



National
Native Title
Tribunal

Registration Decision

Application name	Woppaburra People #2
Name of applicant	Yasmin Green, Nerark Morris, Danielle Sheehan, Valmai Smith, Samala Cronin, Summer Britcher, Bronwyn Britcher
Federal Court of Australia No.	QUD243/2024
NNTT No.	QC2024/004
Date of Decision	20 September 2024

Claim accepted for registration

I have decided that the claim in the Woppaburra People #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.

Michael Raine

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) ('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; (2012) 297 ALR 660 ('Anderson')

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

Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People [2019] FCAFC 177; (2019) 273 FCR 350 ('Warrie')

Griffiths v Northern Territory of Australia [2007] FCAFC 178; (2007) 165 FCR 391 ('Griffiths')

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

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

Gudjala People #2 v Native Title Registrar [2009] FCA 1572; (2009) 182 FCR 63 ('Gudjala 2009')

Kanak v National Native Title Tribunal [1995] FCA 1624; (1995) 61 FCR 103 ('Kanak')

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

McLennan v Queensland [2019] FCA 1969 ('McLennan')

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

Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24 ('Peko-Wallsend')

Muir on behalf of the Woppaburra People v Queensland [2021] FCA 1505 ('Woppaburra Determination')

Northern Land Council v Quall [2020] HCA 33; (2020) 271 CLR 394 ('Quall HC')

Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group [2005] FCAFC 135; (2005) 145 FCR 442 ('Alyawarr')

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

Sampi v Western Australia [2005] FCA 777 ('Sampi')

Strickland v Native Title Registrar [1999] FCA 1530; (1999) 168 ALR 242 ('Strickland')

Wakaman People # 2 v Native Title Registrar and Authorised Delegate [2006] FCA 1198; (2006) 155 FCR 107 ('Wakaman')

Western Australia and Northern Territory v Lane [1995] FCA 1484; (1995) 59 FCR 332 ('Lane')

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

Western Australia v Strickland [2000] FCA 652; (2000) 99 FCR 33 ('Strickland FC')

Western Australia v Ward [2002] HCA 28; (2002) 213 CLR 1 ('Ward HC')

Background

- [1] This decision relates to an application filed on behalf of the Woppaburra People #2 native title claim group ('claim group'). It covers land and waters of approximately nine square kilometres over the majority of Woppa (Great / South Keppel Island), in the Capricorn Coast area of Central Queensland. It is the second claim filed by the Woppaburra People, the first being determined on 3 December 2021 ('Woppaburra Determination') over an area which completely surrounds this second claim.²
- [2] The Registrar of the Federal Court ('Court') gave a copy of the application and accompanying affidavits to the Native Title Registrar ('Registrar') on 15 May 2024 pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A.³

Preliminary considerations

Registration conditions

- [3] 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 of s 190B (which the Act refers to as dealing mainly with the merits of the claim) and s 190C (which the Act refers to as dealing with procedural and other matters). Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B–190C.
- [4] Given that the application was made on 13 May 2024 and has not been amended, I am satisfied that neither s 190A(1A) nor s 190A(6A) apply.
- [5] I have decided that the claim in the application must be accepted for registration and this document sets out my reasons for that decision.

Procedural fairness

Process

- [6] The following steps were taken to ensure that procedural fairness was afforded in the making of this registration decision:
- On 24 May 2024 a Senior Officer of the National Native Title Tribunal ('NNTT') wrote to the applicant requesting that any information additional to the application and accompanying documents filed in the Court that the applicant wished to be considered for the purpose of the registration test be provided by 11 June 2024.
 - On the same date, a Senior Officer wrote to the State of Queensland ('State') to provide a copy of the application in accordance with s 66(2) and to request that any

² *Woppaburra Determination*.

³ Section 190A(1).

submissions that the State wished to make in relation to the application of the registration test be provided to the NNTT by 11 June 2024.

- On 11 June 2024 the applicant provided additional information to the NNTT. This information is set out below at paragraph 11. A Senior Officer wrote to the applicant to confirm whether confidentiality was claimed over any of the additional material and the applicant confirmed on 12 June 2024 that the information could be provided to the State. This information was then provided to the State on 14 June 2024, for their comment by 28 June 2024.
- On 28 June 2024 the State provided submissions ('State's Submissions') and tenure information to the NNTT. These were provided to the applicant on 3 July 2024 for their comment by 17 July 2024.
- On 17 July 2024 the applicant provided submissions in response to the State ('Applicant's Response Submissions'). The applicant also filed re-sworn affidavits for the purpose of s 62 of the Act on 13 August 2024. The Applicant's Response Submissions and the s 62 affidavits were provided to the State on 13 August 2024, for their comment by 27 August 2024. This timeframe was extended at the request of the State to 6 September 2024.
- On 6 September 2024 the State provided further Submissions ('State's Further Submissions').

[7] This concluded the procedural fairness process.

Application of the principles of procedural fairness

[8] As a delegate of the Registrar, I am bound by the principles of administrative law, including the rules of procedural fairness in making my decision about whether or not to accept this application for registration. The relevant principles of procedural fairness were set out by Carr J in *WA v NTR*, as follows:

The authorities establish the following principles:

- natural justice or procedural fairness is a common law duty to act fairly in the making of administrative decisions which affect rights, interests and legitimate expectations: *Kioa v West* (1985) 159 CLR 550 at 584;
- part of the content of that duty is that allegations adverse to a person whose interests are affected should be disclosed to that person before the decision is made so that the person may have a reasonable opportunity to contradict or comment on the adverse material: *Kioa v West*;
- the common law duty will only be held not to arise where it is clearly excluded by statute "by plain words of necessary intentment": *Kioa v West* at 584; *Annetts v McCann* (1990) 170 CLR 596 at 598.⁴

[9] I consider that I was required to ensure that steps were taken to afford procedural fairness to both the applicant and the State.⁵ The steps taken are set out above at paragraph 6. These

⁴ *WA v NTR* [29] (references in original).

steps sought to ensure that both the applicant and the State were provided with copies of any relevant material adverse to their interests. For the State, this has included all additional material and submissions provided by the applicant. For the applicant, this included the State's Submissions and tenure information provided on 28 June 2024. The State's Further Submissions were not provided to the applicant on the basis that they did not provide material that would 'tip the balance'⁶ such that a decision would be made adverse to the applicant's interests. I refer to my below reasons at paragraphs 22 to 38 and 182 to 183 in relation to these submissions.

Information considered

[10] 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'.

[11] I have had regard to information in the application, including the affidavits filed for the purpose of s 62 on 13 August 2024. I have also considered documents provided by the applicant directly to the Registrar on 11 June 2024:⁷

- Affidavit of [claim group member 1], dated 20 December 2019;
- Affidavit of [claim group member 2], dated 18 April 2024;
- Affidavit of [claim group member 3], dated 31 October 2013;
- Affidavit of [claim group member 4], dated 18 October 2013;
- Affidavit of [claim group member 4], dated 19 December 2019;
- Affidavit of [claim group member 5], dated 10 August 2013;
- Affidavit of [claim group member 6], dated 19 December 2019;
- Affidavit of [claim group member 6], dated 8 August 2013;
- Affidavit of [claim group member 7], dated 18 April 2024;
- Affidavit of Ms Samala Cronin⁸ (unsigned and undated);
- Affidavit of [claim group member 8], dated 20 December 2019; and
- Attachment F and M to the QUD243/2024 Woppaburra #2 application (with references for NNTT), undated

(together referred to as the 'Applicant's Additional Material').

[12] I note there is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers.⁹

⁵ Ibid [37].

⁶ *Peko-Wallsend* 61.

⁷ Section 190A(3)(a).

⁸ Ms Cronin is named as one of the persons comprising the applicant.

- [13] I have had regard to the State's Submissions and tenure information provided on 28 June 2024, as well as the State's Further Submissions dated 6 September 2024, in accordance with s 190A(3)(c).
- [14] I have also considered it appropriate to have regard to the registration test decision dated 7 March 2014 for the first Woppaburra People claim ('Woppaburra People #1 Registration Decision') and the geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services dated 30 May 2024 ('Geospatial Assessment').

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

Sections 190C(2) and ss 61 and 62: registration conditions about procedural and other matters – condition met

- [15] I have examined the application and am satisfied, for the reasons set out below, that it contains all details and other information and is accompanied by affidavits and other documents as required by ss 61 and 62.
- [16] 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 61–62. This condition does not require any merit assessment of the material to be undertaken, however it does seek '...to ensure that the application contains "all details" required by s 61...'.¹⁰ As such, I understand that s 190C(2) requires consideration of whether the application contains the required material and whether such material is sufficient to enable the Registrar to form an opinion about whether the claim satisfies all of the conditions in ss 190B and 190C.¹¹

Section 61 – native title applications

- [17] **Section 61(1)** provides that only persons included in and authorised by the native title claim group may make a native title determination application for the particular native title claimed. Seven persons comprising the applicant are named in the application. Schedule A contains a description of the native title claim group. Each of the seven persons comprising the applicant has deposed an affidavit for the purposes of s 62. These are included at Attachment R of the application, with subsequent versions of these filed in the Court on 13 August 2024.¹² These affidavits indicate that each deponent is a member of the native title claim group and is authorised to make the application by the persons in the native title claim group.¹³ From the material contained in Schedule A and the affidavits provided for the purpose of s 62, I am satisfied that the application meets the requirements of ss 61(1) and 190C(2).

⁹ Section 190A(3)(b).

¹⁰ *Doepel* [35].

¹¹ See also s 190D(3)(b).

¹² I refer to my below consideration of the requirement at s 62(1)(a) in relation to these affidavits.

¹³ Applicant Affidavits, [1], [5].

- [18] **Section 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 application or other material that I have considered that would suggest otherwise.
- [19] **Section 61(3)** requires an application to state the name and address for service of the applicant. The names of each of the persons comprising the applicant are stated in the application and Part B indicates that the applicant is represented by Queensland South Native Title Services ('QSNTS') and includes the address for service. As such, I am satisfied that this requirement is met.
- [20] **Section 61(4)** requires a native title determination application authorised by persons in a native title claim group to name or describe the persons in that claim group so that it can be ascertained whether any particular person is one of those persons. In *Gudjala 2007*, Dowsett J considered s 61(4) and emphasised the procedural nature of the exercise undertaken by a delegate under s 190C(2) regarding the details and information required by ss 61 and 62 in contrast to the merits exercise undertaken pursuant to s 190B(3).¹⁴ Schedule A of the application contains a description of the native title claim group as comprising the descendants of one or more of four named apical ancestors. I am satisfied that Schedule A of the application meets the requirements of ss 61(4) and 190C(2) because Schedule A 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.¹⁵
- [21] **Section 61(5)** provides that the application must be filed in the Court in a manner as prescribed and be accompanied by any prescribed fee. In my view, these are matters for the Court however I note that the application is made on a Form 1 (the prescribed form) and was accepted for filing by the Court on 13 May 2024.

Section 62(1)(a), (1A): application accompanied by affidavits

- [22] **Section 62(1)(a)** requires an application to be accompanied by affidavits sworn or affirmed by the applicant stating each of the matters mentioned in sub-s (1A). Submissions have been received from both the State and the applicant in relation to this requirement. I have set out these submissions and my consideration below.

Submissions received in relation to ss 62(1)(a) and 190C(2)

- [23] The State Submissions provided on 28 June 2024 included submissions to the effect that the affidavits annexed to the application at Attachment R were not properly sworn, and so did not meet the requirements of ss 62(1)(a) and 190C(2).¹⁶
- [24] In response, the applicant submitted that the s 62 affidavits were sufficiently compliant, including by reference to *Doepel*,¹⁷ (as referred to in the registration test decision dated 11 January 2013 in *Gunggari People #4*)¹⁸ but nevertheless indicated as follows:

¹⁴ *Gudjala 2007* [31]–[32].

¹⁵ Section 61(4)(b).

¹⁶ State Submissions [9]–[12].

¹⁷ *Doepel* [86]–[87].

17. Although the Applicant maintains that the section 62 affidavits are sufficiently compliant, QSNTS is in the process of obtaining replacement affidavits and the Applicant is prepared, if necessary, to file an Interlocutory Application seeking orders that:
- a. the affidavits that accompanied the Native Title Determination Application (Form 1) filed on 13 May 2024 be uplifted from the Court's file and replaced with new affidavits; and
 - b. the replacement affidavits be taken to have accompanied the Form 1 filed on 13 May 2024.¹⁹

[25] The further affidavits were then filed in the Court on 13 August 2024.

[26] Following the filing of these affidavits on 13 August 2024, the State made further submissions as follows:

13. The State maintains its position that the affidavits accompanying the Application do not comply with s 62(1)(a) of the NTA. The State also observes that r 34.103(3) of the *Federal Court Rules* requires the application to be accompanied by an affidavit **sworn or affirmed** by the applicant.
14. The State considers it necessary for the Applicant to file an interlocutory application seeking those orders as outlined at paragraph [17] of the Applicant's Submissions.
15. Consistent with the course followed in *Ethel Munn & Ors on behalf of Gunggari People #4* (QUD 550/2012), the State considers that the orders must be made prior to the Registrar making their decision under s 190A with respect to registration of the Application if the later affidavits are to be considered.²⁰

[27] Having regard to the above, I understand the State's submissions to be to the effect that I cannot consider the affidavits filed on 13 August 2024 for the purpose of the registration test unless an order is made by the Court for the affidavits initially provided at Attachment R to be uplifted from the Court file and replaced with those of 13 August 2024.

Consideration of ss 62(1)(a) and 190C(2)

[28] Sections 190C(2) and 62(1)(a) require an application to be 'accompanied' by sworn affidavits containing the details set out in s 62(1A). I have had regard to relevant case law regarding whether an affidavit can be said to 'accompany' an application. In *Doepel*, Mansfield J stated as follows:

I also do not accept that the Registrar erred in having regard to the affidavits of the claimants even though they were not exhibited or annexed to the application. The requirement of s 62 is that the application be accompanied by the affidavits. It was. There could be no serious submissions made that the affidavits did not refer to the application, and should not be read by reference to it. The Registrar, in my judgment, did not err in treating the affidavits as having accompanied the application and as referring to it.²¹

¹⁸ Gunggari People #4 QC2012/014 (registration test decision dated 11 January 2013), pages 8–9.

¹⁹ Applicant's Response Submissions [17].

²⁰ State's Further Submissions [13]–[15] (emphasis in original).

²¹ *Doepel* [88].

[29] Justice Mansfield also confirmed that the relevant affidavits need not be dated contemporaneously with the application.²²

[30] In considering this issue, I have also had regard to the judicial guidance relating to the beneficial nature of the Act. In *Strickland*, French J noted that:

The Act is to be construed in a way that renders it workable in the advancement of its main objects as set out in s 3, which include providing for the recognition and protection of native title. The requirements of the registration test are stringent. It is not necessary to elevate them to the impossible.²³

[31] The content of each of the affidavits provided for the purpose of s 62 contained at Attachment R is identical to those in the affidavits filed on 13 August 2024, the difference being that the affidavits filed later have been properly sworn. I do not consider that anything in the State's Submissions and Further Submissions take issue with the substantive content of the affidavits.

[32] In my view both the affidavits at Attachment R and those filed on 13 August 2024 refer to the application and should be read by reference to it.

[33] As noted by the State, as set out in the registration test decision dated 11 January 2013 in *Gunggari People #4*, the approach taken in that proceeding was that a Registrar of the Court made an order for the previous affidavits to be uplifted and replaced with the those that had been filed later.²⁴ In my view, the course taken in that matter does not mean that I cannot consider the affidavits filed on 13 August 2024 for the purpose of registration testing of the requirements at ss 62(1)(a) and 190C(2) in this matter.

[34] Having regard to the above, notwithstanding that the Court has not made an order to uplift the affidavits contained at Attachment R and replace them with those filed on 13 August 2024, I have considered below whether the affidavits filed on 13 August 2024 ('Applicant Affidavits') contain the statements required by s 62(1A).

[35] I consider that each of the Applicant Affidavits have been properly affirmed.

[36] The Applicant Affidavits are deposed by each of the seven persons comprising the applicant. These affidavits are in substantially identical terms, and include statements to the effect that:

- the deponent is a member of the Woppaburra claim group and a person authorised by the Woppaburra People #2 native title to be one of the persons comprising the applicant;
- the deponent believes that the Woppaburra People continue to hold the native title rights and interests over land and waters in the application and that these rights have not been extinguished in relation to any part of the area covered by the application;

²² Ibid [89].

²³ *Strickland* [55]. See also *Kanak* [73]; *Lane* [9].

²⁴ *Gunggari People #4* QC2012/014 (registration test decision dated 11 January 2013), pages 8–9; Orders of Registrar Fewings (as she then was) in *Munn & Ors on behalf of the Gunggari People #4 v Queensland* (Federal Court of Australia, QUD550/2012, 11 December 2012).

- the deponent believes that none of the area covered by the application is also covered by an approved determination of native title;
- the deponent believes that all of the statements made in the application are true;
- the deponent is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it;
- the deponent was authorised at a meeting of the claim group on 13 April 2024 in North Lakes, convened by QSNTS;
- at the authorisation meeting on 13 April 2024, the Woppaburra People passed a motion confirming that although the Woppaburra People have traditional laws and customs relating to decision-making, these processes are not recognised under the Act, and so a process of decision-making was adopted for the purpose of the authorisation meeting;
- the seven persons comprising the applicant were authorised to make the application and deal with matters arising in relation to it; and
- conditions were imposed on the authority of the applicant in accordance with s 251BA, and these conditions have been satisfied by ensuring that all decisions and actions relating to the making of the application were made after receiving legal advice and in accordance with the conditions.

[37] The conditions imposed on the applicant under s 251BA are set out in Attachment IA of the application. These conditions are broad and include matters that both relate to the making of the application (to act in the interests of the claim group as a whole and in good faith, to do all things necessary to implement the resolutions of the authorisation meeting on 13 April 2024 and to ensure that the claim group is legally represented) and matters that do not relate directly to the making of the application. I am satisfied that the Applicant Affidavits set out that the relevant conditions have been satisfied and how they have been satisfied for the purpose of s 62(1A)(g).

[38] I am satisfied that the above statements in the Applicant Affidavits meet the description of each of the statements required by s 62(1A)(a)–(g), noting that because conditions were imposed s 62(1A)(f) is not applicable. I am therefore satisfied that the application is accompanied by the documents required by s 62(1)(a).

*Section 62(1)(d) and (2): information etc. in relation to certain applications;
claimant applications*

[39] **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. Schedule L of the application does not indicate that there is any agreement under s 47C in relation to the area covered by the application. As such, s 62(1)(d) does not apply to this application.

[40] **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. Schedule B of the application refers to

Attachment B, which contains a written description of the area covered by the application by reference to ten parcels described by lot on plan references. Schedule B and Attachment B also contain information about areas that are not included in the claim. As such, I am satisfied that the application contains the information required by s 62(2)(a).

- [41] **Section 62(2)(b)** requires that the application include a map showing the boundaries of the area mentioned in s 62(2)(a). Schedule C contains a map showing the area covered by the application. I am satisfied that the application contains a map as required by s 62(2)(b).
- [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. Schedule D of the application refers to title searches conducted by the applicant dated 30 June 2024. The results of these searches are then contained in Attachment D. I am satisfied that the requirement at s 62(2)(c) is met because the application contains the required details and search results.
- [43] **Section 62(2)(d)** requires an application to contain a description of the native title rights and interests claimed in relation to particular land or waters. This 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. Schedule E of the application contains a description of the native title rights and interests claimed in relation to the application. I am satisfied that Schedule E of the application meets the requirements of s 62(2)(d).
- [44] **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 of the application refers to Attachment F and M. This attachment contains information setting out a general description of the traditional laws and customs of the native title claim group that are asserted to give rise to the claimed rights and interests. As such, I am satisfied that the application contains the information required by s 62(2)(e).
- [45] **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 are to be included in the application. Schedule G of the application includes a list of activities currently undertaken by members of the claim group in the application area. Schedule G also refers to Attachment F and M. I am satisfied that Schedule G and Attachment F and M of the application contains the information required by s 62(2)(f).
- [46] **Section 62(2)(g)** requires an application to 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 of the application refers to the first Woppaburra People Claim but notes that this Woppaburra People #2 claim does not include any area covered by that first claim. Schedule H otherwise states that the applicant is not aware of any active applications made in relation to the whole or part of the claim area. As such, I am satisfied that the application contains the information required by s 62(2)(g).
- [47] **Section 62(2)(ga)** requires the application include details of any s 24MD(6B)(c) notifications relevant to the claim area. Schedule HA of the application states that the applicant is not aware of any relevant notices given in accordance with s 24MD(6B)(c) that relates to the

whole or part of the area covered by the application. I am satisfied that the application contains the information required by s 62(2)(ga).

[48] **Section 62(2)(h)** requires that the application include details of any s 29 notifications relevant to the claim area of which the applicant is aware. Schedule I of the application states that the applicant is not aware of any relevant notices given in accordance with s 29 notice that relates to the whole or part of the area covered by the application. As such, I am satisfied that the application contains the information required by s 62(2)(h).

[49] **Section 62(2)(i)** requires the 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. Schedule IA of the application refers to Attachment IA, which contains details of the conditions imposed on the authority of the applicant for the purposes of s 251BA. I am satisfied that the application contains the information required by s 62(2)(i).

Conclusion on s 190C(2)

[50] As set out above, I am satisfied that the application contains all of the details and other information, and is accompanied by any affidavit or other document, as required by ss 61–62. As such, the condition at s 190C(2) is met.

Section 190C(3): no previous overlapping claim group – condition met

[51] The condition at s 190C(3) requires 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’.

[52] Although s 190C(3) is expressed in the past tense, the Explanatory Memorandum to the *Native Title Amendment Act 1998* (Cth) which inserted this provision indicates that its purpose is served if it is interpreted in the present tense, such that ‘no member of the claim group for the application ... is a member of the claim group for a registered claim which was made before the claim under consideration, which is overlapped by the claim under consideration and which itself has passed the registration test’.²⁵ Having regard to this, I understand that the purpose of s 190C(3) is to prevent overlapping claims by members of the same native title claim group from being on the Register at the same time. This purpose is achieved by preventing a claim from being registered if it includes members in common with an overlapping claim that is on the Register when the registration test is applied. I consider that taking this approach more accurately reflects the intention of the legislature, rather than a more literal reading of s 190C(3).

[53] I understand that in assessing this requirement I may have regard to information which does not form part of the application and accompanying documents.²⁶

[54] 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).²⁷ These criteria are that any previous application

²⁵ Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) 303 [29.25], emphasis added.

²⁶ *Doepel* [16].

²⁷ *Strickland FC* [9].

covers at least some of the same area, was accepted for registration under s 190A and is on the Register.

- [55] The Geospatial Assessment and my own searches of the Tribunal’s mapping database indicate that there is no previous application overlapping any of the area covered by the application that meets the criteria set out in s 190C(3)(a)–(c).
- [56] As there are no previous applications that meet the description of sub-ss (a)–(c), s 190C(3) does not require further consideration. I am satisfied that the application does not contravene this requirement.

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

- [57] Under s 190C(4) the Registrar must be satisfied that either a certificate under s 203BE has been issued by the relevant representative Aboriginal/Torres Strait Islander body,²⁸ or the requirements in subsection (4AA) are met.²⁹ Schedule R of the application states that the application has been certified by QSNTS and refers to Attachment R, which contains a certification under s 203BE. As such, I must consider whether the requirements of s 190C(4)(a) have been met.
- [58] Section 190C(4)(a) requires the Registrar to be ‘satisfied about the fact of certification by an appropriate representative body’, but is not to ‘go beyond that point’ and ‘revisit’ or ‘consider the correctness of the certification’.³⁰ As such, I understand that my task is to identify the appropriate representative body and be satisfied that the application is certified under s 203BE.

Does the certifying body have power to certify?

- [59] The Geospatial Assessment indicates that QSNTS is the relevant representative Aboriginal/Torres Strait Islander body responsible for the land and waters covered by the application. The certification at Attachment R states that QSNTS is a body funded under s 203FE of the Act and has authority to certify the application under the function given, and not revoked, under s 203FEA.
- [60] The certification is signed by the Chief Executive Officer of QSNTS. I understand that a Chief Executive Officer may perform the functions of a representative body under an instrument of delegation or as an agent.³¹
- [61] Having regard to the above, I am satisfied that QSNTS is the relevant representative body for the area covered by the application and that it was within its power to issue the certification.

²⁸ Section 190C(4)(a).

²⁹ Section 190C(4)(b).

³⁰ *Doepel* [78], [80]–[82]; see also *Wakaman* [32].

³¹ *Quall HC* [48], [63] and [93].

Have the requirements of s 203BE been met?

[62] To meet the requirements of s 190C(4)(a), the certification must comply with the provisions of s 203BE(4)(a) to (c).

[63] **Section 203BE(4)(a)** requires a certification to contain a statement of the representative body's opinion as per s 203BE(2), that all persons in the native title claim group have authorised the applicant to make the application and deal with all matters in relation to it, any conditions under s 251BA on the authority that relate to the making of the application have been satisfied, and all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group. Paragraph 2 of the certification contains statements that meet the description of the statements of opinion at s 203BE(2), and indicates that the signatory is 'satisfied that the provisions of section 203BE(2)(a), (aa) and (b) of the Act have been met'. As such I am satisfied that the certification meets the requirement at s 203BE(4)(a).

[64] **Section 203BE(4)(b)** requires a certification to include brief reasons for the representative body's opinion. Paragraph 3 of the certification contains the following information:

- QSNTS convened an authorisation meeting on 13 April 2024 for the purpose of authorising the application;
- on 22 March 2024 notice of the authorisation meeting was mailed out to all the Woppaburra People with complete contact details on the register maintained by QSNTS of Woppaburra People;
- on 26 March 2024 the draft resolutions for the authorisation meeting were mailed out to Woppaburra People;
- as the proposed application area was surrounded by the existing Woppaburra Determination, providing notice only to Woppaburra People was considered to be sufficient;
- an information session was held at North Lakes on 13 April 2024 prior to the authorisation meeting;
- records of attendance were taken at the authorisation meeting, indicating that 27 Woppaburra People attended, including persons from all family groups, and this was considered to be sufficiently representative to enable decisions to be made;
- at the authorisation meeting, the members of the native title claim group authorised the making of the application and the persons to comprise the applicant in accordance with s 251B;
- conditions were imposed on the applicant (as set out at Schedule 1A of the application); and
- all members of the applicant were aware of and understood the conditions and agreed to comply with the conditions.

[65] In my view the above information in the certification is sufficient to meet the requirements of s 203BE(4)(b).

- [66] **Section 203BE(4)(c)** states that where applicable, a certification should briefly set out what the representative body has done to comply with s 203BE(3) (relating to achieving agreement and minimising the number of applications where the relevant area is or may be covered by an overlapping application for determination of native title). As noted above in my consideration of the condition at s 190C(3), there are no overlapping claims. As such, s 203BE(4)(c) does not apply to the certification.

Conclusion on s 190C(4)

- [67] Having regard to the above, I consider that the certification at Attachment R satisfies the requirements of s 203BE(4) of the Act. As such, I am satisfied that the application has been properly certified under s 190C(4)(a) and so this condition is met.
- [68] I note that once satisfied that the requirements of s 190C(4)(a) have been met, I am not required to address the condition at s 190C(4)(b).³²

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

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

- [69] 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.
- [70] Schedule B of the application refers to Attachment B, which describes the application area as all of the lands and waters described by nine listed lot on plan identifiers and one part lot defined by a former portion on plan reference. Attachment B specifically excludes the Woppaburra Determination. Schedule B also sets out general exclusions from the area covered by the application.
- [71] Attachment C of the application comprises an undated black and white map with no title, which includes the application area depicted by a black outline and black stipple, cadastral boundaries labelled with lot on plan identifiers, labelled islands, scalebar and legend.
- [72] The Geospatial Assessment notes that the map depicts Lot 1 on SP293747 as being part of the application area, however that lot is not listed in the written description in Attachment B. As such, the written description and map are inconsistent. However, because Schedule B provides that where there is any discrepancy between the map and description the written description prevails, the Geospatial Assessment concludes that the written description alone identifies the claim area with reasonable certainty.
- [73] The State initially provided submissions in relation to s 190B(2), including in relation to Lot 1 on SP293747.³³ The Applicant's Response Submissions confirmed that this lot is not intended to be included in the application area, and that the written description at Attachment B, which

³² Doepel [80].

³³ State's Submissions [6]–[8].

does not include this lot, is intended to prevail over the map.³⁴ In light of this, the State does not press its submission with respect to s 190B(2).³⁵

[74] Having regard to the conclusion of the Geospatial Assessment and the Applicant's Response Submissions, as Schedule B provides that the written description at Attachment B prevails in the event of any discrepancy, there is no uncertainty with to the application area. As such, I am satisfied that the written description and map contained in the application are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land and waters, and therefore the application meets the requirements of s 190B(2).

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

[75] Section 190B(3) requires the Registrar to be satisfied that either the persons in the native title claim group are named in the application,³⁶ or that persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.³⁷

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

- I am required to address only the content of the application;³⁸
- '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';³⁹
- 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';⁴⁰ and
- 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'.⁴¹

[77] The description of the native title claim group at Schedule A is as follows:

The Woppaburra People are those persons who are descendants of one or more of the following people:

1. Yulowa "Weerobilling"
2. Nellie "Ooroong-ooran"

³⁴ Applicant's Response Submissions [13]–[14].

³⁵ State's Further Submissions [12].

³⁶ Section 190B(3)(a).

³⁷ Section 190B(3)(b).

³⁸ *Doepel* [51]; *Gudjala 2007* [30].

³⁹ *Gudjala 2007* [33].

⁴⁰ *Ibid* [34].

⁴¹ *WA v NTR* [67].

3. Oyster Maggie

4. Fanny Lohse/Singh

[78] This description is largely identical to that recognised in the Woppaburra Determination.⁴²

[79] Identifying members of the claim group by descent from named persons has been accepted by the Court as satisfying the requirements of s 190B(3)(b).⁴³ In my view, requiring a member to show descent from an identified ancestor provides a clear starting or external reference point and 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.

[80] As such, I am satisfied that the description of the claim group is sufficiently clear such that it can be ascertained whether a particular person is a member of the claim group as required by s 190B(3). This condition is met.

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

[81] Section 190B(4) requires the Registrar to be satisfied that the description contained in the application as required by s 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified. I understand that I am confined to the material contained in the application itself in considering this condition.⁴⁴

[82] I understand that my task pursuant to s 190B(4) is to identify whether the rights and interests claimed are ‘readily identifiable’. Justice Mansfield noted in *Doepel* that the description of the native title rights and interests must be understandable, have meaning and be without contradiction.⁴⁵ It is also open to the Registrar to read the contents of the claimed rights and interests together with any stated qualifications or restrictions.⁴⁶ I note that 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)’.⁴⁷

[83] The claimed rights and interests are set out in Schedule E as follows:

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 section 47B of the *Native Title Act 1993* (Cth) applies), the Woppaburra people claim the following rights and interests, being:
 - a. the right to possession, occupation use and enjoyment of the area to the exclusion of all others; and
 - b. In relation to Water, the non-exclusive rights to take the Water of the area for personal, domestic and non-commercial communal purposes.

⁴² *Woppaburra Determination*, Orders, Schedule 1 Native Title Holders.

⁴³ *WA v NTR* [67].

⁴⁴ *Doepel* [16].

⁴⁵ *Ibid* [99], [123].

⁴⁶ *Ibid* [123].

⁴⁷ *Strickland* [60]. See also *Strickland FC* [85]–[87].

2. Over areas where a claim to exclusive possession cannot be recognised, the Woppaburra People claim the following rights and interests, being:
- a. access, be present on, move about on and travel over the area;
 - b. camp, and live temporarily on the area as part of camping, and for that purpose build temporary shelters;
 - c. hunt, fish and gather on the land and waters of the area for any purpose;
 - d. take, share and exchange Natural Resources from the land and waters of the area for any purpose;
 - e. conduct ceremonies and maintain our intangible spiritual and cultural connections on the area;
 - f. bury Native Title Holders within the area;
 - g. maintain places of importance and areas of significance to the Native Title Holders under their traditional laws and customs and protect those places including waterways from physical, spiritual and cultural harm;
 - h. teach on the area the physical and unbroken intangible spiritual connections of our land and sea country of the area;
 - i. hold meetings on the area;
 - j. light fires on the area; and
 - k. burn.

[84] Paragraph k. of the non-exclusive rights and interests claimed at paragraph 2 of Schedule E contains a single word: 'burn'. As this is preceded by the claimed right to light fires, I take this to be a distinct claimed right that refers to traditional cultural burning practices. This view is supported by the material in the application, in particular the list of activities which includes '[m]anaging the environment inter alia through traditional burning techniques...'.⁴⁸

[85] I consider that the claimed native title rights and interests described in Schedule E of the application are understandable and have meaning. I do not consider there to be any inherent contradictions. As such I am satisfied that the requirements of s 190B(4) are met.

[86] I note that I consider below whether the factual basis material is sufficient to establish the existence of these claimed rights and interests on a prima facie basis under s 190B(6).

Section 190B(5): factual basis for claimed native title – condition met

[87] 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

⁴⁸ Form 1, Schedule G, paragraph 18.

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

[88] Justice Mansfield stated in *Doepel* 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

[89] As such, when assessing the requirements of this condition, I understand that I must treat the asserted facts as true and assess whether they are sufficient to support each of the relevant assertions.

[90] 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...' is also relevant to the task under s 190B(5):

The fact that the detail specified by s 62(2)(e) is described as "a general description of the factual basis" is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim.⁵⁰

[91] In *Gudjala 2009*, Dowsett J further 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

[92] From the above, it is my understanding that although the material provided by the applicant need not provide evidence to make out each claim, it must nevertheless provide sufficient

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

⁵⁰ *Gudjala FC* [92].

⁵¹ *Gudjala 2009* [29]; *Anderson* [43], [47]–[48].

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

- [93] The factual basis material is contained in a combined Attachment F and M, which includes a table titled ‘Comparative table of instances of the exercise of native title rights and interests’ (‘Table of Rights and Interests’), and the Applicant’s Additional Material. I have considered all of the factual basis material, and have set out the relevant material in particular relating to the claim area (Woppa or Great / South Keppel Island) in relation to each of the assertions at s 190B(5)(a) to (c) in turn below.

Section 190B(5)(a): the association of the native title claim group and their predecessors with the area

- [94] Section 190B(5)(a) was recently considered by Reeves J in *McLennan*. His Honour set out the relevant principles as follows:

To satisfy the condition in s 190B(5)(a) of the [Act], it will be sufficient if the applicant demonstrates that:

- (a) “the claim group presently has an association with the area, and the claim group’s predecessors have had an association with the area since sovereignty or European settlement” [*Gudjala 2007* [52]];
- (b) “there is an association between the whole group and the area, although not all members must have such association at all times” [*Gudjala 2007* [52]]; and
- (c) “there is an association with the entire area claimed, rather than an association with only part of it or ‘very broad statements’, which have no ‘geographical particularity’” [*Martin* [26] and *Corunna* [39]].⁵³

- [95] In addition, I note the comments of Dowsett J in *Gudjala 2007* that s 190B(5)(a) requires sufficient factual material to support the assertion that the identified claim group (and not some other group) hold the identified rights and interests (and not some other rights and interests).⁵⁴

What information has been provided in support of the assertion at s 190B(5)(a)?

- [96] Attachment F and M states that:

The Woppaburra Saltwater Aboriginal people are those descended from the apical ancestors who had known associations with the lands and waters of the claim area. These apical ancestors further passed on oral history to their descendants, which contained specific cultural knowledge of Woppa (or Great/South Keppel Island). Even after their forced removal in 1902, the Woppaburra Saltwater people maintained connection to their Country and their people through reunions on Woppa.

The Woppaburra Saltwater People have inhabited the islands, specifically Woppa, since before sovereignty in 1778. The first observation of inhabitants living on the Keppel Islands was recorded

⁵² *Gudjala 2009* [29].

⁵³ *McLennan* [28], citations incorporated from original.

⁵⁴ *Gudjala 2007* [39].

in 1770 by a passing ship, *Endeavor* which noted people occupying the Keppel Islands. In 1802, Flinders was the first to record people occupying Woppa (then known as South Keppel).⁵⁵

- [97] Records from early explorers and archaeological evidence supports Aboriginal occupation of the claim area.⁵⁶ The early ethnographic records of Walter E. Roth indicated that Woppaburra means ‘island dwelling’ and that ‘the group for the Keppel Islands (and specifically Woppa) were the Woppaburra people’.⁵⁷
- [98] European settlement occurred on the mainland from the 1850s and on Woppa from 1867, with devastating impact on the Woppaburra People, leading to forced removals in 1902.⁵⁸
- [99] The material in Attachment F and M details each of the apical ancestors and their association with Woppa.⁵⁹ The association of the apical ancestors was assessed in the Woppaburra People #1 Registration Decision, including the following:
- Apical ancestor Yulowa ‘*Weerobilling*’ was born around 1837 and was the headman or the doctor of the claim group. He, along with his wife, his son and his son’s wife, were removed from the application area in 1902.
 - Apical ancestor Nellie ‘*Ooroong-ooran*’ was born around 1868. She worked for the pastoralists on the application area around 1900 and was removed from the application area in 1902. Her granddaughter lodged the initial Aboriginal Land Application over the Keppel Island and her great grandson has been involved in site protection, promotion of Woppaburra cultural identity and other Woppaburra business since the 1980s.
 - Fanny Lohse/Singh, another apical ancestor, was born around the 1860s ... Her son was removed from the application area in 1902 at the age of eight. He was a revered seaman and passed on the skills and knowledge he had learnt from an early age growing up in the application area to his descendants.
 - Apical ancestor Oyster Maggie was born around the 1850s ... She had four children who were all born at a traditional birthing place near [place name deleted] on North Keppel Island. She died around 1901 in the application area.⁶⁰
- [100] The factual basis material indicates that many of the apical ancestors and their descendants were born on the Keppel Islands, including on Woppa, and one apical ancestor is recorded as passing away on Woppa in 1899.⁶¹
- [101] The factual basis material indicates that despite their forced removal from the claim area in 1902, the Woppaburra People held onto the belief that they had to return to their Country, and from the 1950s a number of Woppaburra persons were able to return.⁶² In 1993 one of

⁵⁵ Form 1, Attachment F and M [2]–[3].

⁵⁶ Ibid [10]–[11].

⁵⁷ Ibid [8].

⁵⁸ Ibid [4]–[6].

⁵⁹ Ibid [14]–[19].

⁶⁰ Woppaburra People QC2013/008 (registration test decision dated 7 March 2014), page 17 [106] (references removed).

⁶¹ Form 1, Attachment F and M [14]–[19].

⁶² Ibid [23]–[24].

the members of the claim group planted the Aboriginal flag on Woppa as a declaration of Woppaburra interests in the claim area.⁶³

- [102] The affidavits of members of the claim group contained in the Applicant's Additional Material further detail the association of the claim group and their predecessors with the claim area. Most of these affidavits describe the deponents' genealogical links to the predecessors of the claim group, going back to the apical ancestors.⁶⁴
- [103] The affidavits also include further information about the association of the predecessors of the claim group with Woppa, for example by talking about specific locations on the claim area, such as caves and locations where you can find fresh water.⁶⁵ Another example is that [claim group member 1] describes learning about how her great-grandfather was taken from the Keppel Islands by the government, along with his mother and other relatives.⁶⁶
- [104] [Claim group member 1] describes first visiting the claim area in 1983 with her Aunty when she returned to Country, with her Aunty describing Woppa as 'our island'.⁶⁷ Since that first visit, [claim group member 1] has returned to the claim area many times, including with her children and other family members, ensuring that the younger people are quiet and respectful so that the spirits of the country get to know them.⁶⁸ The factual basis material demonstrates that other members of the claim group also regularly visit the Keppel Islands,⁶⁹ and describe having a strong connection to Country.⁷⁰ Members of the claim group have been involved in protecting and providing information signs in relation to particular important sites in the claim area, for example the middens between Monkey Beach and Long Beach.⁷¹
- [105] [Claim group member 2] describes seeing her role as a ranger for Woppaburra Country as 'being the caretaker for Woppa', incorporating her cultural responsibility into the work by ensuring 'that country is healthy, that cultural heritage is protected and that culture is passed down to other Woppaburra people'.⁷²
- [106] Another member of the claim group describes visiting the area and that it 'is a very special feeling going over to the Keppel Island and walking in the place my ancestors are from'.⁷³ Similarly, [claim group member 6] describes visiting Woppa for the first time in 1984 as a 'very

⁶³ Ibid [26]. A photograph of this event is included in the Affidavit of [claim group member 6] affirmed 20 December 2019 at [32].

⁶⁴ See, eg, Applicant's Additional Material, Affidavit of [claim group member 1] affirmed 20 December 2019 [17]; Affidavit of [claim group member 2] affirmed 18 April 2024 [3].

⁶⁵ Applicant's Additional Material, Affidavit of [claim group member 3] affirmed 31 October 2013 [52].

⁶⁶ Applicant's Additional Material, Affidavit of [claim group member 1] affirmed 20 December 2019 [17]-[18].

⁶⁷ Applicant's Additional Material, Affidavit of [claim group member 1] affirmed 20 December 2019 [34].

⁶⁸ Ibid [39], [64].

⁶⁹ Applicant's Additional Material, Affidavit of [claim group member 2] affirmed 18 April 2024 [12]; Affidavit of [claim group member 3] affirmed 31 October 2013 [19]; Affidavit of [claim group member 4] affirmed 18 October 2013 [27].

⁷⁰ Applicant's Additional Material, Affidavit of [claim group member 7] affirmed 18 April 2024 [4].

⁷¹ Applicant's Additional Material, Affidavit of [claim group member 1] affirmed 20 December 2019 [62].

⁷² Applicant's Additional Material, Affidavit of [claim group member 2] affirmed 18 April 2024 [14].

⁷³ Applicant's Additional Material, Affidavit of [claim group member 5] affirmed 10 August 2013 [33].

powerful experience', following which she 'could not stay away'.⁷⁴ Claim group members also describe conducting welcomes to Country on Woppa.⁷⁵

Consideration of the assertion at s 190B(5)(a)

[107] From the above information, I consider that the factual basis material is sufficient to enable a 'genuine assessment' of the assertions that members of the claim group have an ongoing association with the claim area. The material in Attachment F and M and the Applicant's Additional Material contain a significant amount of detail to support the assertion at s 190B(5)(a).

[108] In my view, the factual basis material set out in Attachment F and M demonstrates that the apical ancestors of the claim group have an association to the claim area, with such association existing prior to effective sovereignty. The affidavits of members of the claim group demonstrates direct links from the ancestors and predecessors to current members of the claim group and provides many examples of the association of Woppaburra People to Woppa. The Woppaburra Determination and Woppaburra People #1 Registration Decision support the association of the claim group and their predecessors with the surrounding area, and it can be inferred that this association is as strong in relation to the claim area.

[109] I consider that the factual basis material demonstrates that the claim group and their predecessors have an association with the entire claim area. I also consider that the factual basis material provides sufficient geographical particularity to support the assertion of an association between the whole group and the claim area.⁷⁶ As such, I am satisfied that the factual basis material is sufficient to support the assertion at 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

[110] 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.

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

- '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

⁷⁴ Applicant's Additional Material, Affidavit of [claim group member 6] affirmed 8 August 2013 [30].

⁷⁵ Applicant's Additional Material, Affidavit of [claim group member 7] affirmed 18 April 2024 [10].

⁷⁶ *Gudjala 2007* [52].

⁷⁷ *Yorta Yorta* [46].

⁷⁸ *Ibid* [49].

- 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
- 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
- those laws and customs have been acknowledged and observed without substantial interruption since sovereignty.⁸¹

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

- 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
- 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
- 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

[113] 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

What material has been provided in support of the assertion at s 190B(5)(b)?

[114] Attachment F and M notes that the Woppaburra People recorded as occupying the claim area speak a variety of the Darumbal language that can be distinguished from that of the mainland Darumbal People and that the ‘Darumbal language belongs to a larger society that consists of Darumbal, Koinmurburra, Ningebul, and Warrabul peoples’.⁸⁶ This is reflected in the affidavits of members of the claim group, for example [claim group member 1] recalls being told by her mother and Aunty that ‘the Woppaburra had a close relationship with the Darumbal but that we were separate people with separate country’.⁸⁷ The traditional laws and customs of the

⁷⁹ Ibid [47].

⁸⁰ Ibid [46], [79].

⁸¹ Ibid [87].

⁸² *Gudjala 2009* [37], [52].

⁸³ Ibid [40].

⁸⁴ Ibid [29], [54].

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

⁸⁶ Form 1, Attachment F and M [8].

⁸⁷ Applicant’s Additional Material, Affidavit of [claim group member 1] affirmed 20 December 2019 [26].

Woppaburra People at sovereignty are summarised in Attachment F and M at paragraph 30, and these are reflected in the affidavits of members of the claim group contained in the Applicant's Additional Material, including the information below.

- [115] Members of the claim group describes creation stories in relation to the claim area, for example about Mugga Mugga (humpback whale) at Red Beach.⁸⁸ Mugga Mugga is described as the totem for all Woppaburra People because it is the creator of all Woppaburra Country.⁸⁹ Such stories are described as a way of connecting to Country even when members of the claim group are not physically there.⁹⁰
- [116] The material describes the respect for the spirits that is maintained by members of the claim group, for example by ensuring they are not disturbed at night.⁹¹ [Claim group member 2] describes how when she goes on Country, she constantly talks to her ancestors to them know she is there.⁹²
- [117] Particular types of sprits are described in the factual basis material, for example *Junjarries*, which are described as living on the land and keeping an eye on what people are doing and who can punish and torment those that do not do the right thing on Country.⁹³
- [118] Members of the claim group also describe places on Woppa that should be avoided, such as traditional burial and initiation places, as well as places associated with the history of what occurred on Woppa that should be treated with care and respect.⁹⁴ Similarly, members of the claim group maintain restrictions about men's and women's sites in the claim area.⁹⁵
- [119] Traditional laws and customs relating to totems are also maintained. Totems are described by [claim group member 1] as 'a personal and spiritual relationship to an animal. Totems are connected to dreaming stories or birthing stories'.⁹⁶ The factual basis material demonstrates the importance of a personal totems to Woppaburra People.⁹⁷ Naming protocols are also important, as explained by [claim group member 3] as follows:

In accordance with the custom I was taught by my grandfather, now that I am an elder I can give names to my children and grandchildren. A name is important because it described a person's character and spirit. I have to look at them and get a sense of who they are. ... I'll sit with them and we will talk about stuff before I choose a name. There is a very spiritual dimension to this practice because you have to be able to really feel who they are.

⁸⁸ Applicant's Additional Material, Affidavit of [claim group member 1] affirmed 20 December 2019 [27]; Applicant's Additional Material, Affidavit of [claim group member 2] affirmed 18 April 2024 [20]–[22].

⁸⁹ Applicant's Additional Material, Affidavit of Samala Cronin (unsworn and undated) [72].

⁹⁰ Applicant's Additional Material, Affidavit of [claim group member 2] affirmed 18 April 2024 [24].

⁹¹ Applicant's Additional Material, Affidavit of [claim group member 1] affirmed 20 December 2019 [78]–[79].

⁹² Applicant's Additional Material, Affidavit of [claim group member 2] affirmed 18 April 2024 [25]. See also Affidavit of [claim group member 4] affirmed 18 October 2013 [29].

⁹³ Applicant's Additional Material, Affidavit of Samala Cronin (unsworn and undated) [80].

⁹⁴ Applicant's Additional Material, Affidavit of [claim group member 4] affirmed 18 October 2013 [33].

⁹⁵ Applicant's Additional Material, Affidavit of [claim group member 4] affirmed 19 December 2019 [33].

⁹⁶ Applicant's Additional Material, Affidavit of [claim group member 1] affirmed 20 December 2019 [73], [76].

⁹⁷ Applicant's Additional Material, Affidavit of Samala Cronin (unsworn and undated) [77]–[79].

Your traditional name is your totem. It is part of you. Naming a totem is recognising part of you. When you name a child they can sense “*This is me*”. It is part of our culture and a part of you that you should be proud of.⁹⁸

[120] Animals are also believed to carry messages, in particular birds such as brown hawks, white cockatoos and kookaburras.⁹⁹ A further example of this is [claim group member 3]’s description of crows as ‘healing birds’ who bring messages from the spirit world and that Woppaburra People have a connection to crows.¹⁰⁰ The factual basis material also includes information relating to stories about other animals, such as wallabies,¹⁰¹ and refers to other stories that cannot be spoken about but that give the Woppaburra People their identity and sense of belonging.¹⁰²

[121] The importance of traditional laws and customs relating to mortuary practices are described by [claim group member 1] as follows:

the Woppaburra people – whether they are alive or in spirit form are intrinsically linked to their country. By that I mean that I was taught by my two Aunties that the spirits of our old people link us, the Woppaburra people who are still living, back to our country. The land and the people are connected together.¹⁰³

[122] [Claim group member 3] also describes the importance of repatriation and burials on Country as a process of cleansing and to put their ancestors to rest in their homeland.¹⁰⁴ This involved a smoking ceremony, burying the remains close to the roots of trees and talking to the spirits to welcome the ancestors back to Country.¹⁰⁵ Where a Woppaburra person cannot be buried on Country, members of the claim group describe sprinkling sand and shells prior to burial to ‘settle the spirits of the deceased by having a bit of their country interred with them’ to connect them to the Country of their ancestors.¹⁰⁶

[123] Other laws and customs are also referred to in the factual basis material, for example [claim group member 3] describes being told by his grandfather about the rules relating to marriage, which ‘depended on who your parents are and which group you belonged to ... You were only allowed to marry someone from another specific group’.¹⁰⁷ Similarly, [claim group member 4] describes being taught that there was a wrong way for marriage.¹⁰⁸ The material also provides information in relation traditional cultural protocols and obligations relating to family, such as cousins being treated as brothers and sisters and nieces and nephews as one’s own children,¹⁰⁹ as well as other traditional practices such as those relating to childbirth.¹¹⁰ [Claim

⁹⁸ Applicant’s Additional Material, Affidavit of [claim group member 3] affirmed 31 October 2013 [72]–[73].

⁹⁹ Applicant’s Additional Material, Affidavit of [claim group member 1] affirmed 20 December 2019 [82]–[83].

¹⁰⁰ Applicant’s Additional Material, Affidavit of [claim group member 3] affirmed 31 October 2013 [3].

¹⁰¹ Applicant’s Additional Material, Affidavit of [claim group member 3] affirmed 31 October 2013 [60].

¹⁰² Ibid [61].

¹⁰³ Applicant’s Additional Material, Affidavit of [claim group member 1] affirmed 20 December 2019 [52].

¹⁰⁴ Applicant’s Additional Material, Affidavit of [claim group member 3] affirmed 31 October 2013 [99].

¹⁰⁵ Ibid [100].

¹⁰⁶ Applicant’s Additional Material, Affidavit of [claim group member 4] affirmed 19 December 2019 [70]; Affidavit of [claim group member 6] affirmed 20 December 2019 [24].

¹⁰⁷ Applicant’s Additional Material, Affidavit of [claim group member 3] affirmed 31 October 2013 [109]. This system is no longer practiced as there are ‘too few Woppaburra families left to continue the system’: at [110].

¹⁰⁸ Applicant’s Additional Material, Affidavit of [claim group member 4] affirmed 18 October 2013 [57].

¹⁰⁹ Applicant’s Additional Material, Affidavit of [claim group member 8] affirmed 20 December 2019 [24]–[25].

group member 1] describes how the descent connections makes her and her children Woppaburra People and connects them to the Keppel Islands.¹¹¹

[124] The factual basis material also describes the important role of elders to bring Woppaburra People together, make decisions, act as ‘peace maker’, keep knowledge about the islands and pass on knowledge to the younger generations.¹¹² The material also demonstrates the importance of knowledge being passed down to appropriate people who show interest and respect and have ‘earned’ that knowledge and who the Elders know will look after that knowledge.¹¹³ The decision-making process among Woppaburra families is also set out, with each family choosing an appropriate representative to have a say in decisions.¹¹⁴

[125] Further, I note that the traditional laws and customs of the Woppaburra People giving rise to their native title rights and interests were recognised as having existed ‘for thousands of years before European settlement’ over the surrounding area in the Woppaburra Determination.¹¹⁵

Consideration of the assertion at s 190B(5)(b)

[126] I am satisfied that the material outlined above is sufficient to enable a genuine assessment of whether there exist traditional laws acknowledged and customs observed by the Woppaburra People that give rise to the claim to native title rights and interests.

[127] In my view, the factual basis material contained in Attachment F and M and the Applicant’s Additional Material, together with the Woppaburra Determination, demonstrates the existence of the traditional laws and customs of the Woppaburra People. I consider that these laws and customs are supported by the examples given by the members of the claim group in the factual basis material, including as set out above.

[128] Having regard to this, I am satisfied that the factual basis material is sufficient to support the assertion at s 190B(5)(b).

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

[129] 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 traditional laws and customs. The traditional laws and customs referred to in s 190B(5)(c) are those referred to under s 190B(5)(b).¹¹⁶

¹¹⁰ Applicant’s Additional Material, Affidavit of [claim group member 8] affirmed 20 December 2019 [21].

¹¹¹ Applicant’s Additional Material, Affidavit of [claim group member 1] affirmed 20 December 2019 [25]. See also [72].

¹¹² Applicant’s Additional Material, Affidavit of [claim group member 1] affirmed 20 December 2019 [86]–[88]; Applicant’s Additional Material, Affidavit of [claim group member 3] affirmed 31 October 2013 [33]–[41].

¹¹³ Applicant’s Additional Material, Affidavit of [claim group member 1] affirmed 20 December 2019 [87]; Applicant’s Additional Material, Affidavit of [claim group member 3] affirmed 31 October 2013 [43]; Affidavit of [claim group member 5] affirmed 10 August 2013 [41].

¹¹⁴ Applicant’s Additional Material, Affidavit of [claim group member 1] affirmed 20 December 2019 [89].

¹¹⁵ *Woppaburra Determination* [4].

¹¹⁶ *Martin* [29].

[130] 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'.¹¹⁷

What information has been provided in support of the assertion at s 190B(5)(c)?

[131] As noted above, in 1902 the Woppaburra People were subjected to forced removals from their Country. Nevertheless, as described by [claim group member 3], '[o]ur people have a deep continuing spiritual connection to the Islands which ties us together despite the harsh reality our People have endured since being removed from our homeland'.¹¹⁸ This is further demonstrated in [claim group member 3]'s description of her grandfather, who was the first Woppaburra person to return to the islands:

The fact that my grandfather got the chance to go back to country ... shows he never lost connection to Woppaburra Country. It also shows he never forgot who he was and where he was from.¹¹⁹

[132] This is also demonstrated in the material in the affidavits of members of the claim group, for example [claim group member 8] states that the connection to the Keppel Islands is in the children's veins, that '[t]hey have the blood of our ancestors running through them' and this connection has not been broken.¹²⁰ The material demonstrates that despite the forced removals, traditional knowledge was maintained, for example [claim group member 3] states that her grandfather 'passed on the knowledge of that place and the stories for the day that we could return ... our ancestors are still guiding us in our return to our country'.¹²¹

[133] The factual basis material contained at Attachment F and M also provides further information on how the Woppaburra People continued their practice of their traditional laws and customs. Woppaburra People maintained their contact across family groups, with families connecting in Hervey Bay and Acacia Ridge.¹²² The material also shows how exogamous marriage and connection with the Butchulla People, who are also saltwater people, was important in helping the Woppaburra People maintain their connection to the ocean.¹²³ This is reflected in the affidavits of members of the claim group contained in the Applicant's Additional Material.¹²⁴

[134] Members of the claim group describe how knowledge is passed down from generation to generation. For example, [claim group member 3] describes how when walking along with his grandfather 'everything was a lesson',¹²⁵ and how an Uncle would speak Woppaburra and teach his children about Woppa, and that '[m]y children and grandchildren know the

¹¹⁷ *Gudjala 2009* [33].

¹¹⁸ Applicant's Additional Material, Affidavit of [claim group member 3] affirmed 31 October 2013 [2].

¹¹⁹ Applicant's Additional Material, Affidavit of [claim group member 3] affirmed 31 October 2013 [17], [19].

¹²⁰ Affidavit of [claim group member 8] affirmed 20 December 2019 [29].

¹²¹ Applicant's Additional Material, Affidavit of [claim group member 3] affirmed 31 October 2013 [128].

¹²² Form 1, Attachment F and M [34].

¹²³ *Ibid* [35].

¹²⁴ See, eg, Applicant's Additional Material, Affidavit of [claim group member 3] affirmed 31 October 2013 [7], [11], [22]–[23], [25]; Affidavit of [claim group member 8] affirmed 20 December 2019 [14].

¹²⁵ Applicant's Additional Material, Affidavit of [claim group member 3] affirmed 31 October 2013 [120].

Woppaburra history, they all have Woppaburra traditional names and are very proud to have the chance to visit Woppaburra Country'.¹²⁶

[135] [Claim group member 1] describes taking her children to Country to teach them about the islands and to pass down the stories that she was told.¹²⁷ Knowledge about Country and culture is also passed down to younger generations on Woppa through the junior ranger program, including by teaching them how to maintain and protect Country.¹²⁸ The material demonstrates the importance of maintaining traditional laws and customs for the protection of important sites, for example [claim group member 3] states that:

It is important for my children to know the places and protocols for protecting those places for when I am gone. They will then have that responsibility to continue to ensure that these places are protected and that their children know how to look after them. That is our culture. That is what my grandfather taught me.¹²⁹

[136] [Claim group member 4] also describes having a responsibility to look after Country 'because of my ancestors, grandfather, aunties, uncles, and my mother. I fulfil this responsibility by going there and teaching my children and grandchild about this place'.¹³⁰

[137] An example of how particular traditional methods have been passed down includes [claim group member 2]'s description that traditional burn methods 'have been passed down from generation to generation through my ancestors'.¹³¹

[138] In the Woppaburra Determination, Rangiah J states that the evidence demonstrates that 'the Woppaburra People have maintained a continuous presence on their country to the extent possible within the context of the decimation of the population and removal from traditional lands and waters'.¹³²

Consideration of the assertion at s 190B(5)(c)

[139] In my view, the factual basis material contains sufficient detail relating to the transmission of traditional laws and customs from generation to generation to enable a genuine assessment of the extent to which the Woppaburra People have continued to hold the native title in the claim area under those traditional laws and customs.

[140] The material demonstrates the impact of the forced removals from Country, but that despite this the Woppaburra People have maintained a strong connection to their Country, as well as to their traditional laws and customs through stories and the continuing passing down of knowledge.

[141] Having regard to the information set out above as well as the Woppaburra Determination, I consider that the factual basis material demonstrates that the Woppaburra People have maintained continuing connection to and respect for their traditional laws and customs that

¹²⁶ Ibid [23].

¹²⁷ Applicant's Additional Material, Affidavit of [claim group member 1] affirmed 20 December 2019 [70].

¹²⁸ Applicant's Additional Material, Affidavit of [claim group member 2] affirmed 18 April 2024 [15].

¹²⁹ Applicant's Additional Material, Affidavit of [claim group member 3] affirmed 31 October 2013 [130].

¹³⁰ Applicant's Additional Material, Affidavit of [claim group member 4] affirmed 18 October 2013 [64].

¹³¹ Applicant's Additional Material, Affidavit of [claim group member 2] affirmed 18 April 2024 [32].

¹³² *Woppaburra Determination* [18].

existed in the pre-sovereignty society and continue to this day. I consider that the material demonstrates the genealogical links between the ancestors and predecessors of the claim group and current members of the claim group such that it can be said that the traditional laws and customs of the society at sovereignty have continued to be acknowledged and observed by the current members of the claim group.

[142] As such, I am satisfied that the factual basis material is sufficient to support the assertion at s 190B(5)(c).

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

[143] 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.¹³³

[144] I understand that I may consider material additional to the application for the purpose of my assessment of this condition.¹³⁴ Because a ‘more onerous test [is] to be applied to the individual rights and interests claimed’ than under s 190B(5),¹³⁵ 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.¹³⁶

[145] In *Gudjala 2007*, Dowsett J indicated that s 190B(6) is to be considered having regard to the definition of ‘native title rights and interests’ in s 223(1).¹³⁷ 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.

[146] Justice Kirby observed in *Ward HC* 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’.¹³⁸ The term “in relation to” is here to be given a ‘wide import’.¹³⁹

[147] The claimed native title rights and interests are set out above at paragraph 83. I consider that each of these is in relation land or waters. In the Woppaburra Determination, both exclusive and non-exclusive rights and interests were recognised in generally consistent terms with the

¹³³ Section 186(1)(g) of the Act requires the Register of Native Title Claims to include a description of the native title rights and interests that, in applying s 190B(6), could be established on a prima facie basis.

¹³⁴ *Doepel* [16].

¹³⁵ *Ibid* [127], [132].

¹³⁶ *Yorta Yorta* [86]; *Gudjala 2007* [86].

¹³⁷ *Gudjala 2007* [85]–[87].

¹³⁸ *Ward HC* [577].

¹³⁹ *Alyawarr* [93].

claimed native title rights and interests in Schedule E,¹⁴⁰ noting that the non-exclusive rights in relation to water were separately detailed as including rights to hunt, fish, gather and take natural resources and water, the rights in relation to conducting ceremonies and teaching on the area are expressed slightly differently, the right to light fires is qualified in the determination as being ‘for domestic purposes including cooking, but not for the purpose of hunting or clearing vegetation’ and the claimed right to ‘burn’ is not included in the determination.¹⁴¹

[148] I have set out my consideration under s 190B(6) of each of the claimed exclusive and non-exclusive rights and interests below.

Exclusive rights to possession, occupation, use and enjoyment of the lands and waters

[149] Paragraph 1 of Schedule E provides that where recognisable and except in relation to water, the Woppaburra People claim ‘the right of possession, occupation, use and enjoyment of the area to the exclusion of all others’.

[150] I note the comments of the High Court in *Ward HC*, that exclusive rights are ‘the rights under traditional law and custom to be asked permission and to “speak for country” that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others’.¹⁴²

[151] The Full Court held in *Griffiths* that:

It is not necessary to a finding of exclusivity in possession, use and occupation, that the native title claim group should assert a right to bar entry to their country on the basis that it is “their country”. If control of access to country flows from spiritual necessity because of the harm that ‘the country’ will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive. The relationship to country is essentially a ‘spiritual affair’. It is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people. The question of exclusivity depends upon the ability of the [native title holders] effectively to exclude from their country people not of their community. If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have ... an exclusive right of possession, use and occupation.¹⁴³

[152] Justice French (as his Honour then was) noted in *Sampi* that:

The right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation.¹⁴⁴

¹⁴⁰ *Woppaburra Determination* [6]–[8].

¹⁴¹ *Woppaburra Determination* [6]–[8].

¹⁴² *Ward HC* [88].

¹⁴³ *Griffiths* [127].

¹⁴⁴ *Sampi* [1072].

[153] The factual basis material includes information about asking permission to access Woppaburra Country, for example [claim group member 3] describes that '[a]ccording to our law and culture, anyone who is not Woppaburra should ask permission from Woppaburra People before enter[ing] Woppaburra Country'.¹⁴⁵ [Claim group member 8] explains that '[o]ur responsibility to look after country involves making decisions about our country'.¹⁴⁶ This extends to asking permission to hunt on the Keppel Islands.¹⁴⁷ The material also describes that the Woppaburra People are recognised by the Darumbal People on the mainland as having rights to speak for the Keppel Islands.¹⁴⁸

[154] Member of the applicant Ms Cronin describes the importance of protecting Country and obeying these rules, because

[i]f we don't protect our country or obey those rules, we anger the spirits because we are not obeying traditional law. When we anger the spirits, they can punish.

...

The role of our spirits is in punishing people is an important reason why visitors to our country should seek permission before they come on our country.¹⁴⁹

[155] A high-profile example of these rules being exercised is set out in the factual basis material by explaining that famous naturalist David Attenborough and his production team 'did the right thing' by seeking permission from the Woppaburra People to film on Country during production of a documentary on the Great Barrier Reef.¹⁵⁰

[156] In my view, the factual basis material contains examples which demonstrates the importance to the Woppaburra People of the rules relating to asking permission and making decisions about the use and enjoyment by others on Woppa, and also in relation to the Woppaburra People as speaking for the land as set out in *Sampi*. The material also describes the importance of these rules as a way of avoiding spiritual harm as described in *Griffiths*. As noted above, exclusive rights were recognised in the Woppaburra Determination.¹⁵¹

[157] For the above reasons, I am satisfied that the factual basis material demonstrates that the claimed exclusive rights and interests can be prima facie established.

Non-exclusive rights and interests

[158] Paragraph 1 of Schedule E sets out the non-exclusive rights claimed in relation to water and paragraph 2 lists eleven claimed non-exclusive rights and interests. The affidavits of members of the claim group contained in the Applicant's Additional Material, as well as the Table of Rights and Interests in Attachment F and M contain many examples of the exercise of each of

¹⁴⁵ Applicant's Additional Material, Affidavit of [claim group member 3] affirmed 31 October 2013 [106].

¹⁴⁶ Applicant's Additional Material, Affidavit of [claim group member 8] affirmed 20 December 2019 [49].

¹⁴⁷ Applicant's Additional Material, Affidavit of [claim group member 4] affirmed 18 October 2013 [68]; Affidavit of [claim group member 5] affirmed 10 August 2013 [34].

¹⁴⁸ Applicant's Additional Material, Affidavit of [claim group member 5] affirmed 10 August 2013 [26].

¹⁴⁹ Applicant's Additional Material, Affidavit of Samala Cronin (unsworn and undated) [44], [46].

¹⁵⁰ Applicant's Additional Material, Affidavit of [claim group member 8] affirmed 20 December 2019 [50]–[51].

¹⁵¹ *Woppaburra Determination* [6(a)].

these claimed native title rights and interests. Some of this material is referred to above in my consideration of the condition at s 190B(5).

- [159] I refer to the material above at paragraphs 104 to 106, which in my view contains sufficient material to demonstrate the right to access, be present on, move about on and travel over the area. I also consider that the material sufficiently demonstrates the claimed right to camp on the area and the traditional methods for erecting shelters, for example: ‘A *durra* is a type of shelter. Grandfather taught me how a *durra* should be built. The men built the shelter, the women stripped the vines use[d] to secure the shelter’.¹⁵²
- [160] In relation to hunting, fishing and gathering, the factual basis material describes traditional methods for fishing and gathering seafood, for example using the stars to determine where seafood will be in season, collecting oysters on Woppa at Leeke’s Creek at the time when black wattle is flowering.¹⁵³ One member of the claim group describes using particular types of nets for different fish and how to ‘read the water to see where the fish were’.¹⁵⁴ [Claim group member 6] states that Woppaburra ancestors used fish traps, and there are the remnants of fish traps on Woppa at the end of Leekes Beach.¹⁵⁵ The factual basis material also describes hunting lizards, snakes, bird’s eggs and bandicoots, as well as seafood such as dugong, turtle, crabs, pipis, oysters, squid and other fish.¹⁵⁶ One member of the claim group describes collecting turtle eggs on the Keppel Islands at the right time of year, and that ‘[b]eing a Woppaburra person means I have the right to take turtles and turtle eggs off Keppel Island’.¹⁵⁷
- [161] [Claim group member 1] refers to using natural resources, such as the grass tree or pandanus root to make dolls for birthing or burial rituals and to make fire and resin, honey from grevillea trees, soap bush for fishing, snake vine for arthritis and billi bark (casuarina) for pain relief or sunburn.¹⁵⁸ Other natural resources are used, for example white, red and orange ochre that is found on the claim area is used for ceremonies about the *mugga mugga*.¹⁵⁹
- [162] In relation to conducting ceremonies, the factual basis material provides examples as recently as April 2024 of members of the claim group conducting smoking ceremonies to welcome people and let the spirits know that people are being brought onto Country.¹⁶⁰ [Claim group member 7] also refers to playing the yidaki for ceremonial times: ‘the didgeridoo is a ceremonial instrument, it has a very earthy, transient instrument, the sounds that are created from it are from me and the vibrations that come out go through me’.¹⁶¹

¹⁵² Applicant’s Additional Material, Affidavit of [claim group member 8] affirmed 20 December 2019 [30].

¹⁵³ Applicant’s Additional Material, Affidavit of [claim group member 2] affirmed 18 April 2024 [49].

¹⁵⁴ Applicant’s Additional Material, Affidavit of [claim group member 5] affirmed 10 August 2013 [28]. One of the traditional nets used on the Keppel Islands is pictured in the Affidavit of [claim group member 8] affirmed 20 December 2019 [17].

¹⁵⁵ Applicant’s Additional Material, Affidavit of [claim group member 6] affirmed 8 August 2013 [70].

¹⁵⁶ Applicant’s Additional Material, Affidavit of [claim group member 3] affirmed 31 October 2013 [119].

¹⁵⁷ Applicant’s Additional Material, Affidavit of [claim group member 4] affirmed 18 October 2013 [54].

¹⁵⁸ Applicant’s Additional Material, Affidavit of [claim group member 1] affirmed 20 December 2019 [41]–[42], Applicant’s Additional Material, Affidavit of [claim group member 2] affirmed 18 April 2024 [50]–[55].

¹⁵⁹ Applicant’s Additional Material, Affidavit of [claim group member 7] affirmed 18 April 2024 [42].

¹⁶⁰ Applicant’s Additional Material, Affidavit of [claim group member 2] affirmed 18 April 2024 [26].

¹⁶¹ Applicant’s Additional Material, Affidavit of [claim group member 7] affirmed 18 April 2024 [10]–[11].

- [163] Members of the claim group have been involved in repatriation efforts to return the remains of Woppaburra People onto Country, ‘so that the spirits could return to their country’.¹⁶² I also refer to the material set out above at paragraphs 121 to 122 in relation to burials on Country.
- [164] The material also demonstrates the importance of protecting important sites in the claim area, as set out above at paragraphs 104 and 135. A further example of this is the efforts of members of the claim group to stop an airstrip from being built where there are significant sites for the Woppaburra People.¹⁶³
- [165] In relation to the claimed right to teach on the area the spiritual connection of the Woppaburra People to the area, I refer to the material set out above at paragraphs 134 to 135 in relation to my consideration of the condition at s 190B(5)(c). The material also demonstrates the importance of teaching the younger generations on Country. [Claim group member 7] describes how ‘[k]nowledge of culture is definitely a passing down thing. I got everything from my dad and I am passing it down to my kids and the young Woppaburra people’.¹⁶⁴
- [166] In relation to holding meetings, the Table of Rights and Interests contained in Attachment F and M refers to the pre-sovereignty practices about making decisions and about meetings to discuss initiation rites, as well as current members of the claim group meeting on Woppa in relation to land and meetings with elders.¹⁶⁵
- [167] In relation to lighting fires on the area, the factual basis material contains examples of members of the claim group using fire to cook seafood.¹⁶⁶ The material also refers to members of the claim group having campfires on Woppa.¹⁶⁷
- [168] The factual basis material also contains detailed information in relation to the claimed right to ‘burn’. Members of the claim group describe the traditional process for conducting cultural burns, ensuring that cultural and important sites such as scar trees as well as animals are protected, as well as the traditional methods for preparing and conducting ‘circular mosaic’ burns by checking the moisture content of the ground, examining weather and the behaviour of ants and preparing the ground.¹⁶⁸
- [169] I consider that the material set out above is sufficient to establish each of the claimed non-exclusive rights and interests on a prima facie basis.

Conclusion on s190B(6)

- [170] Because I am satisfied that at least some of the claimed native title rights and interests can be prima facie established, the condition at s 190B(6) is met. For the reasons above, I am satisfied

¹⁶² Applicant’s Additional Material, Affidavit of [claim group member 1] affirmed 20 December 2019 [45].

¹⁶³ Applicant’s Additional Material, Affidavit of [claim group member 6] affirmed 8 August 2013 [50]–[52].

¹⁶⁴ Applicant’s Additional Material, Affidavit of [claim group member 7] affirmed 18 April 2024 [38].

¹⁶⁵ Form 1, Attachment F and M, Table of Rights and Interests, page 16.

¹⁶⁶ Applicant’s Additional Material, Affidavit of [claim group member 3] affirmed 31 October 2013 [122]; Affidavit of [claim group member 4] affirmed 18 October 2013 [34].

¹⁶⁷ Applicant’s Additional Material, Affidavit of [claim group member 6] affirmed 20 December 2019 [25].

¹⁶⁸ Applicant’s Additional Material, Affidavit of [claim group member 2] affirmed 18 April 2024 [14], [30]–[39]; Affidavit of [claim group member 7] affirmed 18 April 2024 [26]–[31].

that the factual basis material is sufficient to establish each of the claimed exclusive and non-exclusive rights and interests set out at Schedule E of the application on a prima facie basis, and as such these will be entered on the Register in accordance with s 186(1)(g).

Section 190B(7): traditional physical connection – condition met

[171] 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.

[172] Justice Dowsett observed in *Gudjala 2009* 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’.¹⁶⁹ ‘Traditional’ as that term is used under s 223 of the Act, was considered in *Yorta Yorta*:

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.¹⁷⁰

[173] In *Doepel*, Mansfield J stated that 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’.¹⁷¹

[174] Having regard to this, 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.

[175] I refer to my reasons and conclusions regarding the requirements of ss 190B(5) and 190B(6). I consider that the factual basis material contains many examples of the traditional physical connection that members of the claim group have on Woppa. One such example is that [claim group member 7] refers to the specific lots set out in Attachment B and states that he knows these lots on Woppa very well and has been going out to Woppa since he was young,¹⁷² and that

I am there all the time. I go out to Woppa a lot, but if you average it out, I probably go out at least five times a month. I’ve spent a lot of time camped out on Woppa for short periods, usually around Monkey Point and I spent about 6 weeks over there during the Christmas holidays.

Recently, I have been spending even more time on Woppa as I work ... my “work” involves activities that protect country. Some of the activities I do include walking country, teaching people about our country and how to use plants and animals, how to protect and use country, doing smoking ceremonies and doing burns. I consider many of these activities to be activities I would do

¹⁶⁹ *Gudjala 2009* [84].

¹⁷⁰ *Yorta Yorta* [86].

¹⁷¹ *Doepel* [18].

¹⁷² Applicant’s Additional Material, Affidavit of [claim group member 7] affirmed 18 April 2024 [7].

to protect and maintain my country. I am carrying out my cultural responsibilities while I'm at work.¹⁷³

[176] Having regard to the above, I am satisfied that the application establishes that at least one member of the claim group currently has a traditional physical connection with the lands and waters of the claim area. As such, I am satisfied that the application meets the requirements of s 190B(7).

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

[177] 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.

[178] **Section 61A(1)** provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title. Paragraph 3 of each of the Applicant Affidavits state that the deponent believes that none of the area covered by the application is also covered by an approved determination of native title. This is confirmed in the Geospatial Assessment and my own searches of the Tribunal's database. Attachment B of the application confirms that the application does not include any of the lands and waters subject to the Woppaburra Determination.

[179] **Section 61A(2)** provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in s 61A(4) apply (including where extinguishment is to be disregarded under s 47B).

[180] Schedule B of the application includes the following:

1. The area covered by the application excludes any land or waters within the application area covered by valid previous exclusive possession acts as defined by section 23B of the *Native Title Act 1993* (Cth).
2. The area covered by the application excludes any land or waters where the native title rights and interests claimed have been otherwise extinguished.
3. If any of the land or waters referred to in 1 or 2 above are subject to extinguishment that is required to be disregarded under subsection 47B(2) of the *Native Title Act 1993* (Cth), then the area is not excluded from the application.

[181] Schedule L of the application contains a statement that the benefit of s 47B is claimed in relation to all of the areas where it is applicable.

[182] The State provided submissions and tenure information in relation to extinguishment and previous exclusive possession acts, and the applicant provided submissions in response.¹⁷⁴ I have reviewed these submissions. Neither the State nor the applicant express their submissions as being made in relation to any of the conditions of the registration test.

¹⁷³ Applicant's Additional Material, Affidavit of [claim group member 7] affirmed 18 April 2024 [12]–[13].

¹⁷⁴ State's Submissions [3]–[5]; tenure information provided by the State on 28 June 2024; Applicant's Response Submissions [3]–[12]; State's Further Submissions [3]–[11].

[183] In *Strickland*, French J stated that the applicability of s 47B 'will require findings of fact and law to be made as part of the hearing of the application'.¹⁷⁵ As such, I consider that the applicability of s 47B in relation to the application is a matter for the Court and not the registration test. For the purpose of the condition at s 190B(8), having regard to the material at Schedules B and L I am satisfied that either the circumstances in s 62A(4) apply, in which case s 61A(2) does not apply, or if the assertion proves incorrect, then the application excludes any areas covered by a previous exclusive possession act. As a result, in my view there is no failure to comply with s 61A(2).

[184] **Section 61A(3)** provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done, unless the circumstances described in s 61A(4) apply. I am satisfied that the terms of Schedules B and E indicate that exclusive rights and interests are not claimed over areas where there has been a previous non-exclusive possession act.

[185] Having regard to the information contained in the Applicant Affidavits, the Geospatial Assessment and Schedules B and E, I am satisfied that there is no failure to comply with s 61A. As such, the application meets the requirements of s 190B(8).

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

[186] 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 include claims to ownership of minerals, petroleum or gas wholly owned by the Crown, 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 Act).¹⁷⁶

[187] Schedules Q and P to 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.

[188] Paragraph 2 of Schedule B of the application confirms that the application does not cover any areas where native title rights and interests have otherwise been wholly extinguished, subject to the applicability of s 47B. As noted above at paragraph 182, the applicant and the State provided submissions in relation to extinguishment. For similar reasons as set out above at paragraph 183 in relation to the condition at s 190B(8), having regard to Schedules B and L, I am satisfied that the application has not been made contrary to s 190B(9)(c).

[189] In the absence of evidence to the contrary, having regard to Schedules B, L, Q and P, I am satisfied that the application meets the requirements of s 190B(9).

¹⁷⁵ *Strickland* [55].

¹⁷⁶ See ss 47(2), 47A(2), 47B(2) or 47C(8) of the Act.

End of reasons

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Woppaburra People #2
NNTT No.	QC2024/004
Federal Court of Australia No.	QUD243/2024

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:

13 May 2024

Date application entered on Register:

20 September 2024

Applicant:

Yasmin Green, Nerark Morris, Danielle Sheehan, Valmai Smith, Samala Cronin, Summer Britcher, Bronwyn Britcher

Applicant's address for service:

[As per the Schedule]

Conditions on Applicant's authority

[As per the Attachment IA, paragraphs 1 to 19, 24 to 26 and 29]

Area covered by application:

[As per the Schedule]

Persons claiming to hold native title:

[As per the Schedule]

Registered native title rights and interests:

[As per the Schedule]

Michael Raine

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.

20 September 2024