidavit of Ernest Grant at [15]. This claimant also explains the way in which his parents' marriage was tribally arranged by their elders when his parents were still very young – at [18].

[130] From this information in the affidavits and in the report before me, I consider the factual basis to support an assertion of laws and customs of a normative content that bound the persons comprising the society at settlement. In my view, the aspects of those laws and customs supported by the material include:

- rights and interests in the land and waters of the application area that were of a proprietary nature, held by the persons comprising the society at settlement;

- a kinship system prescribing obligations upon members of the society, including obligations to family members of various types, and rules surrounding marriage;
- a strong sense of responsibility to care for and protect one's traditional country, including by defending it from intruders, and using its resources in a manner that avoided exploitation and exhaustion;
- a shared mythology and system of beliefs including those relating to the presence of spiritual forces and beings within the landscape who are able to inflict harm upon persons who fail to adhere to particular rules surrounding use of and access to country; and
- authority structures, whereby elders are revered and respected and have greater decision-making authority than the rest of the claim group, supported by way of elders being the 'knowledge-holders' for country and for laws and customs.

[131] Consequently, I am satisfied that the material is sufficient to support a society at settlement, acknowledging and observing laws and customs of a normative content. I am also satisfied that the factual basis is sufficient to support a link between the apical ancestors named in Schedule A and the society in the area at settlement.

[132] In my view, the factual basis contains relatively detailed information regarding the laws and customs acknowledged and observed by the native title claim group today. Section 190B(5)(b) requires that those laws and customs asserted are 'traditional'. That is, they must be rooted in the laws and customs of a society at settlement – see *Yorta Yorta* at [46] and [79]. Pursuant to the present system of laws and customs described in the material, members of the native title claim group primarily hold rights and interests in land at a local level, identifying as members of a particular descent group. This, the material provides, is on the understanding that the particular apical ancestor from whom a member of the claim group is descended, owned and occupied a particular area within Jirrbal country around the time of settlement.

[133] In my view, consistent with the assertion of tenure rights and interests pursuant to descent lines, statements by claimants demonstrate that they have a thorough knowledge of their line of descent, including the persons who comprised the intervening generations and the way in which knowledge of the descent groups' country was passed down to those persons, including back to the apical ancestors. I consider the following statement by a claimant an example of this type of material:

> My Mum's traditional names were *Mijabunjal* and *Bubalmurri* which means "pull a hut out of the ground by a cyclone". Her name fitted with the cyclone story at *BundayBunday*. She was raised by Willie and Nellie Mango and she was given that name because the Mango family came from that area and have the right to name children after places that fit into the Story. All over Davidson Falls are people's names. That is where they are: top, bottom and middle of the falls. A person's *jindigal* is where they go back to; where your name is. My uncle, aunty and niece all have their names at Davidson Falls. **[name deleted]** name was *ngarraguny*, which means the mist or plumes of spray coming the waterfall itself. Nellie Mango raised **[name deleted]** and my Mum. **[name deleted]** and his siblings and my Mum have names from Davidson Falls. Davidson Creek, Echo Creek and the

> upper Tully River are my Mum's family's country. **[name deleted]** and his family are from Echo Creek. His tribal name is *gumbay*, which is the small fig tree with red fruit, and he was my Mum's cousin. **name deleted]** used to say that Echo Creek is the country that claims him and his family. That is how I see my relationship to my family's area. WE belong there; it does not belong to us... – affidavit of Ernest Grant at [49].

[134] From this information, I have formed a view that the factual basis is sufficient to support this aspect of the laws and customs of the society at settlement as one that has been passed down through the generations to the claim group today. In this way, I consider this to support a 'traditional' system of laws and customs.

[135] I also consider it clear from the factual basis material that pursuant to present laws and customs, there are specific rules surrounding when and how knowledge of laws and customs is imparted, and which persons within the native title claim group have the requisite authority to hold knowledge. In my view, statements made by claimants indicate that these patterns around the transfer of knowledge between generations mirror those that were the practice of their predecessors, including the apical ancestors in the area at settlement. For example, one claimant states:

> Throughout my life, I have sought and accumulated knowledge and information about my people, our language, our culture and our traditions. One lifetime is not enough to know everything; you need much more than that. My knowledge is an accumulation of what my parents, grandparents and great-grandparents knew, passed down from their ancestors over thousands of years. It is through my family and other tribesman, especially elders, I have learned about the things that are beyond my living memory. In Jirrbal language we call that time *djudjaba*. It is often called the "dreamtime" by non-Indigenous people and in children's books.
>
> My Mum's younger brother, **[name deleted]**, was her *giya*, meaning younger brother. It was his role to show and teach me things such as: language; place names; customs; law; protocols; hunting and other things which I need to know to live properly as Jirrbal – affidavit of Ernest Grant at [42] and [43].

[136] This claimant then shares his knowledge of particular apical ancestors passing down knowledge of laws and customs to his predecessors – at [79].

[137] From the information of this nature before me, therefore, I consider that almost all aspects of the system of laws and customs described in Schedule F as currently acknowledged and observed by the claim group, can be seen in the system I have set out above, supported by the factual basis as the normative system acknowledged and observed by the relevant society at settlement. In this way, my view is that the factual basis is sufficient to support an assertion that there has been relatively little change to the laws and customs of the native title claim group from the time of settlement.

[138] Further to this, Schedule F provides that laws and customs have normative force through claimants' fear of retribution from spiritual forces within the landscape. In my view, claimants statements clearly demonstrate how knowledge of those spiritual forces has been passed down to them through the generations, including back to the apical ancestors, such as the way in which these stories have been recorded in rock art by the 'old people' – see for example affidavit of Bradley Go Sam at [51] and [57]. Having regard to this fear of retribution from spiritual forces supported by the material, I consider it reasonable to infer that the claimants and their predecessors are likely to have continued to acknowledge and observe laws and customs in the correct way taught them by their elders, for fear that any alteration to the way in which laws and customs are adhered to may result in punishment and/or social isolation by the rest of the group.

[139] Following on from this, therefore, I consider the factual basis before me is sufficient to support current laws and customs that are rooted in the laws and customs of the society in the area at settlement. I also consider it sufficient to support an assertion that those laws and customs have been observed since that time without major interruption or alteration. Noting the claimants' understanding that it was the *djudjuba* ('Dreamtime') beings who enacted the laws and customs of the group at the time of creation, I accept the material to assert that laws and customs were acknowledged and observed by the group's predecessors unchanged and without interruption from time immemorial to settlement.

[140] Consequently, in light of my reasoning above, I am satisfied that the factual basis is sufficient to support an assertion 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.

[141] The requirement at s 190B(5)(b) is met.

Reasons for s 190B(5)(c)

[142] It is my understanding that 'those traditional laws and customs' in the assertion at s 190B(5)(c), refers to the laws and customs that answer the assertion at s 190B(5)(b). On that basis, it is my view that the requirement at this condition flows directly from that at s 190B(5)(b), such that where the factual basis is not sufficient to support the former assertion, I cannot consider it sufficient to meet the assertion here – see *Martin* at [29].

[143] Noting the focus on continuity in s 190B(5)(c), in my view, the assertion can be equated with the second element of the meaning of 'traditional' discussed by the High Court in *Yorta Yorta*. That is, 'traditional laws and customs' are those pursuant to which the members of the native title claim group have continued to hold their native title rights and interests, by acknowledging and observing laws and customs rooted in those of a pre-sovereignty society, in a substantially uninterrupted way – see *Yorta Yorta* at [47] and [87].

[144] This approach appears to be supported by Dowsett J in *Gudjala 2007*. In addressing the requirement at s 190B(5)(c), His Honour held that the factual basis may need to address the following:

- that there was a society at sovereignty that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed to the current claim group;
- that there has been continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement – at [82].

[145] I have already explained above in relation to the requirement at s 190B(5)(b), the reasons for which I am satisfied that the material is sufficient to support a society at settlement, acknowledging and observing laws and customs, from which current laws and customs were derived. I have also explained, in my reasons above, my satisfaction regarding the sufficiency of the factual basis in supporting an intergenerational transfer of knowledge about laws and customs down through the claimants' predecessors over the period since settlement to the present day.

[146] My role here, therefore, is to turn my mind to the matter of continuity. That is, whether the factual basis is sufficient to support an assertion that the native title claim group and its predecessors have continued to acknowledge and observe those laws and customs without substantial interruption. In my view, it is.

[147] Firstly, the information before me, in particular the statements made by claimants in their affidavits, speaks to the particular individuals comprising each of the preceding generations, back to and including the apical ancestors. Secondly, the information that claimants give about those individuals, in my view, describes certain laws and customs acknowledged and observed by those persons, and provides examples of them doing so in relation to the land and waters of the application area – see for example the affidavit of Ernest Grant at [11], excerpted above at [123]. Finally, I consider it is clear from the material that today, claimants possess a thorough knowledge of traditional law and custom, and of the way in which this knowledge has been passed down through the generations to the claimants today. The claimants also share details of how they currently acknowledge and observe those laws and customs that have been passed down to them. In this way, I am satisfied that the factual basis is sufficient to support an assertion of continuity in the observance of traditional laws and customs by the claim group and its predecessors.

[148] Further, as referred to in *Yorta Yorta*, I am of the view that the factual basis supports a system that has had 'a continuous existence and vitality since sovereignty' – at [47]. There are a number of matters spoken of in the material before me that have led me to form this view.

[149] Firstly, claimants speak to the way in which knowledge of Jirrbal language has been preserved and passed on, such that today, claimants continue to have an understanding of, use, and are familiar with, Jirrbal words and phrases. For example, one claimant states:

> Both my parents spoke the Jirrbal language fluently. My mother also spoke the Girramay language and was an informant for the linguist **[name deleted]** for both the Jirrbal and Girramay languages. I remember when **[name deleted]** visited us at Yabbon in 1963. He asked Mum whether she would help him record our language so Mum asked all the old people to come and meet him. The old people asked me to record the language but I suggested that **[name deleted]** do it as I was working out then. **[name deleted]** also worked with other elderly Aboriginal people living at *gaba*, which was a traditional camp site across the Murray River from Yabbon. For example, **[name deleted]** worked with Mum's adopted brother **[name deleted]** and his wife **[name deleted]**. The children of all those Jirrbal elders except **[name deleted]** have continued to work with **[name deleted]** on producing a Jirrbal dictionary which is expected to be finished by the end of this year. After Mum passed away, I worked with **[name deleted]** from the early 1980's right through to the present. Mum always spoke language and I grew up using Jirrbal as my first language. I do not get the chance as much these days to talk to other people who can speak Jirrbal so I am a bit out of practice but I know the Jirrbal names for most things, such as the names for people, body parts, places, plants and animals – affidavit of Ernest Grant at [25].

[150] Claimants also speak to specific methods and techniques by which various aspects of their culture and laws and customs continue to be taught to the younger generations. For example, one claimant describes a book by a Jirrbal elder that records a number of traditional Jirrbal stories, about how the landscape was created and the spiritual beings that were responsible for that creation – see affidavit of Ernest Grant at [44]. Further, the claimant explains the way in which he teaches students at his local high school traditional Jirrbal ways:

> I have shown the students at the Tully High School how traditional Jirrbal things are made. Other senior Jirrbal people have also shown the children at the high school many of our traditional practices over the years. For example, annexed to this my affidavit and marked EBG29 is a photo taken of a trip to the high school by **[names deleted]**. It was taken by **[name deleted]**, a teacher there, in the 1980s. They are showing the students how to traditional shields, baskets and other things are made. I was also involved in developing workbooks for the students at Tully High School which were used in the late 1980's and early 90's for teaching them Jirrbal culture, language and traditions… - affidavit of Ernest Grant at [72].

[151] Finally, claimants speak to the way in which, pursuant to their laws and customs, and in accordance with their understanding of the rights and interests in country that they possess, they actively seek to protect that area – see the affidavit of Ernest Grant at [65], excerpted above at [124]. Elsewhere, the claimant explains how his great grandmother, apical ancestor Polly Robinson, taught his father the importance of caring for his country. It is in light of the material of this nature before me that I consider the factual basis sufficient to support a system of traditional law and custom that has had a continuous existence and vitality since settlement.

[152] Consequently, I am satisfied that the factual basis is sufficient to support the assertion at s 190B(5)(c), that is, that the native title claim group have continued to hold the native title in accordance with their traditional laws and customs.

Conclusion

[153] The application satisfies the condition of s 190B(5) because the factual basis provided is sufficient to support each of the particularised assertions in s 190B(5).

Subsection 190B(6)
Prima facie case

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

[154] The test at s 190B(6) is, 'prima facie' whether I can consider that some of the native title rights and interests claimed can be established. In *Doepel*, Mansfield J affirmed the meaning given to the phrase 'prima facie' by the High Court in *North Ganalanja Aboriginal Corporation v Queensland* [1996] HCA 2 – *Doepel* at [134]. That is, the ordinary meaning of the phrase, 'at first sight; on the face of it; as appears at first sight without investigation' – *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at [615] to [616], [652].

[155] Mansfield J further held that 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis' – at [135].

[156] I note that there is no requirement that I consider all of the rights and interests claimed prima facie established, and that I am able to consider information beyond the application in reaching a view at this condition – *Doepel* at [16].

[157] The focus of the requirement at s 190B(6) is 'native title rights and interests'. That term is defined in s 223(1) of the Act and provides that such rights and interests are communal, group or individual rights and interests in relation to land and waters, where:

> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.

[158] In my consideration of each of the individual rights and interests before me, therefore, I have turned my mind to whether those rights and interests exist under traditional law and

custom, are in relation to land and waters, and whether they have been extinguished over the whole of the application area.

[159] The claimed native title rights and interests that I consider can be prima facie established are identified in my reasons below.

Consideration

Right to exclusive possession

[160] The case law has explored in some detail the nature and characteristics of a native title right to exclusive possession. In *Western Australia v Ward* [2002] HCA 28 (*Ward HC*), the majority of the High Court held that:

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

[161] In *Sampi v State of Western Australia* [2005] FCA 777 (*Sampi*), French J took a similar approach, finding that:

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

[162] In addition to the above principles, the Court has emphasised that native title rights are not to be classed as, or compared with, common law proprietary interests. In *Griffiths v Northern Territory* [2007] FCAFC 178 (*Griffiths*), the Full Federal Court held that:

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

[163] In *Griffiths*, comments from the Full Court indicate that what is required is that the native title claim group demonstrate how, pursuant to their traditional laws and customs, the group is able to 'effectively exclude from their country people not of their community' – at [127]. The Full Court held that '[i]f, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry and if they are the gatekeepers for the purpose of preventing such harm

and avoiding injury to the country, then they have, in our opinion, what the common law will recognise as an exclusive right of possession, use and occupation' – at [127].

[164] There is various information before me that I consider speaks to a right of the members of the native title claim group to exclusive possession of the application area. The following statements made by claimants in their affidavits are examples of this material. One claimant states:

> My parents taught me to believe that all people have a spirit. They told me that when we die, our spirit returns to the country where we belong. They told me that the spirits of our ancestors remain in our country, watching and protecting it. They recognise you if you are from the country and will make sure you are safe. Being on our country is good for us. That is not the case, if you are not from our country. To be safe, people from outside our country should be accompanied by a Jirrbal person or have their blessing if they want to go on to our land – affidavit of Bradley Go Sam at [59].

[165] And another claimant states:

> Jirrbal people have many spiritual beliefs. There are spirit beings in the world that can harm you. For example, the rainbow serpent is known as *yamani* to Jirrbal people and is one of the most powerful spirit creatures. It is associated with deep waterholes. For this reason, such places are avoided by Jirrbal people. Other spirits which take the form of a man we call *goy* and the woman form are called *gwyngan*. **[name deleted]** tells a story in her children's book which has *goy* in it. That story is told to Jirrbal children to make sure they obey their parents. My Mum told me that story in Jirrbal language. There is a light coloured spirit man called *dambun* which can be dangerous and another called *jigulbinna*. He is a flying man with fire coming behind him when he flies. He has long fingernails and can tickle you to death – affidavit of Ernest Grant at [58].

[166] And also states:

> My Mum and members of her family such as **[name deleted]** told me that cyclones are made at a site at Davidson Falls that could blow the world away. The site is only dangerous if you do the wrong thing, like going in without the old people. Mum told me that if you go there the older sister comes out and she has a clay bowl and she says "break this", and if you do, a cyclone will come quickly that will blow away the world. You have to say "no". Then, the middle sister brings a smaller bowl and makes the same offer. If you break it, another severe cyclone will come but in a day or two. Lastly, the younger sister comes out with a small bowl and asks you to break it. If you want a cyclone, you break it. Then you have four days to hide and get away before the cyclone comes. Jirrbal and other Aboriginal people avoid the falls and only go there with elders. All the tribes are frightened to hell by it. I have taken my kids there and my nephew **[name deleted]**. His mother was angry with me for taking him there but I thought that he should go there with me. I have a right to go there. I have walked in there by myself. I remember going there once with my brother **[name deleted]** and my cousin **[name deleted]** when we were cutting timber nearby. **[name deleted]** was with us before we set off. When we came back, we noticed his footprints all over the place. He had been pacing back

and forth, worried about us going there. There is only one place like that and nowhere else like it that I know of – affidavit of Ernest Grant at [51].

[167] And states:

My grandfather's brother and I got our name *irrigan* from *girra* dropping the jaw bone of his eels at certain places. The first was a mountain on the north end of Hinchinbrook Island, the next at a rock just outside of Cardwell and the other at a waterhole at Murray Upper. If your name place is out of your country you don't get a say about all that country, but for your name place you can have a say. For example, people say that's my rock at Hinchinbrook and Cardwell. I don't know of people from other tribes who have a place in Jirrbal country that their name comes from – affidavit of Ernest Grant at [55].

[168] And states:

I know the **[name deleted]** family who have made a claim for the Gulnay people. It covers areas that are Jirrbal, such as Tully River Station, Davidson Creek, Munroe Plains, Dingo Pocket, Jarra Creek and parts of the Tabletop and Walter Hill Ranges. The **[name deleted]** family claim that country through old**[name deleted]**. I knew him from childhood. **[name deleted]** was a white woman, an amateur historian. She wrote a book called Cardwell Shire Story in the early 1960's. She said that old **[name deleted]** was Girramay and he owned a much larger area of land than what was true. He is Jirrbal through his grandmother. **[name deleted]** didn't get it right. His name is *ginjubayal* and his country is on the head of Culpa Creek, in the headwaters of the Tully River. That is Jirrbal land. Another example is Boundary Creek, on the Davidson Creek Road. It is a white name but it fits the Aboriginal boundary between Gulnay and Jirrbal. I argued with **[name deleted]** about the significance of the name. She said it meant nothing but I said it was the boundary from what I had been told – affidavit of Ernest Grant at [76].

[169] In addition to these statements by claimants, the report provides information relating to a right of the native title claim group to exclusive possession of the application area. The report states that:

'[t]hrough the Wabubadda Aboriginal Corporation Jirrbal people are actively exercising their rights as native title holders in a number of ways. They attempt to control access of non-Jirrbal people to Jirrbal country, participate in various cultural monitoring projects and are applying for further determinations of native title over country they consider to be Jirrbal.

The corporation and individual Jirrbal members also guard the geographical boundaries of Jirrbal country by contesting any perceived encroachments by neighbouring language groups – the report at [271] to [272].

[170] From these statements in the factual basis material before me, I understand that the claimants have a strong understanding of the boundaries of their country and of their exclusive rights as Jirrbal people to that country. In this way, the material provides that they seek to

prevent other groups encroaching on the exercise of their rights on and within the land and waters they identify as their traditional country.

[171] I also understand that the members of the native title claim group have certain beliefs about the presence of spiritual beings within their country, including the spirits of their ancestors, who can inflict harm upon non-Jirrbal persons. In this way, I understand the material to assert Jirrbal people to be caretakers of their country, namely to keep the land itself from harm, but also to ensure that visitors to their country do not suffer punishment from spiritual forces by failing to adhere to rules surrounding access to sites. From the statements by claim group members, excerpted above and elsewhere, I understand the claimants to see this as their responsibility and obligation pursuant to their traditional laws and customs. These statements also indicate that these responsibilities have been handed down to the claimants by their predecessors in accordance with traditional patterns of teaching – see for example affidavit of Bradley Go Sam at [14].

[172] In my view, the information before me further suggests that the actions taken by the claimants and their predecessors in seeking to protect their country, namely the application area, are a reflection of their understanding of their right to speak for, and make decisions about, those lands and waters.

[173] Consequently, in light of the material of this nature before me, I consider that the right of the native title claim group to exclusive possession of the application area is a right held pursuant to the traditional laws and customs of the group and that it is, prima facie established.

Right to live and be present on the application area

[174] The following statement by a member of the claim group, in my view, speaks to a right of the claimants to live and be present on the application area:

> One particular area my family is associated with is the Silver Valley area, in the North-western part of Jirrbal country. The Go Sam family has lived there since white people first came there. We have lived on the Woolamin, One Mile and Mowbray Creek watersheds in Silver Valley for at least six generations. We have rights in this area according to Jirrbal law and custom through Polly Robinson who gave birth to my grandfather **[name deleted]** at Mowbray Falls in around 1898. I have calculated grandfather's birthdate as 1898 because my mum told me that he was about ten years older than **[name deleted]** who was born in 1908 – affidavit of Bradley Go Sam at [13].

[175] From statements such as this in the material before me, I understand that this right is held pursuant to the traditional laws and customs of the Jirrbal People, and that it has been handed down to the claimants through the generations by their predecessors. I consider, therefore, that a right to live and be present on the application area is, prima facie, established.

Right to take, use, share and exchange Traditional Natural Resources

[176] The material before me speaks in some detail of the way in which members of the claim group and their predecessors exercised a right to take, use, share and exchange natural resources from the application area. The following statement by a member of the claim group is an example of this material:

> In summer, Jirrbal families like mine took a seasonal journey from the lowlands up to the tablelands to get things such as *jubula* (black pine), *guway* (black walnut), possum and turkey eggs. Jubula nuts have to be put into water to leach the toxins out. Then it is ground into porridge and eaten. *Guway* nuts are roasted in the fire and eaten. But sometimes we got stuck between seasons and food was scarce. For example, I remember one time my family waited three days for black bean seeds to leach so we could eat them. That was at a place called *ibinibin*, which is up in the top end of the Murray River. The creeks were flowing too fast to fish and the season for turkey eggs had finished – affidavit of Ernest Grant at [37].

[177] The following statement is another example:

> Dad was strict about eating the silver eel, even though it is good tucker. The Black and spotted eels were ok for us to get but Dad told us that the only time we were allowed to eat the silver eel was if a member of our family was sick. The only time he allowed me to take a silver eel was if he was sick, then I'd get an eel and he'd cook it to get better. It is only for certain purposes. I do that now. The eels are totems – affidavit of Bradley Go Sam at [54].

[178] From statements within the material of this nature, I understand that the right asserted is held pursuant to the traditional laws and customs of the Jirrbal People, noting that those laws and customs dictate the way in which resources are taken and used.

[179] I consider, therefore, that the right is, prima facie, established.

Right to conduct burial rites

[180] The affidavits sworn by members of the claim group that comprise the factual basis in support of the claim, do not speak specifically to a right to conduct burial rites. Schedule F, however, states that rituals conducted by members of the group today include funerals of claim group members – at [44]. In addition to this, one claimant speaks of a kinship obligation upon extended family members to attend funerals of their relatives – affidavit of Bradley Go Sam at [70]. Another claimant also speaks of massacres of Jirrbal people (namely, predecessors of the claim group) that occurred within the application area. For example, the claimant states:

> **[name deleted]** told me at Kara that he knew **[name deleted]**, a Jirrbal man from the Tablelands who worked with **[name deleted]** and the Native Mounted Police. **[name deleted]** told me **[name deleted]** led people to customary Jirrbal camps near Kara and Woorooa station. Another camp where he did that was at a place called Bullyard, on Jarra Creek. **[name deleted]** said that that [*sic*] our

> people were massacred at that place. He said that he had seen the bones of our people at Kara and showed me that place… - affidavit of Ernest Grant at [80].

[181] From this information before me, therefore, I consider it reasonable to infer that burial rites were carried out by the predecessors of the claim group on the application area in early settlement times, and that today, this right is manifest in funerals for members of the claim group held on the traditional country of the deceased person. In this way, I understand that the right has been handed down to the claimants through the preceding generations pursuant to the group's traditional laws and customs.

[182] Consequently, I consider that the right of the native title claim group to conduct burial rites is, prima facie, established.

Right to conduct ceremonies

[183] The following statement by a claim group member is an example of the material before me that I consider speaks to a right of the native title claim group to conduct ceremonies on the application area:

> I attended *brun* in my youth. They are large tribal gatherings and ceremonies. As far as I know, I am the last living person who attended the last of *brun* of rainforest people from the Mulgrave to Ingham and out to Herberton. It was held at *gaymbil* waterhole in the middle of King Ranch. A video was made by researchers in the late 1990's and early 2000's of **[name deleted]**, a Girramay man, and I talking about it. He was there too. That was a big one but I went to a smaller *brun* at *yabulum* (lower Murray) and at *gaba* (a site near Upper Murray). Other *brun* grounds are at: Bilyana Creek, near where the highway crosses; Mandalee station; Echo Creek; Kirrima station; a site near the bridge over the Tully River and big *brun* were also held where the racecourse is now at Ravenshoe. I know the locations and names of all these places – affidavit of Ernest Grant at [39].

[184] From this statement, I understand that the right to conduct ceremonies was exercised by the predecessors of the claim group, and has been exercised by current members of the claim group during their lives. In this way, I accept that the right asserted is held pursuant to the traditional laws and customs of the group that have been handed down through the generations to the claimants today.

[185] I consider, therefore, that the right to conduct ceremonies is, prima facie, established.

Right to teach on the area about the physical and spiritual attributes of the area

[186] From the information before me, I understand that the right to teach on the area about the physical and spiritual attributes of the area has been passed down to members of the claim group by their predecessors pursuant to traditional methods of teaching. The following statement is an example:

> **[name deleted]** and **[name deleted]** told me they learnt the Jirrbal boundaries from **[names deleted]** when they were in their mid to late teens. They said that they taught them these things when they worked with them at Woorooa station. **[name deleted]** said that **[name deleted]** and another Jirrbal elder, **[name deleted]**, were taken there by the **[name deleted]** family after surviving a massacre of our people. **[name deleted]** and **[name deleted]** said **[names deleted]** were old men when they knew them and that those old men had walked all over Jirrbal country – affidavit of Ernest Grant at [79].

[187] In light of the information of this nature before me, I consider that the right of the members of the claim group to teach on the area about the physical and spiritual attributes of the area is, prima facie, established.

Right to maintain places of importance and areas of significance

[188] The following statement by a member of the claim group is an example of the material before me that speaks to a right to maintain places of importance and areas of significance:

> Protecting Jirrbal country from harm is part of our responsibilities as traditional custodians. Over the years, I have had [*sic*] tried many times to stop cultural sites being harmed and tried to prevent damage to Jirrbal country generally. For example, I tried to get the Indigenous Land Corporation to buy the Fishtail area at King Ranch. I did everything I could to try and get it. Gulnay tried to claim King Ranch. This was blocked by Jirrbal because it is in our country. It broke our hearts for them to try to take the property. The erosion there now is terrible. Ecological places are so important. The lagoons are now full of mud but they used to be full of tiny fish, the bottom of the food chain, and then huge barramundi further down the Murray River and Davidson Creek, but not now. For example, *Balara* Swamp is just inside the southernmost Jirrbal boundary and is one place where the little fish were. It has been ruined by bad land management and ecological vandalism – affidavit of Ernest Grant at [63].

[189] From statements such as these, I understand that the right asserted by the native title claim group is held pursuant to their traditional laws and customs. I consider, therefore, that a right to maintain places of importance and areas of significance is, prima facie, established.

Right to light fires for domestic purposes

[190] Schedule E frames this right as a right to 'light fires for domestic purposes including cooking but not for the purposes of hunting or clearing vegetation'. Statements made by members of the claim group indicate that fire is and was used by members of the claim group and their predecessors for various purposes, including cooking, and making weapons and domestic implements. The following statement is an example of this type of material before me:

> Making fire the traditional way was another thing I was taught when I was a young boy. It is done by drilling hard wood into soft wood until it smoulders and can be blown onto make a hot coal. This can be done using your hands or with a small bow. Tinder is added after a glowing coal has been created. It is tapped out onto dry tinder which you blow on until it catches. Then small twigs are

> added until a fire is formed. I have done this many times over my life – affidavit of Ernest Grant at [71].

[191] On the basis of this information, I understand that the right asserted is one that has been passed down to the members of the claim group by their predecessors using traditional teaching methods pursuant to the group's laws and customs. I consider that the right to light fires for domestic purposes is, prima facie, established.

Right to be accompanied into the claim area by non claim group members

[192] This right expressed at Schedule E refers to non-claim group members including people required i) by traditional law and custom for the performance of ceremonies or cultural activities; and ii) to assist in observing and recording traditional activities on the claim area. The following statement by a claimant speaks to the way in which non-claim group members have been accompanied by members of the claim group whilst being present in the application area:

> Great granny Polly married a Chinaman by the name of Go-Sam. Granddad **[name deleted]** took the name Go-Sam but his father was a European by the name of **[name deleted]**. **[name deleted]** was in the Mowbray Creek and Silver Valley area at the time of **[name deleted]** Go-Sam's birth. I was told this by a member of the **[name deleted]** family who were pioneering family from Ravenshoe. **[name deleted]** was a well-known stockman from the early pioneering days who worked on cattle properties on Jirrbal country such as Wooroooa. According to **[name deleted]**, Granddad **[name deleted]** was born on the Mowbray creek area, near where the Mowbray Falls are. Annexed to this my affidavit and marked BGS3 is a photo of the Mowbray Falls, taken in the 1970's when my father took an archaeologist there to inspect an important site – affidavit of Bradley Go-Sam at [15].

[193] From the information before me of this nature, I accept that at various times, members of the group and their predecessors have been accompanied on the application area by non-claim group spouses or partners, members of other groups at large gatherings and ceremonies, and archaeologists and other researchers. I also understand that the right asserted has been handed down to the claimants by their predecessors, in accordance with traditional patterns of passing on knowledge, laws and customs.

[194] I consider, therefore, that the right of the native title claim group to be accompanied into the claim area by non claim group members is, prima facie, established.

Right in relation to water, to take and use water and Traditional Natural Resources from the water

[195] The following statement by a member of the claim group is an example of the material that speaks to this right:

> Mowbray Creek runs into the Woolamin, the Woolamin runs into the Dry River and then the Dry River runs into the Wild River. There are waterholes all along those watercourses and all those waterholes are special places because that is where we get our tucker from. Just down from where the Mowbray meets the Woolamin there are two places of particular importance. One is the *Bugal*

(Black Bream) dreaming and the other is the *Jabun* (Eel) dreaming – affidavit of Bradley Go Sam at [52].

[196] Elsewhere, the claimant speaks of the way his Dad instructed him to fish in these areas, and the rules that had to be followed regarding what could be taken from the water – see affidavit of Bradley Go Sam at [53] and [54]. In light of that information, I understand that the right is one held pursuant to the traditional laws and customs of the Jirrbal People, and that it has been passed down to the claimants by their predecessors. I consider, therefore, that the right in relation to water, to take and use water and traditional natural resources from the water, is, prima facie, established.

Conclusion

[197] The application satisfies the condition of s 190B(6).

Subsection 190B(7)
Traditional physical connection

The Registrar must be satisfied that at least one member of the native title claim group:

(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or

(b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:

(i) the Crown in any capacity, or

(ii) a statutory authority of the Crown in any capacity, or

(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

[198] In *Gudjala 2007*, in an aspect of the decision not criticised on appeal by the Full Court, Dowsett J approved the approach of the Registrar's delegate at s 190B(7) whereby '[t]he delegate considered that the reference to 'traditional physical connection' should be taken as denoting, by the use of the word "traditional", that the relevant connection was in accordance with laws and customs of the group having their origin in pre-contact society' – at [89]. His Honour found that this was consistent with the principles from *Yorta Yorta* – at [89].

[199] The explanatory memorandum to the Native Title Amendment Bill 1997 explains that the connection described in s 190B(7) 'must amount to more than a transitory access or non-native title access' – at [29.12]. Similarly, comments from the High Court in *Yorta Yorta* suggest that the material may need to address 'an actual presence on the land' – at [184].

[200] I note that it is not my role to consider whether the traditional laws and customs asserted in fact exist, or to consider whether by those laws and customs the group have the connection required at s 223(1)(b). In *Doepel*, Mansfield J held that while the applicant was required to present evidentiary material addressing the particular matters prescribed by s 190B(7), the focus

of the Registrar's delegate is 'a confined one', and that it is primarily 'upon the relationship of at least one member of the native title claim group with some part of the claim area' – at [18].

[201] Noting that the focus is upon one member of the native title claim group only, I have extracted below information from the factual basis material before me that I consider speaks to the connection of one particular member of the group with the area, namely, Bradley Go Sam. In his affidavit comprising part of the additional material supplied by the applicant, Mr Go Sam states that through his Dad, he is a descendant of apical ancestor Polly Robinson. On that basis, I am satisfied that Mr Go Sam is a member of the native title claim group.

[202] The material provides the following information about Bradley Go Sam and his relationship with the application area:

- he grew up on the Atherton Tableland, and at places in Silver Valley such as One Mile Creek, Mowbray Creek and Woolaman Creek (within the application area), and refers to those places as 'the bush' – affidavit of Bradley Go Sam at [3];
- he was taught the boundaries of his country by his father, older brother and other Jirrbal elders – affidavit of Bradley Go Sam at [7];
- the Go Sam family has lived in the Silver Valley area, in the north-west part of Jirrbal country 'since white people first came there' and have rights in that area according to Jirrbal law and custom through Polly Robinson – affidavit of Bradley Go Sam at [13];
- growing up, Mr Go Sam lived at a reserve at Herberton, and Atherton, however the family would regularly go back and forth to their camp at Silver Valley – affidavit of Bradley Go Sam at [46];
- his father taught he and his siblings about important places on their country – affidavit of Bradley Go Sam at [50];
- as children, he and his brothers used to go fishing along the Woolamin Creek – affidavit of Bradley Go Sam at [53];
- he knows the dreaming stories for his country – affidavit of Bradley Go Sam at [52];
- his family maintains a camp at One Mile Creek and he has taken all of his children to live there when they were little – affidavit of Bradley Go Sam at [72].

[203] In my view, the following statements by Mr Go Sam further describe the nature of his connection with the application area:

> **[name deleted]** visited us every second day when we lived on One Mile Creek. When visiting, he took me, my little brothers and my sister in the afternoon for our bath down on Mowbray Creek. He gave one of us a piece of soap and we had to scrub ourselves and then head back to camp. The old track we used to walk is still there to this very day. **[name deleted]** mined for tin as well and was good at finding tin in the gullies, like Grey Tin gully, a lode which he found. **[name deleted]** left the bush and went to live in town at the Herberton Aboriginal Reserve and that is where he met his wife **[name deleted]**. They moved to Darwin and **[name deleted]** passed away there never to return back home – affidavit of Bradley Go Sam at [41].

[204] And also:

> My brothers and sisters are still very much connected with our tribal land. I visit and camp out on Woolamin Creek once a week, enjoying the peace and quiet and getting in touch with the spirit world. I always visit the *Guligimbilbugan* area to make sure no people harm or destroy that place. My youngest brother **[name deleted]** also goes out bush a lot, camping and living off the land, cooking the day's catch of fish and turtle on the coals of the fire - affidavit of Bradley Go Sam at [73].

[205] And also:

> Like our parents, my brothers and sisters and I have made sure that our children lived at our camp on One Mile Creek when they were little. For example, annexed to this my affidavit and marked BGS21 is a photograph of my three sons at One Mile Creek as young boys. They are now all grown men: **[name deleted]** is 28/29; **[name deleted]** is 25/26; **[name deleted]** is 23; **[name deleted]** is 22 and **[name deleted]** is 19. There are six generations of Go-Sams that have grown up in the Silver Valley. My family still has our camp on One Mile Creek to this day and we go there regularly. My sons and I camped and fished on Woolamin Creek and the Wild River at least once a fortnight when they were young. When there is good rain in Silver Valley I take my youngest son **[name deleted]** fishing in Woolamin Gorge where we always catch a feed of *bugal* - affidavit of Bradley Go Sam at [72].

[206] From this information before me, I accept that Mr Go Sam has spent a considerable part of his life living at places within the application area. I also accept that today, he continues to spend time on the area, camping and fishing, and teaching his children about their country in the same way his father did.

[207] I have explained above, in relation to the condition at s 190B(5)(b), the reasons for which I am satisfied that the factual basis material supports an assertion of traditional laws and customs. In particular, I explained the reasons for which I am satisfied that the factual basis is sufficient to support an assertion of a system of traditional laws and customs, where key aspects of that system include obligations upon members of the native title claim group to care for and protect their traditional country and its significant sites, and the ability to freely use the natural resources of their country in accordance with rights in the land gained by way of descent – see for example [130] above.

[208] In my view, the information within the application about Mr Go Sam's connection to the application area clearly reflects these aspects of the system of traditional laws and customs that the material was sufficient to support at s 190B(5)(b). In this way, I am satisfied that Mr Go Sam previously had and continues to have, a traditional physical connection with the application area.

[209] The application satisfies the condition of s 190B(7).

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

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

Section 61A provides:

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

(2) If:

(a) a previous exclusive possession act (see s 23B) was done in relation to an area; and

(b) either:

(i) the act was an act attributable to the Commonwealth; or

(ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23E in relation to the act;

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

(3) If:

(a) a previous non-exclusive possession act (see s 23F) was done in relation to an area; and

(b) either:

(i) the act was an act attributable to the Commonwealth, or

(ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23I in relation to the act;

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

(4) However, subsection (2) or (3) does not apply to an application if:

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

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

[210] In the reasons below, I look at each part of s 61A against what is contained in the application and accompanying documents and in any other information before me as to whether the application should not have been made.

Section 61A(1)

[211] Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title. The geospatial assessment provides that no part of the application area is also covered by an approved determination of native title.

Section 61A(2)

[212] Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply. Schedule B lists a number of general exclusion clauses, that is, areas within the external boundary of the application area that are not covered by the application. Paragraph [1] provides

that the application area excludes any land or waters covered by various tenure interests. I note that the interests set out at paragraph [1] of Schedule B are identical to those listed in s 23B(c), relating to the definition of a 'previous exclusive possession act'. I am satisfied, therefore, that the application has not been made over areas covered by a previous exclusive possession act.

Section 61A(3)

[213] Section 61A(3) provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done, unless the circumstances described in s 61A(4) apply. Paragraph [3] of Schedule B states that 'exclusive possession is not claimed over areas which are subject to valid previous non-exclusive possession acts done by the Commonwealth or State of Queensland'.

Conclusion

[214] In my view the application does not offend any of the provisions of ss 61A(1), 61A(2) and 61A(3) and therefore the application satisfies the condition of s 190B(8).

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

> The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:
> (a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
> (b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
> (c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss 47, 47A or 47B.

[215] I consider each of the subconditions of s 190B(9) in my reasons below.

Section 190B(9)(a)

[216] Schedule Q states that the native title claim group does not claim ownership of minerals, petroleum or gas wholly owned by the Crown.

Section 190B(9)(b)

[217] Schedule P provides that the application does not include a claim by the native title claim group to exclusive possession of all or part of an offshore place.

Section 190B(9)(c)

[218] Paragraph [6] of Schedule B states that the area covered by the application excludes land or waters where the native title rights and interests claimed have been otherwise extinguished.

Conclusion

[219] In my view the application does not offend any of the provisions of ss 190B(9)(a), (b) and (c) and therefore the application meets the condition of s 190B(9).

[*End of reasons*]