



Registration Decision

Application name	Sam Dallachy & Ors on behalf of the Barada Kabalbara & Yetimarala People and State of Queensland & Ors (BKY#2)
Name of applicant	Samuel Dallachy, Lalu Asela, Elizabeth Doyle, Juanita Mason, Skye Muller, Norman Ross, Deborah Santo, Vanessa Saunders, Michael Smith, Davina Tilberro Snr, Claudine Walsh
Federal Court of Australia No.	QUD15/2019
NNTT No.	QC2013/005
Date of Decision	13 May 2024
Date of Reasons	13 May 2024

Claim accepted for registration

I have decided that the claim in the BKY#2 application satisfies all of the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).¹ Therefore the claim must be accepted for registration and entered on the Register of Native Title Claims.

Paulette Dupuy

Delegate of the Native Title Registrar pursuant to ss 190–190D of the **Act** under an instrument of delegation dated 5 February 2024 and made pursuant to s 99 of the Act.

¹ A section reference is to the *Native Title Act 1993* (Cth) (the Act), unless otherwise specified.

Reasons for Decision

CASES CITED

Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal [2012] FCA 1215 (*Anderson*)

Budby on behalf of the Barada Barna People v Queensland [2013] FCAFC 149 (*Budby*)

Burragubba v State of Queensland [2016] FCA 1525 (*Burragubba*)

Butchulla People v State of Queensland [2006] FCA 1063 (*Butchulla*)

Corunna v Native Title Registrar [2013] FCA 372 (*Corunna*)

Fesl v Delegate of the Native Title Registrar - [2008] FCA 1469 (*Fesl*)

Fortescue Metals Group v Warrie on behalf of the Yinjibarndi People [2019] FCAFC 177 (*Warrie*)

Gudjala People #2 v Native Title Registrar [2007] FCA 1167 (*Gudjala 2007*)

Gudjala People # 2 v Native Title Registrar (2008) 171 FCR 317; [2008] FCAFC 157 (*Gudjala FC*)

Gudjala People #2 v Native Title Registrar [2009] FCA 1572 (*Gudjala 2009*)

Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9) [2007] FCA 31 (*Harrington-Smith*)

Hazelbane v Doepel [2008] FCA 290 (*Hazelbane*)

Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi)

People v Minister for Land and Water Conservation for the State of New South Wales [2002] FCA 1517 (*Lawson*)

Martin v Native Title Registrar [2001] FCA 16 (*Martin*)

Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta*)

Noble v Mundraby, Murgha, Harris and Garling [2005] FCAFC 212 (North, Weinberg and Greenwood JJ) (*Noble*)

Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group [2005] FCAFC 135 (*Alyawarr*)

Northern Territory of Australia v Doepel (2003) 133 FCR 112; [2003] FCA 1384 (*Doepel*)

Pappin on behalf of the Muthi Muthi People v Attorney-General of New South Wales [2017] FCA 76 (*Pappin*)

State of Western Australia v Strickland [2000] FCA 652 (*Strickland FC*)

Strickland v Native Title Registrar [1999] FCA 1530 (*Strickland*)

Ward v Northern Territory [2002] FCA 171 (*Ward*)

Weribone on behalf of the Mandandanji People v State of Queensland [2018] FCA 247 (*Weribone*)

Western Australia v Native Title Registrar (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*)

Western Australia v Ward [2002] HCA 28; 213 CLR 1; 76 ALJR 1098; 191 ALR 1 (*Ward HC*)

Wiri People v Native Title Registrar [2008] FCA 574 (*Wiri People*)

BACKGROUND

- [1] This decision concerns a further amended application (**Amended Claim**) filed on 10 August 2023, in the Federal Court of Australia proceeding *Sam Dallachy & Others on behalf of the Barada Kabalbara and Yetimarala People and State of Queensland & Ors #2* (QUD15/2019) (**BKY#2**).
- [2] The Amended Claim is in the Central Queensland region. It includes lands and waters over approximately 294 sq kms covering an area located to the north of Rockhampton, Central Queensland.
- [3] On 8 August 2023, the Federal Court of Australia (**Court**) gave leave to make the Amended Claim as follows:
1. Pursuant to s 66B of the *Native Title Act 1993* (Cth) the Applicant in these proceedings, jointly comprised of Samuel Dallachy, Vanessa Saunders, Norman Ross, Elizabeth Doyle, Davina Tilberoo, Anthony Henry and Margaret Hornagold, be replaced by Samuel Dallachy, Claudine Walsh, Davina Tilberoo Snr, Deborah Santo, Elizabeth Doyle, Juanita Mason, Lalu Asela, Michael Smith, Norman Ross, Skye Muller and Vanessa Saunders.
- ...
- Amendment of QUD15/2019**
2. Pursuant to r 8.21 of the Federal Court Rules 2011 (Cth), the Applicant be granted leave to file a further amended application in QUD13/2019 substantially in the form annexed at MA-13 to the affidavit of Michael David Frith Allbrook filed on 5 July 2023.
 3. The Applicant file and serve a re-engrossed copy of the further amended application in QUD13/2019 within seven days of these orders.
- [4] On 8 August 2023, the Court also gave leave to the applicant to amend the proceeding *Sam Dallachy & Others on behalf of the Barada Kabalbara and Yetimarala People #2 and State of Queensland & Ors* (QUD13/2019) (**BKY#1**) and made orders to the effect of paragraph [3] above.
- [5] The Registrar of the Court gave a copy of the Amended Claim to the Native Title Registrar (**Registrar**) on 15 August 2023 pursuant to s 64(4) of the Act. This has triggered the Registrar's duty to consider the Amended Claim for registration in accordance with s 190A.²
- [6] I have decided that the claim in the application must be accepted for registration and this document sets out my reasons for that decision.

PRELIMINARY CONSIDERATIONS

Does the registration test apply to the amended application?

- [7] Sections 190A(1A), (6), (6A), and (6B) set out the decisions available to the Registrar under s 190A. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions in ss 190B and 190C. Section 190B deals mainly with the merits of the claim and s 190C deals with procedural and other matters. Section 190A(6B) provides that

² Section 190A(1).

the Registrar must not accept the claim for registration if it does not satisfy all of the conditions in ss 190B–190C.

- [8] Section 190A(1A) provides for exemption from the registration test for certain applications amended under s 87A. Section 190A(6A) sets out the conditions under which the Registrar must accept an amended application for registration without testing under ss 190B and 190C.
- [9] The Court granted leave for amendments to be made to the application. The Amended Claim provided to the Registrar includes the following amendments:
- (a) amending the composition of the persons who jointly comprise the applicant;
 - (b) amending the native title claim group description at Schedule A;
 - (c) including conditions on the authority of the applicant; and
 - (d) amending Attachment R to include the affidavits of each of the persons appointed to jointly comprise the applicant at an authorisation meeting held on 24 June 2023.
- [10] As the Court did not grant leave to amend the application pursuant to s 87A, I am satisfied that s 190A(1A) does not apply to the Amended Claim. It is also clear that the Amended Claim includes amendments that do not fall within the conditions provided for under s 190A(6A)(d)(i) – (v). In the circumstances, the Amended Claim must be tested for registration under ss 190B and 190C.

Procedural fairness

- [11] In relation to this application for registration, the following steps were undertaken:³
- a. On 17 August 2023, a Senior Officer of the National Native Title Tribunal (**Tribunal**) wrote to the applicant advising that a delegate would be considering whether any exemptions under ss 190A(1A) or (6A) apply.
 - b. Also on 17 August 2023, the Senior Officer wrote to the Queensland government (**Queensland**) advising that a delegate would be considering whether ss 190A(1A) or (6A) apply and any submissions regarding same would need to be provided within 7 days of the date of the letter.
 - c. On 25 August 2023, the Senior Officer wrote to the applicant and Queensland advising that the delegate had formed the view that exemptions under ss 190A(1A) and (6A) did not apply and any submissions should be provided by 8 September 2023.
 - d. On 8 September 2023, the Senior Officer received a request from the applicant’s legal representative, Mr Michael Allbrook of Queensland South Native Title Services Ltd (**QSNTS**) for a brief extension of time to 9:00am on 11 September 2023 to provide submissions on the registration test.
 - e. On 11 September 2023, the Senior Officer received the following material:

³ *Hazelbane* [23] to [31]

- i. the applicant's submissions on the registration test (19 pages) (**September Submissions**);
 - ii. Transcripts from the on-country preservation of evidence hearings in the Court proceedings QUD13/2019 and QUD15/2019 held before SC Derrington J on 2, 3, and 4 November 2021 (316 pages) (**Preservation of Evidence hearings**);
 - iii. Transcripts from the on-country hearing in the Court proceedings QUD13/2019 and QUD15/2019 held before SC Derrington J on 14, 15, 16, 17, 18, and 21 November 2022 (643 pages) (**On Country hearings**);
 - iv. Affidavit of Michael Allbrook filed in the Court on 5 July 2023 in support of the applicant's interlocutory application to further amend the Form 1 in each of the BKY Amended Claims as well as in support of an application under s 66B of the NTA to replace the applicant (**Allbrook July affidavit**) (538 pages); and
 - v. Barada Kabalbara Yetimarala People's Historical Report by Dr Fiona Skyring filed in the court on 1 November 2021 (202 pages) (**Historical Report**).
- f. On 16 October 2023, the Senior Officer wrote to Queensland enclosing a copy of the applicant's submissions and the material referred to at paragraph (e) above and advising that the State would have until 30 October 2023 to provide comments or submissions. The State of Queensland did not make any comments or submissions.
- g. On 29 February 2024, the Senior Officer wrote to Mr Allbrook attaching a preliminary assessment prepared by a delegate of the Registrar⁴ in respect of the Amended Claim and the BKY#1.
- h. On 15 March 2024, the Senior Officer received the following material:
- i. applicant's further submissions on the registration test (9 pages) (**March Submissions**); and
 - ii. Unsealed supplementary affidavit of Michael Allbrook (232 pages) containing personal information.

[12] On 19 March 2024, the Senior Officer sent an email to the applicant requesting clarification and confirmation of matters associated with the material provided on 15 March 2024.

[13] On 20 March 2024, the applicant provided:

- (a) a sealed copy of the affidavit of Michael Allbrook (**Allbrook March affidavit**)

The Allbrook March affidavit includes redactions to personal information.

[14] On 25 March 2024, the Senior Officer wrote to Queensland enclosing a copy of the applicant's submissions and the material referred to at paragraph (13) above and advised that the State

⁴ Section 78(1).

would have until 8 April 2024 to provide comments or submissions. The State of Queensland did not provide any comments or submissions.

[15] This concluded the procedural fairness process.

Information considered

[16] Section 190A(3) sets out the information to which the Registrar must have regard in considering a claim under s 190A and provides that the Registrar ‘may have regard to such other information as he or she considers appropriate’.

[17] I have had regard to:

- (a) the Amended Claim;
- (b) the material listed in paragraph [11](e), (h), (i), and [13] above.

[18] I have considered it appropriate⁵ to have regard to the following:

- (a) Registration Test decision dated 27 September 2013 in relation to the BKY#1 application;
 - (b) Registration Test decision dated 29 September 2014 in relation to the BKY#1 application;
(2013 and 2014 Registration Test decisions)
- and
- (c) the decision of Justice Logan in *Budby on behalf of the Barada Barna People v Queensland* [2014] FCA 801.

[19] I have also considered information contained in a geospatial assessment and overlap analysis prepared by the Tribunal’s Geospatial Services in relation to the area covered by the application, dated 30 April 2024 (**Geospatial Assessment**).

[20] I note there is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers.⁶

Section 190C Registration: conditions about procedural and other matters —Conditions met

[21] For the reasons set out below, I have formed the view that the claim satisfies all of the conditions in s 190C.

Sections 190C(1), (2) and ss 61, 62: Registration conditions about procedural and other matters – conditions met

[22] To meet s 190C(2), the Registrar must be satisfied that the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61 and 62. This condition does not require any merit assessment of

⁵ Section 190A(3).

⁶ Section 190A(3)(b).

the material to be undertaken, however it does seek “...to ensure that the application contains ‘all details’ required by s 61...”⁷

[23] Accordingly, in my view, s 190C(2) requires a consideration of whether the application contains the required material and whether such material is sufficient to enable the Registrar to form an opinion whether the claim satisfies all of the conditions in ss 190B and 190C.⁸

Section 61 Native title applications

Section 61(1): Persons who may make application

[24] Section 61(1) provides that only persons authorised by and included in the native title claim group may make a native title determination application for the particular native title claimed.

[25] Schedule A of the Amended Claim contains a description of the native title claim group (**BKY claim group**). Schedule E of the Amended Claim states that the Barada Kabalbara Yetimarala People claim native title rights and interests pursuant to the traditional laws and customs of the claim group. Attachment R of the Amended Claim includes eleven affidavits executed by each of the persons comprising the applicant (**Applicant Affidavits**). Each affidavit is largely identical and includes information to the effect that:

- (a) the deponent is a member of the BKY claim group;
- (b) the deponent is a person authorised by the BKY claim group to be one of the persons forming the applicant for their native title determination applications;
- (c) the deponent believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application;
- (d) none of the area covered by the application is also covered by an approved determination of native title;
- (e) that “all the statements made in the application are true”;
- (f) the deponent is authorised, by all the persons in the native title claim group to make the application to deal with matters arising in relation to it;
- (g) on 24 June 2023 members of the BKY claim group held an authorisation meeting for various purposes including amendments to the claim group description, authorisation of a new applicant, making a s 66B application to the Federal Court and to make the Amended Claim;
- (h) at the meeting, the BKY people in attendance confirmed that there was no decision-making process under traditional law and custom of the native title claim group that must be used for making decisions of this kind and agreed to and adopted a process of decision-making by way of resolutions of majority voting;

⁷ *Doepel* [35].

⁸ See also s 190D(3)(b).

- (i) each of the members comprising the applicant are authorised subject to conditions under s 251BA and that such conditions are satisfied as each member of the applicant agrees to be bound by the conditions.

[26] I am satisfied that the Amended Claim, affidavits and other documents including information provided at Schedules A, E and the Applicant Affidavits (at Attachment R) contain all details and other information to meet the requirements of ss 61(1) and 190C(2).

[27] I note that s 61(2) provides that the persons authorised to make the native title determination application are jointly the applicant and none of the other members of the native title claim group is the applicant. I am satisfied that there is nothing in the Amended Claim or other material that I have considered that would suggest otherwise.

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

[28] Section 61(3) requires an application to state the name and address for service of the applicant. Having regard to the information provided at Part B of the Amended Claim, I am satisfied that this requirement is met.

Section 61(4): Applications authorised by persons

[29] Section 61(4) requires a native title determination application authorised by persons in a native title claim group to name or describe such persons so that it can be ascertained whether any particular person is one of those persons.

[30] Section 61(4) was considered in both *Gudjala* and *Pappin*. Each Judge found no error in the reasoning of the delegate regarding the application of s 61(4) although for different reasons. In *Gudjala*, Dowsett J emphasised the procedural nature of the exercise undertaken by a delegate under s 190C(2) as concerning the details and information required by ss 61 and 62 in contrast to the merits exercise undertaken pursuant to s 190B(3).⁹

[31] Schedule A of the Amended Claim contains a description of the native title claim group as “Those persons who are descendants of the following apical ancestors (including through adoption or raising up)...” each of the six apical ancestors are then listed by name. Schedule A of the Amended Claim contains a description of the native title claim group that is sufficiently clear so that it can be ascertained whether any particular person is one of those persons.¹⁰

[32] I am satisfied that Schedule A of the application meets the requirements of ss 61(4) and 190C(2).

Section 61(5): Prescribed form filed in the Federal Court

[33] Section 61(5) provides that the application must be filed in the Court in the manner prescribed and be accompanied by any prescribed fee. In my view, these are matters for the Court however I note that the Amended Claim, filed as a Form 1, was accepted for filing by the Court on 10 August 2023.

⁹ *Gudjala* 2007 [31] to [32]; *Pappin* [64] to [73]

¹⁰ s 61(4)(b)

Section 62(1), (1A) and (2): Information etc. in relation to certain applications; Claimant applications

Section 62(1)(a) and (1A): Affidavits containing specified details

- [34] Section 62(1)(a) requires a claimant application to be accompanied by an affidavit sworn by the applicant stating each of the matters mentioned in subsection (1A).
- [35] Annexure R to the Amended Claim annexes the Applicant Affidavits summarised in paragraph [25] above. Each affidavit includes statements addressing the matters listed at s 62(1A)(a) to (g). I am satisfied that the Annexure R of the application meets the requirements of ss 62(1A) and 190C(2).

Section 62(1)(d): s 47C agreement

- [36] Section 62(1)(d) applies where an agreement has been entered into under s 47C and requires a copy of any relevant agreement to accompany the application. The Amended Claim does not include any reference to an agreement under s 47C. As such s 62(1)(d) has no application, and this requirement need not be assessed.

Section 62(1)(b) and (2): Details required by paragraph (1)(b)

Section 62(2)(a) and (b): Information about the boundaries of the area and any areas within those boundaries that are not covered by the application...

- [37] Section 62(2)(a) requires that the application contain information that enables the boundaries of the area covered by the application and any areas within those boundaries that are not covered by the application to be identified.
- [38] Schedule B of the Amended Claim provides a written description of the areas that the application does not cover. Attachment B of the Amended Claim contains a detailed written description of the external boundaries of the area covered by the Amended Claim prepared by Geospatial Services, National Native Title Tribunal (**NNTT**) in April 2014 and amended in August 2014 by QSNTS to reflect further exclusions. The second last page of Attachment B lists six native title determination applications that are excluded from the Amended Claim area including the QUD380/2008 Barada Barna People application.
- [39] Section 62(2)(b) requires that the application include a map showing the boundaries of the area mentioned in s 62(2)(a). Attachment C includes a map showing the external boundaries of the Amended Claim and identifies some tenure layers.
- [40] As confirmed in the Geospatial Assessment, I note that Attachment S to the Amended Claim does not suggest that the area of the application has been further amended.
- [41] I am satisfied that the Amended Claim meets the requirements of ss 62(2)(a), (b), and 190C(2).

Section 62(2)(c): Searches of any non-native title rights and interest carried out...

[42] Section 62(2)(c) requires that the application include details and results of searches of any non-native title rights and interests covered by the application. As no information concerning searches under s 62(2)(c) are included at Schedule D of the Amended Claim, this requirement need not be assessed.

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

[43] Section 62(2)(d) requires an application to contain a description of the native title rights claimed in relation to particular land or waters. Such description must not consist merely of a statement that the native title rights and interests are all that may exist or have not been extinguished.¹¹ Schedule E of the Amended Claim contains a detailed list describing the native title rights and interests claimed in relation to the Amended Claim.

[44] I am satisfied that Schedule E of the Amended Claim meets the requirements of ss 62(2)(d) and 190C(2).

Section 62(2)(e): General description of factual basis for assertion that native title exists...

[45] Section 62(2)(e) requires an application to contain a general description of the factual basis on which it is asserted that the native title rights and interests are claimed to exist. Schedule F and Attachment F and M of the Amended Claim provide information and examples to support the claimed native title rights and interests set out at Schedule E and asserts that the native title rights and interests claimed by the native title claim group are derived from their traditional laws and customs.

[46] I am satisfied that Schedule F, and Attachment F and M of the application meet the requirements of ss 62(2)(e) and 190C(2).

Section 62(2)(f): Activities in relation to the land and waters

[47] Section 62(2)(f) requires that if the native title claim group currently carry on any activities in relation to the land or waters claimed, details of those activities must be included in the application.

[48] Schedule G of the Amended Claim lists the activities currently being undertaken by members of the BKY claim group in the application area. Schedule G also refers to Attachment F & M for additional information.

[49] I am satisfied that Schedule G of the Amended Claim meets the requirements of ss 62(2)(f) and 190C(2).

Section 62(2)(g): Other applications

[50] Section 62(2)(g) requires an application include details of any other court applications seeking a determination of native title or native title compensation over any of the area covered by the application. Schedule H states that the area covered by the Amended Claim is not covered by any other applications. This view is confirmed in the Geospatial Assessment.

¹¹ *Gudjala 2009* [10].

[51] I am satisfied that Schedule H of the application meets the requirements of ss 62(2)(g) and 190C(2).

Section 62(2)(ga): Future act notices

[52] Section 62(2)(ga) requires the claimant application include details of any s 24MD(6B)(c) notifications relevant to the claim area. Schedule HA of the Amended Claim provides the details of one notice given in accordance with s 24MD(6B)(c).

[53] I am satisfied that Schedule HA of the application meets the requirements of ss 62(2)(ga) and 190C(2).

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

[54] Section 62(2)(h) requires the claimant application include details of any s 29 notifications relevant to the claim area. Schedule I of the Amended Claim provides the details of two s 29 notices that relate to whole or part of the application area as of 25 May 2013. The Geospatial Assessment lists several historical s 29 notices in relation to the Amended Claim.

[55] I am satisfied that Schedule I of the Amended Claim meets the requirements of ss 62(2)(h) and 190(2).

Section 62(2)(i): Any conditions under s 251BA

[56] Section 62(2)(i) requires the claimant application include details of any conditions under s 251BA on the authority of the applicant to make the application and to deal with matters arising in relation to it.

[57] Schedule IA of the Amended Claim refers to Attachment IA. Attachment IA annexes a document headed “Conditions on authority of the BKY applicant – 24 June 2023” and is signed by each of the persons comprising the applicant on the same date. “Conditions” is defined as “*this document which imposes conditions on the authority of the applicant for the purposes of section 251BA of the NTA.*” It is a 10-page document that sets out several matters conditioning the authority of the applicant in the form of specified “roles”, “responsibilities” and “powers” among other matters.

[58] I am satisfied that Attachment IA of the Amended Claim meets the requirements of ss 62(2)(i) and 190C(2).

Section 190C(3): No previous overlapping claim groups – condition met

[59] Section 190C(3) requires the Registrar to be satisfied that ‘*no person included in the native title claim group for the application ... was a member of the native title claim group for any previous application*’.

[60] The condition at s 190C(3) only arises where there is a previous application that meets the criteria set out in subsections (a) to (c).¹² These criteria are that any previous claim covers at

¹² *Strickland FC* [9].

least some of the same area and was accepted for registration under s 190A and on the Register of Native Title Claims.

[61] The Geospatial Assessment indicates that there is no previous claim overlapping any of the area covered by the Amended Claim. I have undertaken my own search of the Tribunal's mapping database which has confirmed this advice.

[62] As there are no previous overlapping claims that meet the criteria at s 190C(3)(a) to (c), I am satisfied that s 190C(3) does not require further consideration.

Section 190C(4): Identity of claimed native title holders – condition met

[63] Under s 190C(4) the Registrar must be satisfied that either (a) a certificate issued under s 203BE has been issued by any relevant native title representative body or (b) the requirements in subsection (4AA) are met.¹³ As there is no certificate contained in the Amended Claim, in accordance with s 190C(4)(b), I must proceed to consider the requirements at s 190C(4AA).

[64] I note that the Amended Claim includes a certificate dated 2 July 2013 issued by the Queensland South Native Title Services Ltd (**QSNTS**) native title representative body at Attachment R. This certificate relates to the certification of the original application and the authorisation meeting held on 13 April 2013, and not to the authorisation of the Amended Claim. It follows that I am unable to rely upon this certificate for the purposes of s 190C(4)(a) as it does not relate to the certification of the Amended Claim. In the circumstances, I must be satisfied that the requirements under s 190C(4)(b), (4AA) and (5) are met.

Sections 190C(4)(b) and (4AA): Identity of claimed native title holders

Section 190C(4AA)(a): member authorised by native title claim group to be the applicant

[65] Section 190C(4AA)(a) requires the applicant to be a member of the native title claim group and further requires that the applicant is authorised to make the application, and deal with all matters arising in relation to it, by all the other persons in the native title claim group. It is therefore necessary to identify whether:

- (a) the persons comprising the applicant are members of the native title claim group;
- (b) the applicant is "authorised" in accordance with the requirements in s 251B; and that
- (c) such authorisation was given by "all the other persons" in the native title claim group.

[66] Having regard to the authorities concerning authorisation of the applicant, my understanding is that a consideration of the provisions at s 190C(4)(b) and (4AA)(a):

- requires the Registrar to be satisfied '*of the fact of authorisation by all members of the native title claim group' by way of 'inquiry through the material available ... to see if the necessary authorisation has been given'*;¹⁴

¹³ Section 190C(4AA) was inserted into the Act by the *Native Title Legislation Amendment Act 2021*.

¹⁴ *Doepel* [78].

- requires the Registrar to be satisfied as to the identity of the claimed native title holders, including the applicant;¹⁵
- is not ‘to be met by formulaic statements in or in support of applications’;¹⁶
- does not permit a claim group to choose between the two decision-making processes set out in s 251B, as where there is a traditionally mandated process, that process must be followed to authorise the applicant, and where there is no mandated traditional process, the process must be that which has been agreed and adopted by the native title claim group.¹⁷

[67] The first limb of s 190C(4AA)(a) requires that “*the applicant is a member of the native title claim group*”. It is therefore necessary to confirm the definition of the “native title claim group”. Schedule A of the Amended Claim defines membership of the claim group as being derived from descent from an apical ancestor listed therein (**Schedule A ancestor**). It follows that only descendants of a Schedule A ancestor are eligible for selection as a person comprising the applicant.

[68] As indicated in paragraph [25] above, each of the persons comprising the applicant has sworn an affidavit stating that they believe all statements made in the application are true and that they are a member of the native title claim group. Having regard to Schedule A and the contents of the affidavits sworn by each of the persons comprising the applicant, I am satisfied that each person is a member of the native title claim group.

[69] The second limb of s 190C(4AA)(a) requires that “*the applicant...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” The second limb is “lengthy” as it requires a consideration of s 251B “authorising the making of applications”.

Section 251B: Authorising the making of applications

[70] As s 251B contains multiple requirements, it is convenient to identify and address each requirement separately:

- I. “...all the persons¹⁸ in a native title claim group...”
- II. “...authorise...persons to make a native title determination application...and to deal with matters arising in relation to it...if...”
 - where there is a traditional decision-making process to be complied with by the native title claim group that process has been used to authorise the person or persons to make the native title determination application; or
 - where there is no traditional decision-making process applicable, the persons in the native title claim group authorise the person or persons to make the

¹⁵ *Wiri People* [29].

¹⁶ *Strickland* [57].

¹⁷ *Harrington-Smith* [1230].

¹⁸ *Lawson* [25]; cited with approval by Kiefel J (as she then was) in *Butchulla People v State of Queensland* [2006] FCA 1063

*application in accordance with a process of decision-making agreed to and adopted by the native title group.*¹⁹

- [71] The Amended Claim is the application for the purposes of s 190C(5) and it includes at Attachment R eleven Applicant Affidavits. Each affidavit:
- was sworn by the persons comprising the applicant on 24 June 2023;
 - is substantively in the same form;
 - deposes to the matters previously set out in paragraph [25] above;
 - includes at Annexure 1, a document headed “Conditions on authority of the BKY applicant – 24 June 2023”.
- [72] The Applicant Affidavits (including Annexure 1 provided at Attachment R), Attachment IA (a duplicate of Annexure 1), and a s 203BE certificate (that is out of date) are the only documents forming part of the application that go directly to the requirements of s 251B.
- [73] As regards “*all the persons in a native title claim group...*”, I must assess whether “all the persons in the native title claim group” were provided with an opportunity to attend and participate in the meetings as contemplated in the decision of Stone J in *Lawson*. In *Lawson*, her Honour observed that the “*...effect of the section is to give the word “all” a more limited meaning than it might otherwise have...*” and 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...*”²⁰
- [74] Whilst considering whether a reasonable opportunity to participate was given, Stone J was prepared to accept, in the absence of contrary evidence, that those who did not participate chose not to be involved in the decision-making process.²¹
- [75] In *Weribone*, Rares J held that “[t]he notice must be sufficient to enable the persons to whom it is addressed ... to judge for themselves whether to attend the meeting and vote for a proposal’ and that “*fair notice of the business to be dealt with at the meeting’ must be given*”.²²
- [76] The Applicant Affidavits and Amended Claim, do not include any statements, information, details, or grounds to show that all persons eligible to attend the 24 June 2023 meeting, were given notice of the opportunity to attend the meeting for the purpose of making decisions about the Amended Claim. However, information concerning notice of the meeting and the many steps taken by QSNTS to communicate information to the BKY People regarding the purpose of the 24 June 2023 meeting, was provided in the form of the March Submissions and the Allbrook March affidavit. This information is discussed in further detail below and forms part of the “*inquiry through the material available ... to see if the necessary authorisation has been given*’.²³

¹⁹ *Noble* [16] to [18].

²⁰ *Lawson* [25].

²¹ *Ibid* [27].

²² *Weribone* [40], [41]; see also *Burragubba* [31].

²³ *Doepel* [78].

[77] As regards “...authorise...persons to make a native title determination application...and to deal with matters arising in relation to it...if...”, I must assess whether the application was “authorised” under s 251B.

[78] In *Ward*²⁴, O’Loughlin J listed several questions relating to the authorisation process which were required to be addressed. The questions identified by O’Loughlin J, which do not need to be answered in any formal way, but the substance of which must be addressed, are:

*Who convened it and why was it convened? To whom was notice given and why 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?*²⁵

[79] In considering provisions relevant to authorisation for the purposes of s 190C(4), French J (as he then was) in *Strickland* stated that s 190C(4) cannot be met by formulaic statements:

*The affidavit attached to the application meets the requirements of s 190C(5)(a) which requires no more than a statement that the requirement of authorisation referred to in s 190C(4)(b) has been met. It is also required briefly to set out the grounds on which the Registrar should consider that it has been met. The insertion of the word “briefly” at the beginning of par 190C(5)(b) suggests that the legislature was not concerned to require any detailed explanation of the process by which authorisation is obtained.*²⁶

[80] At paragraph 70 of his decision in *Fesl*, Logan J considers the meaning and effect of s 251B as dealt with by the Full Court in *Noble* and reproduces the following remarks made by the Full Court:

Section 251B does not require proof of a system of decision-making beyond proof of the process used to arrive at the particular decision in question. The section accommodates a situation where a native title claim group agrees to follow a particular procedure for a particular decision even if other procedures are normally used for other decisions. Nor does s 251B require a formal agreement to the process adopted for the making of a particular decision. Agreement within the contemplation of s 251B may be proved by the conduct of the parties. There was evidence in this case that the claim group conducted itself at the meeting on the basis that it agreed to a vote by the members of the group to determine the question of authorisation. All persons present voted in favour of the motion. Nobody is recorded as leaving the meeting or refusing to vote or in any other way conducting to indicate dissent from the course adopted. There was thus evidence from the conduct of the claim group on which the primary judge could base his conclusion that the requirements of s 251B were satisfied.

[81] In paragraph 71, after considering authorities concerning s 251B, Logan J states that:

²⁴ *Ward* [2002] FCA 171.

²⁵ *Ibid* [24], cited with approval in *Lawson on behalf of the ‘Pooncarie’ Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales* [2002] FCA 1517 [26].

²⁶ *Strickland v Native Title Registrar* [1999] FCA 1530; (1999) 168 ALR 242 at [57].

- (a) *the effect of the s 251B is to give the word 'all' in, materially, the table which appears below s 61(1) a more limited meaning than it might otherwise have;*
- (b) *in those cases where there is no relevant traditional decision-making process, s 251B does not mandate any one particular decision-making process, only that it be one that is agreed to and adopted by the persons in the native title claim group or compensation group;*
- (c) *"agreed to and adopted by" imports the giving to all of those whose whereabouts are known and have capacity to authorise a reasonable opportunity to participate in the adoption of a particular process and the making of decisions pursuant to that process;*
- (d) *unanimous decision-making is not mandated;*
- (e) *agreement to a particular process may be proved by the conduct of the parties even in the absence of proof of a formal agreement.*

[82] Information concerning processes, attendances, and decisions at the 24 June 2023 meeting are supplied in the Allbrook July affidavit, including the following:

- (a) The first authorisation meeting was attended by 106 people who identified as a BKY claim group member by selecting a nominated apical ancestor. The second authorisation meeting was attended by 95 people who identified as BKY by selecting a nominated apical ancestor from the amended claim group description.²⁷
- (b) The meetings were facilitated by an independent facilitator. QSNTS staff also attended to provide information about the State's position on the evidence relating to the claim group description. This information was provided by an anthropologist employed by QSNTS. Legal staff also attended to provide legal advice about the State's position.²⁸
- (c) At the first authorisation meeting, the native title claim group authorised the amendment to the native title claim group as notified. Mr Allbrook states *"It is my understanding that the decision was made using an agreed and adopted decision-making process but the decision was made by those present considering the evidence and applying the traditional laws and customs of the native title claim group to the proposed decision."*²⁹
- (d) Mr Allbrook further states, *"For the avoidance of doubt, it is my understanding based on the resolutions passed at the Authorisation Meeting #1 that the changes to the claim group description were authorised for both the BKY#1 Claim and the BKY#2 Claim."*³⁰
- (e) At the second authorisation meeting, the new claim group authorised, among other things, certain members of the (new) native title claim group to make an application to replace the applicant and to make the Amendment Claim.³¹
- (f) The members of the new applicant were authorised subject to conditions imposed on them by members of the new native title claim group.³²

²⁷ Allbrook July affidavit at [32].

²⁸ Ibid [33].

²⁹ Ibid [34].

³⁰ Ibid [35].

³¹ Ibid [37].

³² Ibid [39].

[83] Paragraphs 60 to 61 of the September Submissions reiterate that *“the claim group authorised the Applicant to make a native title determination application and to deal with matters arising in relation to it.”* The Submissions further state that *“This is supported by paragraph [8] of the section 62 affidavits...as well as paragraphs [32 – 40] of the affidavit of Michael Allbrook filed on 5 July 2023. Therefore, (sic) the section 251BA conditions are satisfied.”*

[84] The Allbrook March affidavit reiterates matters outlined in the July Allbrook affidavit and includes some fresh information to the effect of the following:

(a) On arrival at the venue for the authorisation meetings, the members of the BKY claim group were required to register their attendance by completing a form titled *“Meeting Attendance Register”*.³³

(b) There was an error in Mr Allbrook’s previous affidavit and 104 members attended the BKY authorisation meeting #1 and 95 members attended the authorisation meeting #2. The redacted meeting attendance registers are annexed to his affidavit.³⁴

(c) Copies of the minutes of authorisation meetings #1 and #2 are annexed to the Allbrook March affidavit.³⁵

[85] The minutes of the authorisation meetings show the resolutions considered by the BKY claim group in relation to the decision-making process agreed to and adopted by them for the purposes of:

(a) Confirming adequate notice of the meeting was provided to BKY people;

(b) Changes to the claim group description (reflected at Schedule A of the Amended Claim);

(c) Authorisation of persons to jointly comprise the applicant to make the native title determination application and to deal with all matters arising in relation to it;

(d) Imposing conditions on the authority of the applicant;

(e) The applicant making a s 66B application to replace the current applicant;

(f) Instructing Michael Allbrook to file the application on behalf of the applicant, etc.

[86] The March Submissions provided by the applicant provide information to the effect of the following:

(a) The applicant relies on the supplementary affidavit of Michael Allbrook affirmed on 15 March 2024;

(b) At the authorisation meetings of 24 June 2023, the BKY people in attendance confirmed that there is no decision-making process that, under the traditional laws and customs of the BKY claim group, must be complied with in relation to authorising things of this kind for the purpose of s 251B(a).

(c) The attendees agreed to adopt the following process in accordance with section 251B(b) of the NTA:

³³ Ibid [16].

³⁴ March Allbrook affidavit, Annexures MA-17 and MA-18

³⁵ Ibid, Annexures MA-19 and MA-20.

- a. a proposed resolution will be displayed and read out to the meeting;
- b. the resolution will be moved and seconded by members of the group present at the meeting;
- c. a decision will be made by members of the group present at the meeting voting on the resolution by a show of hands;
- d. if not carried unanimously, the decision of the majority will be the decision of the meeting.

A decision will be passed if a majority is “for” the motion. A majority is fifty percent plus one of the votes cast on the motion.

(referred to hereafter as the “**Adopted Decision-Making Process**”)

- The applicant submits that the resolution passed at both Authorisation Meetings constitutes an agreed and adopted process for the purposes of section 251B(b).
- At Authorisation Meeting #1, the Adopted Decision-Making Process was used to authorise the amendment to the BKY native title claim group description. The applicant submits that this satisfies the first step of the process stated by Reeves J in *Bigambul*.
- At Authorisation Meeting #2, the new claim group used the Adopted Decision-Making Process to authorise the new BKY claim group members to comprise the applicant for the purposes of section 61 of the NTA. The applicant submits that this satisfies the second step of the process as required in *Bigambul*.
- For the reasons stated above, the applicant asserts that the native title group have authorised the applicant 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.

[87] Having regard to the authorities cited above, the Allbrook July and March affidavits and the July and March Submissions (**Additional Material**), I am satisfied that sufficient information regarding the applicant, the claim group, the meeting arrangements, the decision-making processes, and the meeting outcomes has been provided to address the requirements of s 251B and the conditions for uncertified applications under s 190C(4)(b) and (4AA).

Section 190C(4AA)(b)(ii): s 251BA conditions satisfied

[88] The last limb of s 190C(4AA) requires that if there are any conditions under s 251BA on the authority that relate to the making of the application, they have been satisfied.

[89] Each of the affidavits accompanying the Amended Claim for the purpose of s 62 annexes the document “Conditions on authority of the BKY applicant – 24 June 2023” which sets out the conditions on the authority imposed in accordance with s 251BA. The conditions are extensive. In addition to dealing with circumstances that may arise in the future, such as the establishment of a Prescribed Body Corporate, the conditions include:

- (a) acting for and on behalf of the BKY Claim Group to make an application to the Federal Court of Australia for a determination that native title exists in the BKY Claims area;

- (b) to deal with any matters arising in connection with the BKY claims;
- (c) not act inconsistently with any resolution passed by the BKY Claim Group;
- (d) not agree to amend the BKY Claims without a resolution of the BKY Claim Group authorising the applicant to do so;
- (e) remaining members of the applicant remain authorised in the case of the death or incapacity of a member of the applicant;
- (f) that decisions can only be made by the applicant by consensus or majority of members at a properly convened meeting;
- (g) individual members of the applicant must attend meetings, act in accordance with properly passed resolutions and the best interests of the claim group and sign any documents necessary to facilitate matters arising in relation to the claim.

[90] At [10] and [11] of each affidavit the persons comprising the applicant depose that “...*The s 251BA Conditions have been satisfied.*” And “...*The basis upon which I believe that the s 251BA Conditions have been satisfied is that I and the other members of the Applicant have agreed to be bound by the terms of the s 251BA Conditions.*”

[91] Pursuant to these conditions, each of the affidavits included at Attachment R indicates that the application was made ‘*in accordance with resolutions passed by the claim group at a properly called and constituted claim group meeting*’.³⁶ Having regard to the Additional Material, the statement is uncontroversial.

[92] Having regard to the above information, I am satisfied that the annexures to the Applicant Affidavits meet the requirements of s 190C(4AA)(b)(ii).

Section 190C(5): Requirements for uncertified applications

[93] Section 190C(5) provides that the Registrar cannot be satisfied that an uncertified application meets the requirements of s 190C(4) unless the application³⁷ includes statements to the effect that the requirements in s (4AA) have been met and that the application briefly sets out the grounds upon which the Registrar should consider that the conditions have been met (but not in relation to authorisations given without a s 251BA condition).

[94] The Applicant Affidavits summarised above at [25] include information relevant to an assessment under s 190C(5)(a) and (b).³⁸ Each of the eleven deponents in the Applicant Affidavits states that:

- a. they and other persons in attendance at the meeting of 24 June 2023 were members of the BKY native title claim group;
- b. the BKY people in attendance at the meeting agreed to and adopted a method of decision-making by way of voting on resolutions to be carried by a majority of BKY people;

³⁶ Ibid [21] or [22].

³⁷ *Doepel* [78].

³⁸ See Attachment R [1] to [9] in particular.

- c. an outcome of the 24 June 2023 was the authorisation of each person comprising the applicant to make the Amended Claim and deal with matters arising in relation to it;
- d. they agree to be bound by conditions on their authority pursuant to s 251BA.

[95] In my view, the largely formulaic statements made in each of the Applicant Affidavits, on their own, do not provide sufficient grounds in support of the s 190C(5)(a) statements as required under s 190C(5)(b). However, I am satisfied that the Applicant Affidavits considered together with the Additional Material meet the requirements of s 190C(5).

Section 190B Registration: conditions about merits of the claim – conditions met

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

- [96] Section 190B(2) requires the Registrar to be satisfied that the written information and map contained in the application are sufficient to identify, with reasonable certainty, the land and waters in relation to which the native title rights and interests are claimed.
- [97] Schedule B of the Amended Claim refers to Attachment B for a written description of the external boundary of the application area and provides a general description of areas excluded from it.
- [98] Attachment B describes the application area by metes and bounds referencing watercourses, such as the Mackenzie, Connors and Fitzroy Rivers, land tenure boundaries, geographic coordinates in decimal degrees to six decimal places and existing native title application and determination boundaries.
- [99] Schedule C of the Amended Claim refers to Attachment C which contains a map of the external boundary of the application area. The map is dated April 2019 and was prepared by Geospatial Services, National Native Title Tribunal. The map states that it is amended however, by reference to Schedule C, Schedule S, and the Geospatial Assessment, this appears to be an error and the native title determination application area for BKY#2 was not affected by the amendments in the Amended Claim. The map includes:
- The application area depicted by a bold dark blue outline;
 - Major towns are depicted by a black dot and labelled by name;
 - Various waterways mentioned in the description are labelled; and
 - Scalebar, northpoint, coordinate grid, location diagram.
- [100] The Geospatial Assessment concludes that the description at Schedule B and map at Schedule C are consistent and identify the application area with reasonable certainty. I agree with this assessment.
- [101] Having regard to the Geospatial Assessment and the information outlined above, I am satisfied that Schedules B and C of the Amended Claim meet the requirements of s 190B(2).

Section 190B(3): Identification of the native title claim group – condition met

[102] Section 190B(3) requires the Registrar to be satisfied at sub-section (a) that either the persons in the native title claim group are named in the application or, under sub-section (b) that persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[103] When assessing the requirements under s 190B(3), I understand that:

- (a) I am required to address only the content of the application;³⁹
- (b) *'only ... the members of the claim group are required to be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification'*;⁴⁰
- (c) Where a claim group description contains a number of paragraphs, the paragraphs should be read *'as part of one discrete passage, and in such a way as to secure consistency between them, if such an approach is reasonably open'*;⁴¹
- (d) To determine whether the conditions (or rules) specified in the application have a sufficiently clear description of the native title claim group, [i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described.⁴²

[104] Schedule A of the Amended Claim contains the following description of the native title claim group:

Those persons who are descendants of the following apical ancestors (including through adoption or raising up):

- (a) *Unnamed Barada Woman (spouse of Johnny and Charlie Budby);*
- (b) *Lucy and/or Jimmy Barber;*
- (c) *Kitty (aka Kitty Eaglehawk);*
- (d) *Yatton Boney;*
- (e) *Maggie (mother of Jack Mack and Gypsy Tyson); and*
- (f) *King Boco.*

[105] In *WA v NTR*, Carr J accepted a description which included *'persons adopted by the named people and by the biological descendants of the named people'* without any qualification indicating whether the adoption was according to traditional laws and customs, general law or otherwise. Requiring a member to show descent from an identified ancestor provides a clear starting or external reference point to commence an inquiry about whether a person is a member of the native title claim group. I am of the view that with some factual inquiry it will be possible to identify the persons who fit this part of the description of the native title claim group.

³⁹ *Doepel* [51]; *Gudjala 2007* [30].

⁴⁰ *Gudjala 2007* [33].

⁴¹ *Gudjala 2007* [34].

⁴² *WA v NTR* [67].

[106] Schedule A of the Amended Claim reflects the resolutions passed at the authorisation meeting of 24 June 2023⁴³ confirming that the native title claim group is comprised of persons who are descendants, by birth or adoption, of the Schedule A ancestors.⁴⁴ The approach of identifying members of the native title claim group by descendants of named people, including by adoption, has been accepted by the Court as satisfying the requirements of s 190B(3)(b).⁴⁵

[107] I note that Attachments F and M of the Amended Claim do not appear to reflect the native title claim group description at Schedule A. Attachments F and M include information relating to persons that appear to have been removed from Schedule A. However, as Attachment S to the Amended Claim shows that no amendments were made to Schedules F and M, I have inferred that the absence of consequential amendments to the attachments was an oversight.

[108] I am satisfied that the Schedule A description of the native title claim group in the Amended Claim meets the requirements of s 190B(3).

Section 190B(4): Identification of claimed native title – condition met

[109] Section 190B(4) requires the Registrar to be satisfied that the description contained in the application as required by paragraph 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified. I understand that in order to assess the requirements of this provision, I am confined to the material contained in the application itself.⁴⁶

[110] The description required by s 62(2)(d) is:

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

[111] In *Doepel*, the Court noted that the description of the native title rights and interests must be understandable, have meaning and be without contradiction.⁴⁷ I understand that my task pursuant to s 190B(4), is to identify whether the rights and interests claimed are ‘readily identifiable’. A description of a native title right or interest that is broadly asserted ‘*does not mean that the rights broadly described cannot readily be identified within the meaning of s 190B(4)*’.⁴⁸

[112] I note that whether the claimed rights and interests can be prima facie established as native title rights and interests within the meaning of s 223 is considered in my reasons below under s 190B(6).

[113] Paragraph 1 of Schedule E claims exclusive native title rights and interests over areas where there has been no prior extinguishment of native title or where particular provisions of the Act

⁴³ See Allbrook March affidavit, annexure MA-19, Resolution 7 at meeting 1.

⁴⁴ Schedule A.

⁴⁵ *WA v NTR* [67]; *Yorta Yorta* [108].

⁴⁶ *Doepel* [16].

⁴⁷ *Doepel* [91] – [92], [95], [98] – [101], [123].

⁴⁸ *Doepel* [16]

apply to disregard extinguishment. I understand the “area” in paragraph 1 to include the whole of the application area as described at Schedules B and C of the Amended Claim. Paragraph 2 of Schedule E provides a list from (a) to (n) of non-exclusive native title rights and interests claimed. Each item is clear and, in my view, readily identifiable for the purposes of s 190B(4). Paragraph 3 indicates that the claimed native title rights and interests are subject to the valid laws of the State of Queensland and the Commonwealth and the traditional laws and customs acknowledged and observed by the native title holders.

[114] Having regard to the information contained at Schedules B, C and E, I am satisfied that the requirements of s 190B(4) have been met.

Section 190B(5): Factual basis for claimed native title

[115] Section 190B(5) requires the Registrar to be satisfied that the factual basis for the claimed native title rights and interests is sufficient to support the following assertions:

- (a) that the native title claim group have, and the predecessors of those persons had, an association with the area; and
- (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests; and
- (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[116] Justice Mansfield in *Doepel* states that the task under s 190B(5):

“...requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests.”... “The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts.”⁴⁹

[117] Thus, when assessing the requirements of this condition I understand that I must treat the asserted facts as uncontradicted and assess whether such facts are sufficient to support the existence of the native title rights and interests claimed.

[118] Relevant to the task under s 190B(5) is the guidance provided by the Full Court in *Gudjala FC* in respect of the details required under s 62(2)(e)(i) to (iii) “*general description of the factual basis on which it is asserted that the native title rights and interests claimed exist...*”:

“The fact that the detail specified by s 62(2)(e) is described as “a general description of the factual basis” is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the

⁴⁹ *Doepel* [17]; *Gudjala FC* [57], [83].

*application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim.”*⁵⁰

[119] In *Gudjala 2009*, Justice Dowsett on remittal clarified the task under s 190B(5) as follows:

*In assessing the adequacy of a general description of the factual basis of the claim, one must be careful not to treat, as a description of that factual basis, a statement which is really only an alternative way of expressing the claim or some part thereof. In my view it would not be sufficient for an applicant to assert that the claim group’s relevant laws and customs are traditional because they are derived from the laws and customs of a pre-sovereignty society, from which the claim group also claims to be descended, without any factual details concerning the pre-sovereignty society and its laws and customs relating to land and waters. Such an assertion would merely restate the claim. There must be at least an outline of the facts of the case.*⁵¹

[120] Thus, it is my understanding that whilst the material provided by the applicant need not provide evidence to make out each claim, it must nevertheless provide sufficient factual details to enable a ‘genuine assessment’ of the factual basis for the assertions set out in ss 190B(5)(a) to (c) and at a minimum provide “an outline of the facts of the case”.⁵²

[121] It is convenient to assess each assertion under s 190B(5)(a) to (c) in turn below.

Section 190B(5)(a): “...native title claim group have...and their predecessors had...an association with the area...”

[122] I understand that s 190B(5)(a) requires sufficient factual material to support the following assertions:

- there is an ‘association between the whole group and the area’, although not ‘all members must have such association at all times’;⁵³
- the predecessors of the group were associated with the area over the period since sovereignty;⁵⁴
- there is an association with the entire claim area, rather than an association with part of it or ‘very broad statements’, which for instance have no ‘geographical particularity’;⁵⁵ and
- the identified claim group (and not some other group) hold the identified rights and interests (and not some other rights and interests).⁵⁶

⁵⁰ *Gudjala FC* [92]

⁵¹ *Gudjala 2009* [28], [29]; *Anderson* [43], [48].

⁵² *Gudjala 2009* [29].

⁵³ *Gudjala 2007* [52].

⁵⁴ *Ibid.*

⁵⁵ *Martin* [26]; see also *Corunna* [45].

⁵⁶ *Gudjala 2007* [39].

[123] Before turning to a consideration of the material provided by the applicant for the purposes of s 190B(5)(a) it is useful to note that the Delegate's decision of 29 September 2014 in relation to this matter, considered that the factual basis material met the requirements of s 190B(5)(a). In reaching that conclusion, the Delegate considered material regarding the association of apical ancestors Kitty Eaglehawk and Yatton Boney with the application area both of whom are retained as apical ancestors at Schedule A of the Amended Claim.

Predecessors' association with the claim area

[124] According to the September Submissions, it was established that the effective date of sovereignty is 1865.⁵⁷ The Historical Report references persons included in the list at Schedule A of the Amended Claim and provides source material in support of the apical ancestors and their descendants, particularly Yatton Boney, King Boco, Lucy, and Kitty Eaglehawk, as having an association within and close to the claim area around the time of effective sovereignty.⁵⁸ The source material relies upon information from the Community and Personal Histories Branch, Aboriginal and Torres Strait Island Policy Department of Communities (CPH); Tindale genealogies; archival correspondence; historical newspaper articles, and other historical documents, etc.⁵⁹ See for example, references to the following families:

"On 7 November 1887 Shannon wrote, "All hands cleared...Sold rations to niggers Lucy, Sugar, Kitty and Boco for 2 shillings. Sent the Darkies off." ⁶⁰ The reference to Boco was probably King Boco as he was described..."⁶¹

"In the case of the Budby family and several other families in the region, they worked for the white settlers on country that was traditionally theirs, and this was acknowledged in the reminiscences of J.B. Shannon. At no time, though, did he or his brothers suggest that the Aboriginal people descended from the former 'kings' of Saltbush Park and the country south, to Clive Station, had any recognizable tenure rights to that land."⁶²

"An inquest into the death of stockman Karl Boerl, in 1918, indicated that Alick Smith and Daisy Wilson lived at Clive Station...just west of the Broadsound Range in the BKY claim area...Alick Smith was working as the Head Stockman for the leaseholder...Around this time Alick married Topsy Frances Barron, sometime between 1917 and 1919. Alick and Topsy were the parents of 16 children who were all born on stations or in towns in the region of the BKY claim area, where Alick and Topsy were working."⁶³

"...other records showed that Yatton Boney...was also living at Clive station around this time. He and three other men, Billy Wilson, Powder and Brokely Gray – were employed as

⁵⁷ September Submissions page 4 [12].

⁵⁸ Dr Fiona Skyring Barada Kabalbara Yetimarala Peoples Historical Report 2021 pg 18 - 22, 74 - 76, 82, 99 - 101, 132 - 133, 138 - 139, 141 – 142.

⁵⁹ Historical Report page 24, para 26; Chapter 9.

⁶⁰ Please note that the original language has been retained for reasons of historical accuracy and is not intended to cause offence.

⁶¹ Ibid page 76.

⁶² Historical Report page 119.

⁶³ Ibid page 133.

‘shooters’, possibly dingo or kangaroo shooters...his ‘native place’ was Croydon Station, inland from St Lawrence...Boney had ‘raised Aboriginal scoring’ marks on his chest...”⁶⁴

“In 1927 Barney Olliman was employed at Apis Creek station, and as mentioned in Chapter 1 of this report he was one of the sons of the woman known as Kitty Eaglehawk...”⁶⁵

[125] Excerpts from the testimony of current claim group members supports the information identified in the Historical Report as it relates to the association of their predecessors to the claim area:

[Witness A] regarding her predecessor “Kitty Eaglehawk” and grandfather:

Again, that matriarchal line coming down from Kitty, who is called the apical ancestor, but also a woman who had her own children in a country out here in rough times, early times, with that clash with white settlement and Aboriginal people living on their land, and her having children of her own then who today ends up being my ancestors of the Smith family.⁶⁶

[Witness Y] regarding his ancestor Charlie Budby (great-grandson of King Boco):

“...because my apicals Lizzie and Kitty were – came from Croydon Station played a big role into our grandfather’s occupation or whereabouts he preferred to work...”⁶⁷

[126] At the Preservation of Evidence hearings held in late 2021 and the On Country hearings held in late 2022, many of the BKY People giving evidence spoke about the pastoral stations that were established in the application area at around the time of effective sovereignty (1865)⁶⁸ and in the following years. They spoke about their ancestors working on these stations and the importance of living and working on traditional country. For example, [Witness A] and [Witness Y] gave evidence about the importance of the places on country where their ancestors were born, worked, and used the resources of the land.⁶⁹

[127] In my view, the Historical Report provides sufficient factual details to enable a ‘genuine assessment’ of the factual basis on which it is asserted that the native title rights and interests claimed exist and is sufficient to support the assertion that the apical ancestors listed at Schedule A of the Amended Claim were associated with areas located within or in proximity to the Amended Claim area and the BKY#1 claim area at the time of effective sovereignty and thereafter.

Native title claim group association with the claim area

[128] Excerpts and summaries from the testimony of current claim group members at the On-country Hearings includes the following:

⁶⁴ Ibid.

⁶⁵ Ibid page 139.

⁶⁶ Excerpt from Transcript of on-country hearing on 15 November 2022 page 155 (‘Day 2 Transcript’).

⁶⁷ Ibid page 205.

⁶⁸ Transcript on-country hearing 14.11.2022 p14 (Day 1 Transcript).

⁶⁹ Refer to transcript of on-country hearing on 14 November 2022 pp 35 to 41, pp 122-124, pg 141 and pg 205.

[Witness Z] giving evidence at Dingo Head, Croydon Station:

"This is Dingo Head Mountain...This is where my Grandfather was born, just down around the corner there..."⁷⁰

"...We walked from there all the way to here doing cultural heritage. And we've picked up a lot of stuff along the way. And as we were coming through they were comping behind us with bulldozers, knocking the scrub down behind us and destroying our artefacts. And we had gummbi – your gumbis up there growing...gumbi is one of our best medicines for our people."⁷¹

"...I run all over this country when I was a kid. We come out here chasing sand goanna. This is the best place for sand goanna, best place for porcupine. You get good plain turkeys out here cos they're clean."⁷²

[Witness Y] giving evidence at Middlemount and surrounds under examination in chief⁷³:

- When he was younger he would go to the Isaac River with his Uncles to fish Yellow belly, freshwater perch and freshwater mussels to be cooked on the coals;
- Now goes to the Isaac River with his sons and showed them how to find mussels and other things about bush tucker;
- When camping at Isaac River he was shown how to catch, prepare and cook porcupines, and sand goannas (Duggan) by his Uncles;
- He was told by his Uncles not to eat emu (Goondaloo) as they are ancestors.

[Witness A] giving evidence at Middlemount and surrounds under cross-examination⁷⁴:

- Going onto Junee Park with Aunties and learning about catching fish and gathering berries;
- Visiting Girrah and learning about the significance of waterlilies on the lagoon;
- Visiting country with her son, daughter and grandchildren and camping on country.

[Witness B] giving evidence at Clarke Creek under examination in chief⁷⁵:

- Taught about how to prepare and use bush medicine by mum, aunties and uncles which she collects on country in accordance with how she has been taught;
- Collecting ochre from country for different spiritual and ceremonial purposes;
- Locating artefacts on country with assistance from totemic guides.

[Witness C] giving evidence under re-examination at the Isaac River⁷⁶:

"...My Nanna and Pop they were married just down there at the Yatton Station, the homestead just down the road, and this was an area where Nanna and Pop came....but

⁷⁰ Transcript 18 November 2022 pg 503

⁷¹ Ibid pg 514

⁷² Ibid pg 529

⁷³ Transcript 15 November 2022 pg 215 -

⁷⁴ Ibid pg 149, 165, 167

⁷⁵ Transcript 17 November 2022 pg 429 - 442

⁷⁶ Transcript 17 November 2022 pg 339, 340

Nanna has always talked about this river...And even before Native Title and any of this come into place, I had the pleasure and the opportunity to come down here with Nanna, to take Nanna to bring Nanna and my Aunty Rene down or my Aunty Ethel, whoever was home at the time, and a couple of Nanna's other great grandchildren, and we'd come down here and we'd go all over the country, you know, cramming so much in a day..."

"But this is a special tree because this is where I put a lot of time and effort in here with Nanna all over, and she pointed out that tree there, and I don't know if youse felt it but to us Indigenous, to us Murris we feel the connection and we know what's there in that tree..."

[129] In my view, the evidence given at the On-Country hearings excerpted and summarised above provide sufficient factual details to enable a 'genuine assessment' of the factual basis on which it is asserted that the native title rights and interests claimed exist and is sufficient to support the assertion that members of the claim group have an ongoing association with the claim area.

[130] Having regard to the information above, I am satisfied that the factual basis material is sufficient to meet the requirements under s 190B(5)(a).

Section 190B(5)(b): Traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the native title rights and interests

[131] Section 190B(5)(b) requires the factual basis material to be sufficient to support the assertion of the existence of the traditional laws and customs giving rise to the native title rights and interests claimed. The definition of 'native title rights and interests' in s 223(1)(a) provides that those rights and interests must be '*possessed under the traditional laws acknowledged by, and traditional customs observed*' by the native title holders.

[132] The High Court in *Yorta Yorta*, observed that laws and customs are 'traditional' where:

- (a) '*the origins and content of the law or custom concerned are to be found in the normative rules' of a society that existed prior to the assertion of British sovereignty,*⁷⁷ *where the society consists of a body of persons united in and by their acknowledgement and observance of a body of laws and customs;*⁷⁸
- (b) *the normative system under which those traditional rights and interests are possessed is one which 'has had a continuous existence and vitality since sovereignty';*⁷⁹
- (c) *the laws and customs have been passed from generation to generation, and must be rooted in the traditional laws and customs that existed pre-sovereignty;*⁸⁰
- (d) *those laws and customs have been acknowledged and observed without substantial interruption since sovereignty.*⁸¹

⁷⁷ *Yorta Yorta* [46].

⁷⁸ *Ibid* [49].

⁷⁹ *Ibid* [47].

⁸⁰ *Ibid* [46], [79].

⁸¹ *Ibid* [87].

[133] Dowsett J discussed some of the factors that may guide the Registrar in assessing the factual basis in *Gudjala 2009*, including that:

- (a) *it is necessary for the factual basis material to identify the relevant pre-sovereignty society of persons who acknowledged and observed the laws and customs;*⁸²
- (b) *where the basis for membership of the claim group is descent from named ancestors, the factual basis material must demonstrate some relationship between the ancestors and the pre-sovereignty society from which the laws and customs are derived;*⁸³ and
- (c) *the factual basis material must provide an explanation, beyond a mere assertion, of how the current laws and customs of the claim group are traditional and derived from the pre-sovereignty society.*⁸⁴

[134] I also note the observations of the Full Court in *Warrie*, that although,

*‘a claim group must establish that the traditional law and custom which gives rise to their rights and interests in that land and waters stems from rules that have a normative character’, the Act does not ‘require establishment of some overarching “society” that can only be described in one way and with which members of a claim group are forever fixed in relation to any other land and waters over which they assert native title’.*⁸⁵

[135] The September Submissions assert that the laws and customs of the BKY People:

“...are derived from the transmission of knowledge from generation to generation passing on the laws and customs of the normative society at the time of European occupation. Some of the broader traditional laws and customs are:

- a. Respect for Elders;*
- b. Elders reaching decision by consensus;*
- c. Elders having the right to speak for country;*
- d. Sharing resources;*
- e. Caring for country;*
- f. Burial on country; and*
- g. Access, camping and living on country.”*

[136] Excerpts and summaries from the testimony of current claim group members at the On-Country Hearings includes the following:

[Witness Y] giving evidence at Middlemount and surrounds under examination in chief⁸⁶:

“If you haven't got the permission. Only through the permission, if you are allowed to do. You not to do the proper welcome; you can do a acknowledge – acknowledgement to

⁸² *Gudjala 2009* [37], [52].

⁸³ *Ibid* [40].

⁸⁴ *Ibid* [29], [54].

⁸⁵ *Warrie* [107]; see also *Alyawarr* [78].

⁸⁶ Transcript 15 November 2022 pg 196, 226, 232, 235

country with permission, but a proper welcome to country is only accepted by the elders and to perform by the elders.”

“...Consequences in our folklores, history, special permission needed (to go up Mt Bora). Nobody goes there today. We don’t expect anybody to go there in the near future without going through the proper process...I’d have to go through my elders who are part of our group. One particular old man sitting out in the crowd there, he’d have to give me that permission and also put me through the proper protocols for me to venture up there.”

“All over BKY we share our country with the other two clan groups, Kabalbara, Yetimarala people...that’s been ongoing all the time. Even through the old ringing days they worked together...stockmen days...Croydon used to be the big outpost area, main hub for all people that come from the area.”

“...Making decisions. Rights and interests is a big – big part of everyday society, you know. But we still do that to this day. We don’t make any decisions – any other people’s country.”

[Witness A] giving evidence at June National Park under examination in chief⁸⁷:

- When they were doing some work with Powerlink, ochre sites were located at the top of the escarpment...after consulting with Uncle Clarrie and others elders were brought to the location because the view was that it was a men’s place for ceremony because of the ochre being close by and because of the association with the birth place of [grandfather];

“For me the relationship (with Mundagutta and Junjardi) is based on our traditions, our elders, how they call out to those beings...I can only work from inside my own cultural knowledge base and talk to the things that feel right for me based on what I’ve been told...”

“Apis Creek is like the crossing between inland people, fresh water people and then moving across towards the coast, you know towards St Lawrence. So what I’ve been told is that there was that element of trade that I mentioned yesterday between people on that St Lawrence side and people on this side. But for some reason that gateway between those two places was a familiar place and a number of tribes passed through there...So, you know it was a place where people if they’re travelling say from here around Yatton across there, it’s a good pull up place because of the prevalence of fresh water and honey and those things...”

[137] The testimony of the claim group members as excerpted and summarised in paragraphs [128] and [136] above provide factual details regarding “broader traditional laws and customs” referred to in the September Submissions. The evidence of [Witness Y] and [Witness A] includes explanations, examples and details regarding “respect for elders”, “decision-making by elders” and “sharing resources”, all of which appear from their testimony as practices

⁸⁷ Ibid pg 135 – 137, 112

rooted in past practices, as handed down to them by their ancestors, and carried on by BKY People today.

[138] The evidence of [Witness Y], [Witness A], and other claim group members during the On-country hearings also provided factual details concerning respect for ancestral spirits and spiritual beings on country and sanctions for failure to observe correct practices. For example, most of the witnesses gave evidence about acknowledging their ancestors whenever they visit country and how this is often one of the first things they do to ensure that their ancestors help keep bad spirits away. [Witness A] spoke about calling out to the old people to let them know who she is and that she is on country with proper respect.⁸⁸ Another witness [Witness D], gave evidence about how his grandfather taught him about keeping away from certain sites noting that ‘things won’t go your way’ if you visited these sites.⁸⁹

[139] For the purpose of assessing whether there exist traditional laws acknowledged by and traditional customs observed by the BKY People that give rise to the claim to native title rights and interests, I am satisfied that the factual material outlined above contains sufficient detail and information to permit a genuine assessment of whether it is “traditional” in the sense outlined by the High Court in *Yorta Yorta* and in *Gudjala 2009*.

[140] Having regard to the information above, I am satisfied that the factual basis material is sufficient to meet the requirements under s 190B(5)(b).

Section 190B(5)(c): Native title claim group have continued to hold the native title in accordance with those traditional laws and customs

[141] Section 190B(5)(c) requires the factual basis material to be sufficient to support the assertion that the native title claim group continues to hold native title in accordance with the traditional laws and customs. The traditional laws and customs referred to in s 190B(c) are those referred to under s 190B(5)(b).⁹⁰

[142] I understand that continuity may be inferred where there is ‘[c]lear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs’.⁹¹

[143] The September Submissions include excerpts from testimony that support the assertion that the BKY People hold native title rights and interests in accordance with their traditional laws and customs.

[Witness Y] provided the following evidence regarding the transmission of rights of access to country through descent:

Yes, indeed. Barwon Park was passed down through our stories from the uncles and the grandfathers, grandfather down to uncle actually, yeah. Which Barwon Park hold a lot of

⁸⁸ Refer to transcript of Day 2 of on-country hearing on 15 November 2022, p 115.

⁸⁹ Refer to transcript of Day 3 of on-country hearing held on 16 November 2022, p 312.

⁹⁰ *Martin* [29].

⁹¹ *Gudjala 2009* [33].

*significance for our people, Barada Kabalbara people. They've had many of powwows there, if you like, ceremonial corroborees, marriages and feasts.*⁹²

[Witness A] gave evidence of the importance of showing respect for Elders and ancestors by calling out to them when visiting Country:

*For this area here it would be Kitty, starting with her but then working my way through the others as well. I also pay respect to my brother who was part of this who passed away... So I know they're here with me and it's just saying to the spirits of this land is that I'm here, I'm a descendant, I come here with good intent and I'll leave this place as I find it.*⁹³

[144] Excerpts and summaries of evidence at the On-Country hearings in paragraphs [128], [136] and [143] above, include facts, details, examples, and explanations from current members of the BKY claim group regarding the transmission of knowledge, stories, practices, laws, and customs from generation to generation and continued observance and transmission of same to the present day. In my view such information provides a sufficient factual basis from which a genuine assessment can be made regarding the extent to which the BKY People have continued to hold the claimed native title rights and interests in accordance with those traditional laws and customs.

[145] Having regard to the information above, including the information outlined in relation to s 190B(5)(a) and (b), I am 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 that the native title claim group have continued to hold the native title in accordance with their traditional laws and customs as required under s 190B(5)(c).

Section 190B(6): Prima facie case – condition met

Native title rights and interests prima facie established

[146] Section 190B(6) requires the Registrar to consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.⁹⁴

[147] In undertaking a consideration pursuant to s 190B(6) I may consider material additional to the application.⁹⁵ As a “more onerous test (is) to be applied to the individual rights and interests claimed”⁹⁶ than under s 190B(5)” I consider that the task involves some weighing of the factual basis for the claimed rights and interests. It follows that a claimed native title right and interest can be *prima facie* established if the factual basis is sufficient to demonstrate that it is possessed pursuant to the traditional laws and customs of the native title claim group.⁹⁷

⁹² Excerpt included in the Submissions [40].

⁹³ Excerpt from Transcript of on-country hearing on 14 November 2022 pg 103 ('Day 1 Transcript') included in Submissions [34].

⁹⁴ S 186(1)(g) of the Act requires the Register of Native Title Claims to include a description of the native title rights and interests considered, prima facie, could be established under s 190B(6).

⁹⁵ Ibid [16].

⁹⁶ *Doepel* [127], [132].

⁹⁷ *Yorta Yorta* [86]; *Gudjala 2007* [86].

[148] According to Dowsett J in *Gudjala 2007*, s 190B(6) is to be considered having regard to the definition of ‘native title rights and interests’ in s 223(1).⁹⁸ As such, I must consider whether, on a *prima facie* basis, the claimed native title rights and interests:

- exist under traditional laws and customs in relation to any of the land or waters in the application area;
- are native title rights and interests in relation to land or waters; and
- have not been extinguished over the whole of the application area.

[149] Kirby J in *Ward HC*, observed that ‘for a native title right to be recognised under the [Act], the critical threshold question is whether it is a right or interest “in relation to” land or waters’.⁹⁹ The term “in relation to” is here to be given a ‘wide import’.¹⁰⁰

[150] Schedule E of the Amended Claim includes a description of the native title rights and interests claimed. Schedule E remains unchanged as indicated at Attachment S. Each of these claimed native title rights and interests, with the exception of two, were accepted as having been established on a *prima facie* basis when the requirements of s 190B(6) were previously considered by the Registrar’s delegate in the 2013 and 2014 Registration Test decisions. Having regard to those decisions, the Amended Claim and the Additional Material, and as I am not aware of any material to the contrary, I am satisfied that the requirements of s 190B(6) are met in respect of the claimed rights at Schedule E (a) to (k) and (n).

[151] In the 2013 and 2014 Registration Test decisions the delegate found that the following rights and interests were not established on a *prima facie* basis, and could not be entered on the Register. These are as follows:

- (l) To speak authoritatively about the application area among other Aboriginal People in accordance with traditional laws & customs
- (m) To make decisions about the use and enjoyment of the area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged and observed by the native title holders.

[152] The September Submissions do not provide further information in relation to the above claimed native title rights and interests, however they do provide further information in relation to the following claimed native title rights and interests:

- (a) To access, be present on, move about on and travel over the area¹⁰¹
- (b) To have access to, take and use natural resources from the land and waters of the area for personal, domestic and non-commercial communal purposes¹⁰²
- (c) To be buried or bury native title holders on the area,¹⁰³ and

⁹⁸ *Gudjala 2007* [85] to [87].

⁹⁹ *Ward HC* [577].

¹⁰⁰ *Alyawarr* [93].

¹⁰¹ Applicant’s Submissions at [47]-[48].

¹⁰² Applicant’s Submissions at [49].

¹⁰³ Applicant’s Submissions at [50].

(d) To maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places.¹⁰⁴

[153] In addition to excerpts appearing in paragraphs [128], [136], and [143] above, and the Preservation of Evidence hearings, the following information is relevant to a consideration of the native title rights and interests at (l) and (m) of Schedule E:

[Witness E] giving evidence at Fitzroy River crossing under cross-examination identified:¹⁰⁵

- particular elders who speak for particular parts of BKY country such as Clarke Creek;
- seeking permission from particular elders to visit sites and accompany particular persons to particular sites.

[Witness F] giving evidence at Foleyvale Bottom Camp under cross-examination detailed:¹⁰⁶

- himself and other elders as able to speak for particular parts of BKY country such as Cotherstone and Apis Creek;
- permissions needed from elders to travel and use resources within BKY country and when travelling outside of BKY country;
- strict laws and permissions apply to territorial rights within BKY country;
- sanctions for failing to obtain permission were carried out “in the early days” in accordance with the law;
- the importance of passing down knowledge and custom through the generations,
- conservation practices taught to him by elders.

[154] I consider that taken together the information in the paragraph above evidences ongoing practices such as the right to “speak for” particular areas and sites within BKY country; to visit, maintain, and accompany persons to particular sites within BKY country, to give or withhold permission to travel and use resources of particular areas within BKY country. I also consider that the evidence provides a sufficient factual basis from which it can be established that these practices have been passed down through generations of BKY People and that they continue to exercise the claimed native title rights and interests at (l) and (m) of Schedule E in accordance with traditional laws acknowledged by and customs observed by them and that such rights and interests have not been extinguished over the whole of the claim area.

[155] Having regard to the above information, I am satisfied that the requirements of s 190B(6) have been met in respect of the claimed rights at Schedule E (l) and (m).

Section 190B(7): Physical connection – condition met

[156] Section 190B(7) requires the Registrar to be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters, but for certain things done.

¹⁰⁴ Applicant’s Submissions at [51]-[52].

¹⁰⁵ Preservation of Evidence hearing 4 November 2021, pg 263, 313 – 314.

¹⁰⁶ Preservation of Evidence hearing 3 November 2021, pg 189, 210, 215, 245 - 248.

[157] The courts have observed that the traditional physical connection under s 190B(7) ‘must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs’.¹⁰⁷ “Traditional” as that term is used under s 223 of the Act, was considered by the members of the joint judgment in *Yorta Yorta* who noted that:

*“the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs ... “traditional” in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty.”*¹⁰⁸

[158] In *Doepel*, the task of the Registrar under s 190B(7), requires ‘some measure of substantive (as distinct from procedural) quality control upon the application, if it is to be accepted for registration’.¹⁰⁹ Having regard to the authorities cited, I understand that I must be satisfied that the material provides a factual basis from which I can establish that at least one member of the claim group has or had the necessary “traditional” physical association with the application area.

[159] I refer to my reasons and conclusions regarding the requirements of s 190B(5) and s 190B(6). In particular, I have considered the significant evidence given by claim group members at the Preservation of Evidence hearings and On-country hearings in November of 2021 and 2023 respectively¹¹⁰. The evidence provided at the hearings by [Witness E], [Witness F], and [Witness Y] detail longstanding and contemporary physical access to the lands and waters of the claim area for various purposes including hunting, fishing, caring for sites and conservation by BKY People carried on in accordance with laws, customs and traditional practices passed down from generation to generation. I am satisfied that taken together the evidence establishes that a number of claim group members currently have and have had a traditional physical connection with the lands and waters of the claim area.

[160] Having regard to the above information, I am satisfied that the Amended Claim meets the requirements of s 190B(7).

Section 190B(8): No failure to comply with s 61A – condition met

[161] Section 190B(8) provides that the application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that, the application should not have been made because it does not comply with s 61A.

[162] Section 61A restricts the making of a native title determination application over areas where there has been a previous native title determination/s; or where a previous exclusive possession act was done in relation to the area; or from claiming certain native title rights and interests where a previous non-exclusive possession act was done in relation to an area.

¹⁰⁷ *Gudjala 2009* [84].

¹⁰⁸ *Yorta Yorta* [86].

¹⁰⁹ *Doepel* [18].

¹¹⁰ See paragraphs [136], [143], [153].

- [163] The Applicant Affidavits each state that none of the area covered by the application is also covered by an approved determination of native title as confirmed by the Geospatial Assessment.
- [164] Schedule B of the application indicates that it does not cover any areas where a previous exclusive possession act was done or any other area where native title has been otherwise extinguished except where ss 47, 47A and 47B may apply. In my view, this statement excludes previous non-exclusive possession acts from the Amended Claim.
- [165] Schedule E, para 2 to the application claims non-exclusive native title rights and interests over areas where exclusive possession cannot be recognised.
- [166] In the absence of evidence to the contrary, I am satisfied that the information contained in the Applicant Affidavits, the Geospatial Assessment and Schedules B and E of the Amended Claim meet the requirements of s 190B(8).

Section 190B(9): No extinguishment etc. of claimed native title – condition met

- [167] Section 190B(9) provides that the application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that, claimed native title rights and interests that include claims to ownership of minerals, petroleum or gas wholly owned by the Crown; or exclusive rights to waters in an offshore place; or extinguished native title rights and interests (except where such extinguishment can be disregarded under certain provisions of the Act¹¹¹).
- [168] Schedules Q and P of the application do not include claims under s 190B(9)(a) and (b) to minerals, petroleum or gas; or to any waters in an offshore place.
- [169] Schedule B of the application states that it does not cover any areas where a previous exclusive possession act was done or any other area where native title has been otherwise extinguished except where ss 47, 47A and 47B may apply. In my view, this statement excludes previous non-exclusive possession acts from the Amended Claim.
- [170] In the absence of evidence to the contrary, I am satisfied that Schedules B, Q and P of the Amended Claim meet the requirements under s 190B(9).

End of reasons

¹¹¹ See ss 47(2), 47A(2), 47B(2) or 47C(8) of the Act.

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Sam Dallachy & Ors on behalf of the Barada Kabalbara & Yetimarala People and State of Queensland & Ors (BKY#2)
NNTT No.	QC2013/005
Federal Court of Australia No.	QUD15/2019

Section 186(1): Mandatory information

In accordance with ss 186, 190A(1) of the *Native Title Act 1993* (Cth), the following is to be entered on the Register of Native Title Claims for the above application.

Application filed/lodged with:

Federal Court of Australia

Date application filed/lodged:

10 August 2023

Date application entered on Register:

13 May 2024

Applicant:

Samuel Dallachy, Lalu Asela, Elizabeth Doyle, Juanita Mason, Skye Muller, Norman Ross, Deborah Santo, Vanessa Saunders, Michael Smith, Davina Tilberro Snr, Claudine Walsh

Applicant's address for service:

Queensland South Native Title Services Ltd, Level 4, 293 Queen Street, Brisbane, QLD, 4000.

Conditions on Applicant's authority

See attachment below

Area covered by application:

The Amended Claim is in the Central Queensland region. It includes lands and waters over approximately 294 sq kms covering an area located to the north of Rockhampton, Central Queensland.

Persons claiming to hold native title:

Those persons who are descendants of the following apical ancestors including through adoption or raising up):

- (a) Unnamed Barada Woman (spouse of Johnny and Charlie Budby);

- (b) Lucy and/or Jimmy Barber;
- (c) Kitty (aka Kitty Eaglehawk);
- (d) Yatton Boney;
- (e) Maggie (mother of Jack Mack and Gypsy Tyson); and
- (f) King Boco.

Registered native title rights and interests:

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

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

- (a) To access, be present on, move about on and travel over the area
- (b) To camp on the area and for that purpose, erect temporary shelters on the area
- (c) To hunt, fish and gather on the land or waters of the area for personal, domestic and non-commercial communal purposes.
- (d) To have access to, take and use natural resources from the land and waters of the area for personal, domestic and non-commercial communal purposes
- (e) To hold meetings in the application area
- (f) To conduct ceremonies in the area
- (g) To maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places
- (h) Teach on the area the physical and spiritual attributes of the area
- (i) To be buried or bury native title holders on the area
- (j) To live on the application area
- (k) To move about the application area
- (l) To speak authoritatively about the application area among other Aboriginal People in accordance with traditional laws & customs
- (m) To make decisions about the use and enjoyment of the area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged and observed by the native title holders
- (n) To transmit the cultural heritage of the native title claim group including knowledge of particular sites

3. The native title rights are subject to and exercisable in accordance with:

- a) The valid laws of the State of Queensland and the Commonwealth of Australia;
- b) The traditional laws acknowledged and the traditional customs observed by native title holders.

Paulette Dupuy

Delegate of the Native Title Registrar pursuant to ss 190–190D of the **Act** under an instrument of delegation dated 5 February 2024 and made pursuant to s 99 of the Act.

A DEFINITIONS

Aboriginal Party has the same definition as in the ACHA.

ACHA means the *Aboriginal Cultural Heritage Act 2003* (Cth).

Applicant means the person or persons authorised to bring the BKY Claims on behalf of the BKY People and to deal with matters arising in relation to the BKY Claims.

BKY means Barada Kabalbara Yetimarala.

BKY Claims or Claims means native title determination applications QUD13/2019 and QUD15/2019 and

Claim has a corresponding meaning.

BKY Claim Group or Claim Group means the persons who, according to their traditional laws and customs, hold the common or group rights and interests claimed in the BKY Claims.

CATSU Act means the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

Conditions means this document which imposes conditions on the authority of the Applicant for the purposes of section 251BA of the NTA.

ILUA means an indigenous land use agreement under Division 3 of Part 2 of the NTA.

PBC means a prescribed body corporate as defined in the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth).

NTA means the *Native Title Act 1993* (Cth).

Rule Book means the PBC rule book or constitution.

Registered Native Title Claimant means, in relation to land or waters, a person or group of persons whose name or names appear in an entry of the register of native title claims as the Applicant in relation to a claim to hold native title in relation to the land and waters as defined in the NTA.

B. SCOPE

1. Roles and Responsibilities

The role of the Applicant is to bring the BKY Claims and to deal with matters that arise in relation to the Claims by giving instructions on certain matters, subject to these conditions.

The role of the Applicant (and those individuals who jointly are the Applicant) ceases when the court makes a determination of native title (including the determination of any appeals) or when the Claims are discontinued, dismissed or withdrawn.

2. Applicant for the Native Title Determination Application

2.1 Role

The Applicant will:

- C. act for and on behalf of the BKY Claim Group to make an application to the Federal Court of Australia for a determination that native title exists in the BKY Claims area; and
- D. act for and on behalf of the BKY Claim Group to deal with any matters arising in connection with the BKY Claims (this includes in relation to future act and cultural heritage matters).

2.2 Responsibilities

The Applicant must:

- a) remain informed about, and engaged in, progressing the BKY Claims at all times;
- b) provide timely and informed instructions, as necessary, to the BKY Claim Group's solicitor in relation to the BKY Claims;
- c) do all things necessary to implement resolutions of the BKY Claim Group in relation to the BKY Claims;
- d) not act inconsistently with any resolution passed by the BKY Claim Group;
- e) not execute an agreement that has the effect of extinguishing or confirming the extinguishment of native title within the external boundary of the Claims without first obtaining a resolution of the BKY Claim Group authorising the Applicant to do so;
- f) not execute an agreement that involves high disturbance to the land (such as a mining agreement) or that is over extended land areas (such as windfarm or solar farm projects) within the external boundary of the BKY Claims without first obtaining a resolution of the BKY Claim Group authorising the Applicant to do so;
- g) not agree to amend the BKY Claims without a resolution of the BKY Claim Group authorising them to do so;
- h) not agree to dismiss, discontinue or withdraw the BKY Claims without first obtaining a resolution of the BKY Claim Group authorising them to do so;
- i) attend and participate in properly convened meetings of the Applicant; and
- j) sign agreements or other documents to which the Applicant, through its decision making process, has resolved to agree and execute when asked to do so.

The Applicant (and the individuals who are jointly the Applicant) has an overriding duty to the BKY Claim Group and, while performing the role and duties of the Applicant, must prefer the interests of the BKY Claim Group as a whole to their individual interests or those of their family or friends.

These responsibilities are intended to be a general statement and apply (as required) to each of the roles identified at [2], [3], [4], [5] and [6] in this document.

2.3 Powers

Subject to these Conditions, the Applicant may:

- a) make decisions and give instructions to the BKY Claim Group's solicitor in relation to steps that are necessary or incidental to the prosecution or advancement of the BKY Claims; and
- b) with the assistance of the BKY Claim Group's solicitor and on their advice,
 - i. enter into negotiations with persons or groups that claim an overlapping interest in the claim area or who claim membership of the BKY Claim Group; and
 - ii. enter into negotiations with the State of Queensland and other respondent parties regarding the possible resolution of the BKY Claims; but
 - iii. not make a final decision arising out of negotiations in (i) or (ii) without a resolution of the BKY Claim Group.

3. Applicant for the incorporation of the Prescribed Body Corporate

A PBC is required to be nominated at the same time that native title is determined over the native title claims area.

A PBC may also seek registration under the ACHA as the registered cultural heritage body for the BKY Claims area.

3.1 Role

The Applicant will implement the views and interests of the SKY Claim Group in developing a Rule Book for the PBC that is suitable and relevant to the BKY Claim Group.

3.2 Responsibilities

The Applicant must:

- a) understand and familiarise themselves with the governance requirements and functions of a PBC under the CATSI Act;
- b) consult with members of the BKY Claim Group to obtain their views regarding the structure and Rule Book of the PBC;
- c) consider and respond to any advice provided by a solicitor assisting the BKY Claim Group in regards to the structure and Rule Book of the PBC;
- d) provide timely instructions to any solicitor assisting the BKY Claim Group to ensure that the PBC is registered before the Claims are resolved;
- e) adopt the final structure and Rule Book of the PBC as discussed and agreed upon by the BKY Claim Group, ensuring that it is representative of the BKY Claim Group's views, interests and traditional laws and customs; and
- f) actively encourage and recruit members of the BKY Claim Group to apply for membership of the PBC.

3.3 Powers

The Applicant may resolve to incorporate a corporation under the CATSI Act as described in [3.2] and sign and lodge any documents necessary for the registration and incorporation of the PBC with the Office of the Registrar of Indigenous Corporations.

4. Registered Native Title Claimant for Future Acts

*After a native title claim is registered, the Applicant becomes the Registered Native Title Claimant and the claim group acquires certain procedural rights regarding specified activities (**future acts**) taking place within the claim area, under Division 3 of the NTA.*

The Applicant will play a central role in negotiating and managing these procedural rights.

4.1 Role

The Applicant will:

- a) be the point of contact for receiving future act notices under sections 24 and 29 of the NTA on behalf of the BKY Claim Group; and
- b) represent the BKY Claim Group in responding to notices and negotiating future act agreements under Division 3 of the NTA, including by providing instructions to solicitors where appropriate.

4.2 Responsibilities

The Applicant must:

- a) respond to future act notices as required, or provide instructions to their solicitor to provide standard responses to different types of notices under Division 3 of the NTA;
- b) obtain and consider legal advice in regards to proposed future act agreements;

- c) provide timely instructions to any solicitor engaged on behalf of the BKY Claim Group regarding negotiation of future act agreements; and
- d) regularly report to the BKY Claim Group on the progress and content of negotiations of future act agreements.

4.3 Powers

The Applicant may:

- d) negotiate agreements under s 31 of the NTA; and
- e) negotiate ancillary agreements with proponents under Division 3 of the NTA, subject to the instructions of the BKY Claim Group.

5. Registered Native Title Claimant for Indigenous Land Use Agreements

ILUAs are often negotiated during the life of native title claims. They may also be negotiated in relation to future acts such as the establishment of a large-scale mine by a mining company or wind farm or solar farm projects.

5.1 Role

The Applicant will:

- a) engage in the negotiation of ILUAs by providing timely instructions to the solicitor, based on the views and interests of the BKY Claim Group; and
- b) subject to the instructions of the BKY Claim Group, be the signatory for any ILUAs authorised by the BKY Claim Group.

5.2 Responsibilities

The Applicant must:

- a) obtain and consider legal advice on negotiations, strategies and benefits and other consequences of any proposed ILUAs;
- b) provide timely instructions to the solicitor and attend meetings with proponents, where necessary, during ILUA negotiations;
- c) provide regular updates to the BKY Claim Group on the negotiation of ILUAs; and
- d) obtain consent from the BKY Claim Group before agreeing to any ILUAs.

5.3 Powers

The Applicant may:

- a) negotiate ILUAs, including by providing instructions to the BKY Claim Group's solicitor and attending meetings with proponents, where appropriate; and
- b) sign ILUAs, once consent is obtained from the BKY Claim Group.

6. 'Aboriginal Party' under the ACHA

When the claim has been registered, the Applicant as the Registered Native Title Claimant is the Aboriginal Party in relation to the claims area for the purposes of the ACHA and may be required to negotiate agreements or faci/itate cultural heritage inspection work within the claims area.

6.1 Role

The Applicant will:

- a) act as the Aboriginal Party for any negotiations or activities required by the ACHA; and
- b) facilitate and coordinate cultural heritage inspection work to be carried out by members of the BKY Claim Group, as required.

6.2 Responsibilities

The Applicant must

- a) consult with and consider the views of the BKY Claim Group to ensure that traditional laws and customs are properly incorporated into any cultural heritage agreements;
- b) maintain a thorough knowledge of the location of sites that are significant to the BKY Claim Group. If the member of the Applicant themselves do not or cannot have this knowledge, they must ensure that during negotiations of any cultural heritage agreement, they are in regular contact with members of the BKY Claim Group who can advise them of significant sites in the relevant area which must be taken into consideration;
- c) obtain and consider legal advice on negotiations, strategies and benefits of any proposed cultural heritage agreements;
- d) provide timely instructions to the BKY Claim Group's solicitor and attend meetings with proponents, where necessary, during cultural heritage agreement negotiations, with the BKY Claim Group's solicitor being present;
- e) report to the BKY Claim Group on the progress and content of negotiations of cultural heritage and other agreements;
- f) for large scale projects (such as mining, windfarm or solar projects) obtain consent from the Claim Group before signing cultural heritage or other agreements;
- g) sign cultural heritage and other agreements for small projects after consideration of [6.2.a-d)];
- h) ensure that cultural heritage work is allocated fairly amongst all members of the BKY Claim Group who have the cultural authority to undertake that work in accordance with traditional law and custom; and
- i) inform the BKY Claim Group of the process for allocating cultural heritage inspection, protection and management work and provide updates in relation to that work to the BKY Claim Group.

6.3 Powers

The Applicant may:

- a) negotiate and reach agreement with respect to cultural heritage matters;
- b) sign cultural heritage agreements for small scale projects;
- c) sign cultural heritage agreement for large scale projects (such as mining, windfarm or solar projects) once they have obtained the consent of the BKY Claim Group;
- d) develop a fair and inclusive process for allocating cultural heritage inspection work to members of the BKY Claim Group;
- e) register the PBC referred to at [1.2] as the Registered Aboriginal Cultural Heritage Body under the
- f) ACHA for the Claims area or any area within reason where the Claim Group asserts cultural heritage
- g) exists;
- h) r) in the first instance, appoint a professional cultural heritage service provider and confirm that appointment as soon as possible with the BKY Claim Group at a claim group meeting; and
- i) s) engage the services of a technical advisor, such as an anthropologist or archaeologist, in regards to cultural heritage inspection.

C. GOVERNANCE

7. Decision Making

It is important that the Applicant follow formal procedures when making decisions, to ensure that decision-making is fair and transparent. Therefore, the following procedures must be followed by the Applicant for all decisions made in connection with any of the roles discussed under section B above.

7.1 Calling Meetings

- a) Any decision by the Applicant must be made during a properly convened meeting of the Applicant.
- b) The quorum for an Applicant meeting will be a majority of the Applicant.
- c) Subject to the notice requirements at [d]) below, any member of the Applicant or the solicitor for the Applicant may call an Applicant meeting to discuss business in connection with the BKY Claims, incorporation of the PBC, future acts, cultural heritage or ILUAs.
- d) In the normal course of business, notice must be given to all members of the Applicant at least 7 days before an Applicant meeting is to be held. The notice should provide information about the purpose of the meeting and the specific matters that are to be considered. If a meeting needs to be convened on an urgent basis, a meeting may be held on shorter notice if a majority of the Applicant agrees to that course (agreement may be sought in individual phone calls).
- e) The Applicant may hold a meeting at two or more venues using any technology that provides each member of the Applicant in attendance a reasonable opportunity to participate.

7.2 Decision Making

- a) A decision of the Applicant will be preferably made by consensus.
- b) If a consensus cannot be achieved, a decision may be made by a vote with the vote of the majority of the authorised Applicant deciding the question.
- c) Voting by proxy is not permitted.
- d) Where not all members of the Applicant are present at an Applicant meeting, those present may make a binding decision if a number equal to a majority of the total number of authorised Applicant members agrees.
- e) Where a decision has been properly made, all members of the Applicant must abide by the decision regardless of their personal views and must not act contrary to the decision.

8. Accountability

It is important in its role as an agent of the claim group that the Applicant keeps the claim group informed of its activities and what it is doing on behalf of the claim group.

It is especially important that the claim group is aware of any money or other benefits that are payable to (or become payable to) the claim group because there is a native title claim before the court.

- a) The Applicant must report to the BKY Claim Group at not more than six month intervals about the activities it has undertaken in relation to the BKY Claims (including cultural heritage and future act matters).
- b) The report referred to at [a]) must include:
 - i. The type of activity;
 - ii. The name of the other party;
 - iii. A brief description of the project;
 - iv. Details of any money or other benefit that has accrued to (or will accrue to) the BKY Claim Group because of the activity or project; and
 - v. Details of the trust account to which any money payable for the benefit of the BKY Claim Group has been deposited.

9. Conflict of Interest

A conflict of interest is a situation where your personal or private interests could, or could be seen to, improperly influence the performance of your duties or responsibilities as a member of the Applicant. A conflict of interest can be actual, perceived, or potential:

- *An actual conflict of interest involves a direct conflict between your role or duties and responsibilities as part of the Applicant and a competing interest or obligation, whether personal or involving a third-party.*
- *A perceived conflict of interest occurs where it could reasonably be perceived, or give the appearance, that a competing interest could improperly influence the performance of your role or duties and responsibilities as part of the Applicant.*
- *A potential conflict of interest arises where you have an interest or obligation, whether personal or involving a third-party that could conflict with your role or duties and responsibilities as part of the Applicant.*

9.1 Notice of conflict of interest

a) A member of the Applicant who has a conflict of interest (whether actual, perceived or potential) in a matter that relates to any activity of the Applicant or a matter arising in relation to the BKY Claims must give the other members of the Applicant notice of the interest.

b) The notice required by [a).a)] must give details of:

1. the nature and extent of the interest;
2. the relationship of the interest to the affairs of the Applicant or the BKY Claim Group; and
3. be given at an Applicant meeting as soon as practicable after the member of the Applicant becomes aware of his or her interest in the matter.

c) A member of the Applicant who has a material personal interest in a matter that is being considered at an Applicant meeting must not:

- i) be present while the matter is being considered at the meeting; or
- ii) vote on the matter.

d) Despite [c)] the member of the Applicant may be present and vote if the members of the Applicant who do not have a material personal interest in the matter have passed a resolution that:

i) identifies the conflicted member, the nature and extent of the member's interest in the matter and its relation to the activity of the Applicant or matter arising in relation to the native title claim;

and

ii) states that those non-conflicted members are satisfied that the interest should not disqualify the conflicted member from voting or being present.

e) In exceptional circumstances, if there are not enough members of the Applicant to form a quorum for an Applicant meeting because of [a).a)], the remaining members of the Applicant may, by majority at a properly convened meeting, pass a resolution to deal with the matter.

f) The circumstance set out in [e)] is the only exception to the requirements at [7.1.b)] for a quorum.

C. Communication

Communication between the Applicant and the claim group is critical to the Applicant retaining the trust and confidence of the claim group and to fulfil its special obligations to the claim group.

The Applicant must provide regular updates to the BKY Claim Group:

- i. on the progression of the BKY Claims;
- ii. in relation to the Accountability provisions set out at [8];and
- iii. on the negotiation and implementation of any agreements.

11. Ongoing Authority

- a. The Applicant is to act at all times in the best interests of the whole BKY Claim Group over and above their individual, family or descent group's interests.
- b. If one or more of the individuals comprising the Applicant becomes legally incapacitated or is unable or unwilling to continue to act as a member of the Applicant group for any reason, the remaining individuals (or individual) remain authorised to be the Applicant and may continue to act as the Applicant for and on behalf of the BKY Claim Group and deal with all matters arising under the NTA in relation to the Claims without the need to reconvene a meeting of the Claim Group to authorise a replacement Applicant.
- c. Where [b]) applies, the remaining members of the Applicant may bring an application pursuant to section 668 of the NTA to the Federal Court for an order that the person/s to whom [b]) applies be removed as a person/s authorised to bring the Claims and an application of that kind may be made without any further authorisation by, or resolution of, the Claim Group.
- d. The Applicant must do all things necessary to implement the resolutions of the BKY Claim Group and must not act inconsistently with those resolutions.
- e. The Applicant acknowledges that the Conditions on the authority of the Applicant may be further varied by a resolution of the BKY Claim Group at an authorisation meeting..
- f. A persistent failure or refusal of a member or members of the Applicant to comply with these Conditions (for example failure to attend 3 properly convened meetings without a reasonable excuse) is deemed to be unwillingness (see [b])) to continue to act as a member of the Applicant.

12. Legal Representation

As an outcome of the authorisation meeting at which these terms were adopted, QSNTS has been requested to appoint one of its lawyers to act as solicitor for the claim group.

The terms and conditions relating to engaging a solicitor are not limited to prosecuting the claims but apply to engaging a solicitor for any matter that arises out of the claims (for example, future acts or cultural heritage).

- a. The Applicant will engage with QSNTS' appointed lawyer for provision of all legal advice and legal representation for the BKY Claims, future acts, cultural heritage matters and incorporation and running of the PBC.
- b. Subject to [c)], if the BKY Claim Group finds itself unrepresented by a solicitor, the Applicant may engage a solicitor or agree to the engagement of a solicitor to provide advice on an interim urgent basis.
- c. If the Applicant has taken steps to engage a solicitor on an interim urgent basis, the Applicant will as soon as possible after the date of retaining a solicitor to provide interim urgent advice seek a resolution of the BKY Claim Group confirming the appointment of a solicitor.
- d. Where QSNTS has been requested to appoint a lawyer or a solicitor has been engaged by the Applicant pursuant to a resolution of the BKY Claim Group, the Applicant must not terminate the engagement of that solicitor without first obtaining a further resolution of the BKY Claim Group authorising the Applicant to do so.

13. Dispute Resolution

If there is a deadlock of, or a dispute among, the Applicant, any member of the Applicant may request mediation of the issue/s by a person appointed by the Chief Executive Officer of QSNTS.

14. General Matters

14.1 Tasks

The Applicant and each individual member of it will be required to undertake many tasks, including but not limited to:

- a) attend and participate in meetings and training on a regular basis, including:
 - i. Applicant meetings;
 - ii. Governance training;
 - iii. Negotiation meetings. These may be with representatives of the State, local councils, mining companies, pastoralists, or any other interested parties;
- a) participate in negotiating and implementing agreements regarding cultural heritage protection, financial benefits and access arrangements to pastoral properties;
- b) consider and respond to legal advice in a timely matter;
- c) consult regularly with the BKY Claim Group to obtain and represent their views, and provide accurate information back to the BKY Claim Group on legal issues and the progress of the BKY Claims;
- d) read, understand and respond to complex documents, including:
 - i. legal and financial documents;
 - ii. documents regarding land tenure;
 - iii. the constitution of a corporation; and
- e) work with a solicitor to create a Rule Book and structure for a corporation which is to become the PBC.

14.2 Attributes

In order to properly engage in the activities listed above, in addition to being someone who is respectful, honest, fair, transparent, accountable, reliable, confident, and knowledgeable, an Applicant should possess the following attributes:

- a) regular availability;
- b) regular access to email;
- c) generally be of good health;
- d) a strong commitment to the role;
- e) ability to read and understand high level documents, including financial and legal documents;
- f) ability to make decisions in short timeframes. There is a high volume of cultural heritage protection work, which can require quick responses;
- g) ability to cope with a large amount of information;
- h) communicates well with other Applicants, claimants, legal advisors, consultants, stakeholders and proponents; and
- i) possesses an understanding or ability to acquire an understanding of 'related party benefits' and their management within a corporate setting.

15. Term of Appointment

15.1 The authorisation of the Applicant must be reconfirmed at a properly notified meeting of the BKY Claim group every three years and these Conditions must be reviewed and approved at the same time.

15.2 The role of the Applicant (and those individuals who jointly are the Applicant) ceases when the court makes a determination of native title (including the determination of any appeals) or in circumstances where the BKY Claims are discontinued, dismissed or withdrawn pursuant to these Conditions.