National Native Title Tribunal

Registration Decision

Application name	North Eastern Peninsula Sea Claim Group
Name of applicant	Bernard Richard Charlie, Trevor Henry Lifu, Paul Joseph Ah Mat, Michael Thomas Solomon, Jennifer Jill Thompson, Reginald Williams
Federal Court of Australia No.	QUD115/2017
NNTT No.	QC2017/003
Date of Decision	27 March 2025

Claim not accepted for registration

I have decided that the claim in the North Eastern Peninsula Sea Claim Group application does not satisfy all of the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).[1] Therefore the claim must not be accepted for registration.

For the purposes of s 190D(3)(a), my opinion is that the claim satisfies all of the conditions in s 190B. For the purposes of s 190D(3)(b), my opinion is that although the claim does not satisfy all of the conditions in s 190C, it has nevertheless been possible to consider the conditions in s 190B.

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*’)

Burragubba on behalf of the Wangan and Jagalingou People v Queensland [2017] FCA 373 (‘*Burragubba*’)

Butchulla People v Queensland [2006] FCA 1063; (2006) 154 FCR 233 (‘*Butchulla*’)

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

David on behalf of the Torres Strait Regional Seas Claim v Queensland [2022] FCA 1430 (‘*Torres Strait Regional Determination*’)

Drury v Western Australia [2000] FCA 132; (2000) 97 FCR 169 (‘*Drury*’)

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

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*’)

Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9) [2007] FCA 31; (2007) 238 ALR 1 (‘*Harrington-Smith*’)

Lawson on behalf of the ‘Pooncarie’ Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales [2002] FCA 1517 (‘*Lawson*’)

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

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*’)

Northern Territory 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*’)

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

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

Weribone on behalf of the Mandandanji People v Queensland [2013] FCA 255 (‘*Weribone*’)

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*’)

Wiri People v Native Title Registrar [2008] FCA 574; (2008) 168 FCR 187 (‘*Wiri People*’)

Background

[1] This decision concerns an amended application filed on behalf of the North Eastern Peninsula Sea Claim Group ('NEP Sea Claim'). The NEP Sea Claim covers land and waters of approximately 268.5 square kilometres consisting of waters and a number of islands around the tip of Cape York Peninsula.

[2] The NEP Sea Claim was first filed in the Federal Court ('Court') on 27 February 2017 and was not accepted for registration on the Register of Native Title Claims ('Register').[2] At the time it was filed, the NEP Sea Claim overlapped five other native title determination applications.[3] On 30 November 2022 a determination of native title was made in seven separate claims in this region in *David on behalf of the Torres Strait Regional Seas Claim v Queensland* ('Torres Strait Regional Determination'). One of the seven claims determined was a partial determination of the NEP Sea Claim.[4]

[3] The undetermined balance of the NEP Sea Claim remained in case management following the Torres Strait Regional Determination. Orders were made in the Court on 17 January 2025 granting leave for an amended Form 1 to be filed.[5] The purpose of the amendments was to remove an area referred to as the 'Raine Island Overlap Region' and three discrete parcels over which native title was no longer asserted due to extinguishment.[6] On 21 January 2025, the applicant filed an amended Form 1 ('Amended Application'). The Registrar of the Court gave a copy of the Amended Application and accompanying affidavits to the Native Title Registrar ('Registrar') on 22 January 2025 pursuant to s 64(4) 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.[7]

Preliminary considerations

Registration conditions

[4] 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.

[5] Section 190A(1A) provides for an exemption from the registration test for certain applications amended under s 87A. As the granting of leave by the Court to amend the application was not

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[2] North Eastern Peninsula Sea Claim QC2017/003 (registration test decision dated 26 May 2017) ('Previous Registration Decision').

[3] These are set out in the Previous Registration Decision, page 7 [39].

[4] *Torres Strait Regional Determination*.

[5] Orders of Mortimer CJ in *Bernard Richard Charlie & Ors on behalf of the North Eastern Peninsula Sea Claim Group v Queensland* (Federal Court of Australia, QUD115/2017, 17 January 2025), paragraph 6.

[6] Affidavit of Parkinson Wirrick affirmed 18 November 2024 ('Wirrick Affidavit') [3]–[15].

[7] Section 190A(1).

made pursuant to s 87A, I am satisfied that s 190A(1A) does not apply to the Amended Application.

[6] Section 190A(6A) sets out the conditions under which the Registrar must accept an amended application for registration without testing under ss 190B and 190C, but only applies where the previous application has been accepted for registration.[8] The only amendments to the NEP Sea Claim made in the Amended Application are to reduce the claim area and update the address for service with the current solicitor on record. The material in the Amended Application is otherwise identical to the original claim that did not meet the conditions of the registration test in the original registration test decision dated 26 May 2017 ('Previous Registration Decision'). Given that the previous application made on 27 February 2017 was not accepted for registration, s 190A(6A) does not apply to the Amended Application.

[7] I have decided that the claim in the application must not be accepted for registration and this document sets out my reasons for that decision.

Information considered

[8] Section 190A(3) sets out the information which the Registrar must have regard to 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'.

[9] I have had regard to information in the Amended Application and the affidavit of Parkinson Wirrick affirmed on 18 November 2024 ('Wirrick Affidavit') that was also provided to the Registrar by the Court. There are no other documents provided by the applicant that I must have regard to under s 190A(3)(a).

[10] There is no information obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers that I must have regard to under s 190A(3)(b).

[11] The State has not provided submissions in relation to the application of the registration test that I must have regard to under s 190A(3)(c).

[12] I may also have regard to such other information as I consider appropriate.[9] I have considered it appropriate to have regard to a geospatial assessment and overlap analysis prepared by the NNTT's Geospatial Services in relation to the area covered by the Amended Application, dated 4 February 2025 ('Geospatial Assessment'). I have also considered it appropriate to have regard to the Previous Registration Decision.

Procedural fairness

[13] On 3 February 2025, a Senior Officer of the NNTT wrote to both the applicant and the State of Queensland ('State') to invite any submissions or additional material in relation to the application of the registration test by 17 February 2025.

[8] Section 190A(6A)(b).

[9] Section 190A(3).

[14] No additional material or submissions were received from the applicant or the State. This concluded the procedural fairness process.

Section 190C: conditions about procedural and other matters — conditions not met

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

[15] I have examined the Amended Application and for the reasons set out below, I am not satisfied 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, in my view 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. Six persons are named in the Amended Application as comprising the applicant. Schedule A contains a description of the native title claim group as the descendants by birth or adoption of eight named apical ancestors or ancestor couples. Each of the persons comprising the applicant have deposed an affidavit for the purposes of s 62 and these have been annexed to the Amended Application ('Applicant Affidavits'). Each of the Applicant Affidavits were executed in February 2017 following a meeting held on 17 January 2017 at which each deponent was authorised to make the original application. The Applicant 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.[12] From the material contained in Schedule A and the Applicant Affidavits, I am satisfied that the Amended Application has been made in accordance with s 61(1).

[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 consider that there is nothing in the application or other material I have considered which would suggest otherwise.

[10] *Doepel* [35].

[11] See also s 190D(3)(b).

[12] Form 1, Applicant Affidavits [4].

[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 Amended Application and Part B states the updated address for service. As such, I am satisfied that the Amended Application contains the information required by s 61(3).

[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 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).[13] As noted above, Schedule A contains a description of the native title claim group. I am satisfied that the Amended Application contains the information required by s 61(4) as Schedule A includes a description of the native title claim group that is sufficiently clear so that it can be ascertained whether any particular person is a member of the claim group.[14]

[21] **Section 61(5)** provides that the application must be filed in the Court in the prescribed form and be accompanied by any prescribed fee. In my view, these are matters for the Court however I note that the Amended Application is made in the prescribed form and was accepted for filing by the Court on 22 January 2025. I further note that the compliance with s 61(5)(c) (that the application contain such information as prescribed) is otherwise tested as part of my consideration of s 190C(2) as a whole.

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

[22] **Section 62(1)(a)** requires a claimant application to be accompanied by an affidavit sworn by the applicant containing required statements. The relevant provisions contained in s 62(1)(a) of the Act relating to the requirements of the affidavits that must accompany a claimant application were amended on 25 March 2021 by the *Native Title Legislation Amendment Act 2021* (Cth) (the '2021 Amendment Act'). Section 24(2) and (4) of Schedule 1, Part 1 of the 2021 Amendment Act provides that these amendments apply where the authorisation of the applicant occurs after the commencement of the amendments. I note that in circumstances where a claim has been amended simply to reduce the claim area, fresh s 62 affidavits need not be filed.[15] Part A of the Amended Application indicates that the applicant was authorised on 17 January 2017, prior to the commencement of the 2021 Amendment Act. As such I will consider the requirements of s 62(1)(a) as it was at the time of the authorisation meeting in 2017. At that time, s 62(1)(a) required a claimant application to be accompanied by sworn affidavits that state the following:

> (i) that the applicant believes that the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application; and

[13] *Gudjala 2007* [31]–[32].

[14] Section 61(4)(a).

[15] *Drury* [13].

(ii) that the applicant believes that none of the area covered by the application is also covered by an approved determination of native title; and

(iii) that the applicant believes that all of the statements made in the application are true; and

(iv) that the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it; and

(v) setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it.

[23] The Applicant Affidavits are in substantially identical terms, and include statements to the effect that the deponent:

- believes that the native title rights and interests claimed by the native title group have not been extinguished in relation to any part of the area covered by the application;
- believes that none of the area covered by the application is also covered by an entry on the Nation Native Title Register;
- believes that all of the statements made in the application are true;
- is a member of the claim group and is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it; and
- was authorised to make the application and deal with matters arising in relation to it at a meeting held in New Mapoon on 17 January 2017, in accordance traditional laws and customs.

[24] I am satisfied that the above statements in the Applicant Affidavits meet the description of each of the statements required by s 62(1)(a)(i) to (iv) as at 17 January 2017.

[25] In relation to the requirement at s 62(1)(a)(v) for the affidavit to set out the process of decision-making, the Applicant Affidavits state only that the authorisation was 'in accordance with traditional laws and customs'. A similar description was found to meet the requirements of s 62(1)(a)(v) in *Doepel*,[16] however at that time the relevant requirement was for the affidavit to only state 'the basis on which the applicant is authorised'. The Explanatory Memorandum to the Native Title Amendment (Technical Amendments) Bill 2007, which amended the requirement at s 62(1)(a)(v) to that as at 17 January 2017, indicates that the statement should 'include indicating whether the decision-making process complied with paragraph 251[B](a) or 251[B](b)'.[17] Given that paragraph 5 of the Applicant Affidavits indicates that the decision-making process was in accordance with traditional laws and customs, I consider that the statement may be read to indicate the authorisation complied with s 251B(a). As such, I am satisfied that the Applicant Affidavits also meet the description of the statement required by s 62(1)(a)(v). I am therefore satisfied that the Amended Application is accompanied by the documents required by s 62(1)(a).

[16] *Doepel* [85], [87].

[17] Explanatory Memorandum, Native Title Amendment (Technical Amendments) Bill 2007 (Cth), page 42 [1.224].

[26] **Section 62(1)(d)** applies where an agreement has been entered into under s 47C and requires a copy of any relevant agreement to accompany the application. The Amended Application does not indicate that any s 47C agreement has been made and as such, the requirement at s 62(1)(d) is not applicable.

[27] **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. Attachment B contains the amended written description of the external boundary of the area covered by the Amended Application and Schedule B sets out the areas within the external boundary that are not claimed. As such, I am satisfied that the Amended Application contains the information required by s 62(2)(a).

[28] **Section 62(2)(b)** requires that the application include a map showing the boundaries of the area mentioned in s 62(2)(a). Attachment C contains the amended map showing the boundaries of the claim area. As such, I am satisfied that the Amended Application contains the information required by s 62(2)(b).

[29] **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 states that no searches have been carried out to determine the existence of any non-native title rights and interests in the land and waters of the claim area. As no searches have been conducted, I am satisfied that s 62(2)(c) is not applicable to the Amended Application.

[30] **Section 62(2)(d)** requires an application to contain a description of the native title rights 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 contains a description of the claimed native title rights and interests, and as such I am satisfied that the Amended Application meets the requirements of s 62(2)(d).

[31] **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. I am satisfied that the Amended Application contains the information required by s 62(2)(e) as Attachment F contains a general description of the relevant factual basis.

[32] **Section 62(2)(f)** requires that if the native title claim group currently carry on any activities in relation to the land or waters claimed, details of those activities must be included in the application. Schedule G sets out the activities and refers to Schedules E, F and M for more information. I am satisfied that the Amended Application meets the requirement at s 62(2)(f).

[33] **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 has not been amended and refers to five overlapping native title determination applications. As a result of the amendment to the claim area and as confirmed in the Geospatial Assessment, the Amended Application no longer overlaps these or any other claims. Despite this and having regard to the procedural history of the NEP Sea Claim as set out at paragraphs 2 and 3 above, I am satisfied that the Amended Application contains the information required by s 62(2)(g).

[34] **Section 62(2)(ga)** requires the application to 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 notices under s 24MD(6B)(c) that relate to the whole or part of the claim area. As such, I am satisfied that the Amended Application contains the information required by s 62(2)(ga).

[35] **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 includes the details of seven relevant notices. As such, I am satisfied that the Amended Application contains the information required by s 62(2)(h).

[36] **Section 62(2)(i)** requires the application include details of any conditions under s 251BA, however as the authorisation of the applicant occurred prior to the commencement of the 2021 Amendment Act, this requirement does not apply to the Amended Application.[18]

Conclusion on s 190C(2)

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

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

[38] 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'. Having regard to the the Explanatory Memorandum to the *Native Title Amendment Act 1998* (Cth) which inserted this provision,[19] I consider that its 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 at the time the registration test is applied.

[39] I understand that in assessing this requirement I may have regard to information which does not form part of the application and accompanying documents.[20]

[40] 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).[21] These criteria are that any previous application covers at least some of the same area, was accepted for registration under s 190A and is on the Register.

[41] As noted above, Schedule H of the Amended Application has not been amended and refers to claims that no longer overlap the NEP Sea Claim. Schedule O also has not been amended and refers to claims that may include common ancestors. However, the Geospatial Assessment and my own searches confirm that there is no previous application overlapping any of the Claim Area that meets the criteria set out in s 190C(3)(a)–(c).

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[18] *Native Title Legislation Amendment Act 2021* (Cth) ('2021 Amendment Act'), ss 24(2) and (4) of Schedule 1, Part 1.

[19] Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth), page 303 [29.25].

[20] *Doepel* [16].

[21] *Strickland FC* [9].

[42] As there are no previous applications that meet the description of sub-ss (a)–(c), s 190C(3) requires no further consideration. I am satisfied that the Amended Application does not contravene this requirement.

Section 190C(4): identity of claimed native title holders – condition not met

[43] The relevant provisions relating to the authorisation of claimant applications were amended on 25 March 2021 by the 2021 Amendment Act. The transitional provisions of the 2021 Amendment Act provides that these amendments apply where the authorisation of the applicant occurs after the commencement of the amendments.[22]

[44] The material in the Amended Application refers to the authorisation meeting that was held on 17 January 2017.[23] The Wirrick Affidavit indicates that the reduction in the claim area occurred following a meeting conducted on 30 April 2024 with members of the applicant and representatives for the previously overlapping claims.[24] Discussions with members of the applicant in June and July 2024 resulted in resolutions being signed by five of the six members of the applicant to reduce the claim area to remove various overlaps and instructing the legal representatives for the NEP Sea Claim to take all necessary steps to effect the change to the claim area.[25] The Wirrick Affidavit states as follows:

> The terms of authority of the Applicant in the above proceeding in relation to decision-making provide that a decision of the Applicant about a matter arising under the NTA in relation to the proceeding will be considered to have been made where a decision of the majority of the persons who comprise the Applicant are in agreement with that decision.[26]

[45] As such, I consider that the Amended Application seeks to rely on the authorisation that occurred on 17 January 2017. As the applicant is relying on an authorisation which occurred prior to the commencement of the 2021 Amendment Act, I will consider the authorisation of this application under the provisions of s 190C(4) as at 17 January 2017.

[46] Section 190C(4) required the Registrar to be satisfied either that a certificate under s 203BE has been issued by the relevant representative Aboriginal/Torres Strait Islander body,[27] or the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.[28] As set out in the note to s 190C(4)(b), the word 'authorise' is defined in s 251B. I note that having regard to paragraph 4 of the Applicant Affidavits, I consider that each person comprising the applicant is a member of the native title claim group.

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[22] *Native Title Legislation Amendment Act 2021* (Cth) sch 1 pt 1 s 24(2), (4).

[23] Schedule R refers to an authorisation meeting on 21 May 2015, however Part A and the Applicant Affidavits indicate the meeting was held on 17 January 2017.

[24] Wirrick Affidavit [3]–[5].

[25] Ibid [6]–[8], Annexure PW-2.

[26] Ibid [10].

[27] Section 190C(4)(a).

[28] Section 190C(4)(b).

[47] Schedule R indicates that the Amended Application has not been certified. I must therefore consider whether the condition at s 190C(4)(b) has been met.

What are the requirements for authorisation?

[48] Section 190C(4)(b) requires the Registrar to identify whether:

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

[49] Having regard to the authorities concerning authorisation of the applicant, I understand that consideration of the provisions at s 190C(4)(b):

- requires the Registrar to be satisfied 'of the fact of authorisation by all members of the native title claim group';[29]
- requires the Registrar to be satisfied as to the identity of the claimed native title holders, including the applicant;[30]
- is not 'to be met by formulaic statements in or in support of applications';[31]
- does not permit a claim group to choose between the two decision-making processes set out in s 251B, as where there is a traditionally mandated process, that process must be followed to authorise the applicant, and where there is no mandated traditional process, the process must be that which has been agreed and adopted by the native title claim group.[32]

[50] Section 251B provides as follows:

> For the purposes of this Act, all the persons in a native title claim group or compensation claim group ***authorise*** a person or persons to make a native title determination application or a compensation application, and to deal with matters arising in relation to it, if:
>
> (a) where there is a process of decision-making that, under the traditional laws and customs of the persons in the native title claim group or compensation claim group, must be complied with in relation to authorising things of that kind—the persons in the native title claim group or compensation claim group authorise the person or persons to make the application and to deal with the matters in accordance with that process; or
>
> (b) where there is no such process—the persons in the native title claim group or compensation claim group authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision-making agreed to and adopted, by the persons in the native title claim group or compensation claim group, in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.

[29] *Doepel* [78].

[30] *Wiri People* [29].

[31] *Strickland* [57].

[32] *Harrington-Smith* [1230].

[51] As regards 'all the persons in a native title claim group', Stone J in *Lawson* commented that 'the effect of the section is to give the word "all" a more limited meaning' such that '[i]t is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process'.[33] As such, I understand that I must assess whether all the persons in the native title claim group were provided with an opportunity to attend and participate in the relevant authorisation meeting on 17 January 2017.

[52] Justice Rares held in *Weribone* that a notice for an authorisation meeting 'must be sufficient to enable the persons to whom it is addressed … to judge for themselves whether to attend the meeting and vote for or against a proposal' and that 'fair notice of the business to be dealt with at the meeting' must be given.[34]

[53] As regards '…authorise… persons to make a native title determination application… and to deal with matters arising in relation to it', I must assess whether the application was 'authorised' under s 251B. Justice O'Loughlin listed a number of questions in *Ward* relating to the authorisation process which were required to be addressed. The questions identified by O'Loughlin J, which do not need to be answered in any formal way, but the substance of the questions should be addressed,[35] are:

> Who convened it and why was it convened? To whom was notice given and why was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded?[36]

Section 190C(5): what information has been provided in support of the requirement at s 190C(4)(b)

[54] Section 190C(5) provides that the Registrar cannot be satisfied that the condition at subsection (4) has been met unless an application includes a statement to the effect that the requirements mentioned in s 190C(4)(b) have been met and briefly sets out the grounds on which the Registrar should be satisfied that these requirements have been met.

[55] In *Strickland*, French J (as his Honour then was) stated that s 190C(5):

> requires no more than a statement that the requirement of authorisation referred to in s 190C(4)(b) has been met. It is also required briefly to set out the grounds on which the Registrar should consider that it has been met. The insertion of the word "briefly" at the beginning

[33] *Lawson* [25]. See also *Butchulla* [33].

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

[35] *Ward* [24]–[25].

[36] Ibid [24], cited with approval in *Lawson* [26].

> of par 190C(5)(b) suggests that the legislature was not concerned to require any detailed explanation of the process by which authorisation is obtained.[37]

[56] Schedule R of the Amended Application contains the following statement:

> The applicant is authorised to make this application as the persons authorised by the native title claim group to make the Native Title Determination Application. The applicant was so authorised at a meeting held at Injinoo on 21 May 2015 in accordance with an agreed decision making process.[38]

[57] Each of the Applicant Affidavits provides the following:

> The Native Title Claim Group authorised the other people making up the Applicant and myself to make this application, to deal with matters arising in relation to it and to represent all the people in the native title claim group at a meeting of the native title claim group held in New Mapoon on 17 January 2017, in accordance with traditional laws and customs.[39]

[58] Although I consider that the Amended Application includes a statement to the effect that the requirements mentioned in s 190C(4)(b) have been met, in my view the above material is not sufficient to meet the description of brief grounds as required under s 190C(5). As such, I consider that the Amended Application does not meet the requirement at s 190C(5) and therefore I cannot be satisfied that the condition at s 190C(4) is met.

[59] In any event, in my view and having regard to the authorities set out above, the material is insufficient to address the requirement at s 190C(4)(b) that the applicant is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group. There is no material in the Amended Application to demonstrate that all the persons in the native title claim group were provided with a reasonable opportunity to participate in the relevant authorisation meeting. The material does not contain any information about how notice of the authorisation meeting was published, or otherwise how members of the claim group might be provided the opportunity to participate. The material is also insufficient to address the substance of the questions set out in *Ward* or to be satisfied that the application was properly authorised under s 251B. The material does not provide any information on the conduct of the authorisation meeting, the decision-making process (aside from that it was 'in accordance with traditional laws and customs') or details of the resolutions passed. Further, with the exception of the statement appearing at paragraph 10 of the Wirrick Affidavit, there is no material that establishes the authority of the applicant to reduce the claim area whether by way of resolutions signed by five of the six applicants (as set out in the Wirrick Affidavit) or by any means other than an authorisation meeting.

[60] For the above reasons, the Amended Application does not meet the condition at ss 190C(4) and (5).

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[37] *Strickland* [57].

[38] I take it that the date should refer to 17 January 2017, consistent with Part A of the Amended Application and the Applicant Affidavits.

[39] Form 1, Applicant Affidavits [5].

Section 190B: conditions about merits of the claim – conditions not met

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

[61] 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.

[62] Attachment B of the Amended Application contains the amended description of the claim area, consisting of a metes and bounds description referencing the mainland high-water mark, non-freehold parcels identified by lot on plan identifier, native title determinations and coordinate points in decimal degrees to six decimal points referenced to the Geocentric Datum of Australia (GDA2020). Attachment B also includes three areas consisting of a buffer around Harrington Reef Unlit Beacon, Shortland Reef Unlit Beacon and Wyborn Reef Light, and also confirms that the claim area does not include any of the areas covered by two native title determinations and two claimant applications. Schedule B lists general exclusions.

[63] Attachment C contains an A4 colour copy of an A3 map titled 'North Eastern Peninsula Sea Claim Group', prepared by Geospatial Services, NNTT dated 30 October 2024. The map includes the application area depicted by bold blue outline with a light blue stipple fill, a topographic image background, commencement point, scalebar, coordinate grid, legend and locality diagram and notes relating to the source, currency and datum of data used to prepare the map.

[64] The Geospatial Assessment concludes that the written description and map are consistent and identify the claim area with reasonable certainty, and further confirms that the claim area has been amended and reduced and does not include any areas which were not previously claimed in the original application. I agree with this assessment and am satisfied that the Amended Application meets the requirements of s 190B(2).

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

[65] Section 190B(3) requires the Registrar to be satisfied that either the persons in the native title claim group are named in the application,[40] or that persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.[41]

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

- I am required to address only the content of the application;[42]

[40] Section 190B(3)(a).

[41] Section 190B(3)(b).

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

- ‘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’;[43]
- 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’;[44] 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’.[45]

[67] Schedule A describes the native title claim group as ‘all persons descended by birth or adoption from’ eight named apical ancestors or ancestor couples. As this description does not name all the persons in the native title claim group, I must consider whether it is sufficiently clear within the meaning of s 190B(3)(b).

[68] 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).[46] 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.

[69] The description at Schedule A indicates that membership by descent can be by birth or adoption. In *WA v NTR*, Carr J accepted a comparable description which included ‘persons adopted by the named people and by the biological descendants of the named people’ without any qualification indicating whether the adoption was according to traditional laws and customs or otherwise. I also note that Schedule F contains the following further information in relation to adoption:

> A person may become a member of a local group by adoption as a child by a member of a local group. Where this occurs, the child will have the same rights, interests, identity and responsibilities, as persons who are members of the group by biological descent. Adoption typically, though not necessarily, occurs within extended family groups, and therefore tends to reinforce existing ties of kinship and identity between close relatives, rather than recruiting previously unrelated persons to the group.[47]

[70] In my view, the material in the Amended Application is sufficiently clear with respect to persons who may be adopted into the claim group to enable those persons to be identified through some factual inquiries.

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[43] *Gudjala 2007* [33].

[44] Ibid [34].

[45] *WA v NTR* [67].

[46] Ibid.

[47] Form 1, Schedule F [70].

[71] 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

[72] 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.[48]

[73] In *Doepel*, Mansfield J noted that the 'test of identifiability' for the purpose of this condition is whether the description of the native title rights and interests is understandable, has meaning and is without contradiction.[49] It is also open to the Registrar to read the contents of the claimed rights and interests together with any stated qualifications or restrictions.[50] 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)'.[51]

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

> **Native title where traditional rights are wholly recognisable**
>
> 1. Paragraph 2 applies to every part of the Claim Area:
>
> (a) where there has been no extinguishment to any extent of native title rights and interests or where any such extinguishment is required to be disregarded pursuant to ss 47, 47A or 47B of the NTA; and
>
> (b) which is not subject to the public right to navigate or the public right to fish;
>
> 2. Where this paragraph applies, the native title rights and interests possessed under traditional laws and customs confer possession, occupation, use and enjoyment of the land and waters as against all others.
>
> **Native title where traditional rights are partially recognisable**
>
> 3. Paragraph 4 applies to every part of the Claim Area to which paragraph 2 does not apply.
>
> 4. Where this paragraph applies, the customary rights and interests possessed under traditional laws and customs that are able to be and should be recognised by the common law of Australia include the (non-exclusive) rights to:
>
> (a) have access to, remain on and use the land and waters;
>
> (b) access and take the resources of the land and waters; and
>
> (c) protect places, areas and things of traditional significance on the land and waters.
>
> 5. Further non-exclusive rights and interests are particularised in Schedule F.

[48] *Doepel* [16].

[49] Ibid [99], [123].

[50] Ibid [123].

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

[75] Paragraph 35 of Schedule F includes the following:

> The rights and interests possessed under the traditional laws and customs are the rights to:
>
> (a) speak for land and waters;
>
> (b) control the access to and use of land and waters by others;
>
> (c) have access to, remain on and use the land and waters;
>
> (d) access and take the resources of the land and waters;
>
> (e) protect places, areas and things of traditional significance on the land and waters;
>
> (f) erect shelters and other structures on the area;

[76] Schedule F also provides further general information in relation to the claimed rights and interests.

[77] Paragraph 6 of Schedule E confirms that the claimed native title rights and interests are held by the claim group subject to and in accordance with traditional laws and customs. Paragraph 7 refers to the activities carried out by the claim group and refers to Schedule G. Paragraph 8 states that the claimed rights and interests are subject to the valid laws of the Commonwealth and State and paragraph 9 confirms that 'resources' does not include minerals, petroleum or gas wholly owned by the Crown. Paragraph 10 refers to Schedules F, G and M for more information.

[78] In my view, the native title rights and interests described in Schedule E of the Amended Application are understandable and have meaning. I consider that the further rights and interests particularised in Schedule F (such as at paragraph 35) and the activities listed at Schedule G are generally subsumed within or consistent with the claimed rights and interests at Schedule E. I do not consider there to be any inherent contradictions, including between the information in Schedules E, F, G and M. As such, I am satisfied that the requirements of s 190B(4) are met.

Section 190B(5): factual basis for claimed native title – condition not met

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

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

[80] In *Doepel*, Mansfield J stated 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.[52]

[81] 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.

[82] 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.[53]

[83] 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.[54]

[84] 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 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'.[55]

[85] The factual basis material is contained in Schedules F, G and M. No additional information was provided by the applicant. This material has not been amended and is identical to that assessed in the Previous Registration Decision, which concluded that it was insufficient to

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

[53] *Gudjala FC* [92].

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

[55] *Gudjala 2009* [29].

support the assertions at s 190B(5).[56] I have considered this material myself and, for the reasons that follow, I have reached the same conclusion as in the Previous Registration Decision.

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

[86] Section 190B(5)(a) was 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]].[57]

[87] 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)'.[58]

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

[88] Schedule F states that members of the claim group hold beliefs about Ancestral Beings that are responsible for the existence and form of the lands and waters in the claim area and the existence of traditional law, and are still present and have influence over the lands and waters.[59] The material indicates that the claim area was inhabited by Aboriginal People for millennia prior to the assertion of sovereignty in 1788 and that the archaeological record suggests substantial human habitation on the Cape York Peninsula for at least 37,000 years.[60] The material refers to the observations of early European explorers from 1606 to 1844 recording Aboriginal occupation of the lands and waters around Cape York Peninsula.[61]

[89] European settlement occurred in the claim area in the 1860s with the establishment of sheep and cattle stations, followed by the construction of the overland telegraph line in the 1880s, establishment of the Mapoon and Mitchell River missions in 1891 and 1902 respectively and

[56] Previous Registration Decision, page 13 [73].

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

[58] *Gudjala 2007* [39].

[59] Form 1, Schedule F [62].

[60] Ibid [5]–[6].

[61] Ibid [7].

the discovery of gold in Coen in 1893.[62] The material also refers to the *beche-de-mer* trade in the waters off the Cape York Peninsula that was established by 1880, and that by 1890 this included Aboriginal workers.[63] Schedule F states that the organised presence of Aboriginal People in the claim area has been recorded in ethnographic, linguistic and anthropological research.[64] Schedule F also includes a general assertion that the apical ancestors of the claim group are descended from the Aboriginal people occupying the claim area at sovereignty and are known to be from the claim area at the time of European settlement,[65] however no further details are provided in relation to the apical ancestors.

[90] The material contains general assertions that members of the claim group have continued their connection with the claim area, including because members of the claim group and their predecessors were born on and have been buried within the claim area as well as by continuing to be present and conduct activities on the claim area and by living on or in the vicinity the claim area at locations such as New Mapoon, Old Mapoon, Umagico, Bamaga, Injinoo and Seisia and other semi-permanent camps.[66]

[91] In my view, there is nothing further in Schedules F, G or M that is directly relevant to this condition. Aside from an assertion at a high level of generality that the apical ancestors are known to be from the claim area at the time of European settlement, the material does not contain any detail in relation to the apical ancestors and does not contain any further detail about the predecessors of the claim group. The material also does not contain any accounts or further information from current members of the claim group to support the association that current members of the claim group have with the claim area.

[92] Although there is some detail in the material that indicates the occupation of the claim area by Aboriginal People at the time of the assertion of sovereignty, in my view the material about the association of the claim group and their predecessors with the claim area is limited to assertions at a high level of generality. In my view, the factual basis material is not sufficient to support the assertion at s 190B(5)(a). In particular, the Amended Application does not contain any detail about the association that the apical ancestors had with the claim area, and the material about the association of the claim group to the area is at a high level of generality.

[93] For the above reasons, the Amended Application does not meet the condition 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

[94] 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

[62] Ibid [8].

[63] Ibid [9].

[64] Ibid [11].

[65] Ibid [22].

[66] Ibid [12]–[17].

that those rights and interests must be 'possessed under the traditional laws acknowledged, and the traditional customs observed' by the native title holders.

[95] 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,[67] where the society consists of a body of persons united in and by their acknowledgement and observance of a body of laws and customs;[68]
- the normative system under which those traditional rights and interests are possessed is one which 'has had a continuous existence and vitality since sovereignty';[69]
- 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;[70]
- those laws and customs have been acknowledged and observed without substantial interruption since sovereignty.[71]

[96] 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;[72]
- 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;[73] 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.[74]

[97] 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

[67] *Yorta Yorta* [46].

[68] Ibid [49].

[69] Ibid [47].

[70] Ibid [46], [79].

[71] Ibid [87].

[72] *Gudjala 2009* [37], [52].

[73] Ibid [40].

[74] Ibid [29], [54].

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.[75]

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

[98] The factual basis material contains a general assertion that the apical ancestors and current members of the claim group are members of a single society united in and by their traditional laws and customs, and asserts that in accordance with these laws and customs, the claim group is the 'right' people for Country with proprietary interests in the claim area.[76] As noted in the Previous Registration Decision, the traditional laws and customs of the claim group are set out in some detail.[77] This material states that the current members of the claim group are a marine-oriented society with laws and customs that confer rights and interests in relation to marine territory, including habited and uninhabited areas.[78] These rights and interests may held at a regional as well as more localised levels,[79] and in certain areas may be held jointly or shared between more than one local group.[80]

[99] The material provides further detail on elements of the traditional laws and customs, including rights to speak for country, control and regulation of access, responsibilities to care for and protect Country, trade and exchange of resources, kinship and marriage, ceremonies and rituals, decision-making and other laws and customs.[81] The material refers to cosmological beliefs in Ancestral Beings as well as spirits and mythologies and stories.[82]

[100] Schedule F contains a general assertion that the traditional laws and customs have 'normative force', including through spiritual beliefs and association of stories and ancestral figures, kinship relations, respect for and guidance of Elders, social pressure and fear of spiritual forces for breaches of laws or customs.[83]

[101] However, although the factual basis material provides some detail on these traditional laws and customs, there is little material to support the assertion that the laws and customs are traditional and derived from a society that existed at sovereignty. Although there are general assertions that the shared system of laws and customs extended to all of the apical ancestors[84] and that the traditional laws and customs are the same as and derived from those at sovereignty,[85] as set out above in relation to the condition at s 190B(5)(a), the factual basis material does not contain any information or detail relating to the apical ancestors of the claim group at the time of sovereignty or European settlement in the claim area. As such, in my view there is insufficient factual basis material to establish that the laws and customs

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

[76] Form 1, Schedule F [19], [22]–[23], [79].

[77] Previous Registration Decision, page 14 [84].

[78] Form 1, Schedule F [26]–[27].

[79] Ibid [32]–[34].

[80] Ibid [41].

[81] Ibid [43]–[61], [66]–[69], [71], [75]–[76].

[82] Ibid [62]–[65].

[83] Ibid [77].

[84] Ibid [21].

[85] Ibid [83].

described in Schedule F are those of the persons that occupied the claim area at sovereignty. The material does not include any detail from historical or other records that demonstrate the laws and customs of the claim group at sovereignty. In my view, where the factual basis material does not contain sufficient material relating to the pre-sovereignty society, the material will not be sufficient to support the assertion that the laws and customs of the claim group are 'traditional'.[86] The material also does not include any further detail or accounts from contemporary members of the claim group that demonstrate how their laws and customs are traditional and derived from a pre-sovereignty society.

[102] For the above reasons, in my view the factual basis material is insufficient to support the assertion that there exist traditional laws and customs that give rise to the claimed rights and interests. As such, the Amended Application does not meet the condition 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

[103] Section 190B(5)(c) requires the factual basis material to be sufficient to support the assertion that the claim group continue 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).[87]

[104] 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'.[88]

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

[105] Schedule F contains general assertions that the claim group are the recognised descendants of the apical ancestors and their predecessors and that they have continued to acknowledge and observe the traditional laws and customs that have been handed down from generation to generation since sovereignty.[89] The material also sets out that some laws and customs have undergone some adaptation since sovereignty, for example the rules relating to patrifilial inheritance have adapted to confer full membership of the claim group through descent from either parent.[90]

[106] I refer to the above consideration of the conditions at s 190B(5)(a) and (b). In my view, the factual basis material does not include sufficient detail to establish that the laws and customs of the claim group are 'traditional' and derived from an at-sovereignty society. The material does not provide any further detail, beyond assertions at a high level of generality, of how particular laws and customs have been passed on or taught from one generation to the next.

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[86] *Gudjala 2009* [53].

[87] *Martin* [29].

[88] *Gudjala 2009* [33].

[89] Form 1, Schedule F [78], [80].

[90] Ibid [84]–[86].

[107] In any event, given my above conclusion that the factual basis is insufficient to support the assertion at s 190B(5)(b), in my view it follows that the application cannot meet the requirement at s 190B(5)(c).[91] I am therefore satisfied that the factual basis material is insufficient to support the assertion that the claim group continue to hold native title in accordance with traditional laws and customs.

[108] For the above reasons, the Amended Application does not meet the condition at s 190B(5)(c).

Section 190B(6): prima facie case – condition not met

[109] 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.

[110] I understand that I may consider material additional to the application for the purpose of my assessment of this condition.[92] Because a 'more onerous test [is] to be applied to the individual rights and interests claimed' than under s 190B(5),[93] 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.[94]

[111] According to Dowsett J in *Gudjala 2007*, s 190B(6) is to be considered having regard to the definition of 'native title rights and interests' in s 223(1).[95] 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.

[112] As such, I understand that a claimed native title right and interest can be prima facie established if the factual basis material is sufficient to demonstrate that it is possessed in accordance with the traditional laws and customs of the native title claim group.[96]

[113] Accordingly, the condition at s 190B(6) cannot be met if I am unable to be satisfied that the factual basis material is sufficient to support the assertion at s 190B(5)(b).[97] I refer to my above reasons and conclusion that the factual basis material is not sufficient to support the assertion at s 190B(5)(b). In my view, it therefore follows that I cannot be satisfied on a prima facie basis that at least some of the native title rights and interests can be established.

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[91] *Martin* [29].

[92] *Doepel* [16].

[93] Ibid [127], [132].

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

[95] *Gudjala 2007* [85]–[87].

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

[97] *Gudjala 2007* [86]–[87].

[114] For the above reasons, the condition at s 190B(6) is not met.

Section 190B(7): physical connection – condition not met

[115] 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.

[116] The courts have observed that the traditional physical connection under s 190B(7) 'must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs'.[98] 'Traditional' as that term is used under s 223 of the Act, was considered by the members of the joint judgment in *Yorta Yorta* who noted that:

> the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs … "traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty.[99]

[117] In my view, the condition at s 190B(5) must be met before the Registrar can be satisfied that the condition at s 190B(7) can be met. As I am not satisfied that the factual basis material is sufficient to support the assertion at s 190B(5)(b), I cannot be satisfied that at least one member of the claim group currently has or previously had a traditional physical connection with the claim area. In any event, I consider that the factual basis material does not contain sufficient detail relating to any particular member of the claim group that may establish a traditional physical connection. The information at Schedule M is at a high level of generality. As such, in my view the condition at s 190B(7) is not met.

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

[118] 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.

[119] **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 2 of each of the Applicant Affidavits states that none of the area covered by the application is also covered by an entry on the National Native Title Register (in other words, an approved determination of native title[100]). Paragraph 5 of Schedule B also confirms that the Amended Application does not include any areas for which there is an approved determination of native title. Attachment B excludes two specified approved determinations. The Geospatial Assessment and my own searches of the Tribunal's database also confirm that the Amended Application does not cover any area where there is an approved determination of native title.

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[98] *Gudjala 2009* [84].

[99] *Yorta Yorta* [86].

[100] Section 193(1).

[120] **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. Paragraph 2 of Schedule B confirms that any areas in which a previous exclusive possession act was done are not covered by the Amended Application, subject to the operation of ss 47, 47A or 47B. Having regard to Schedule B, I am satisfied that the Amended Application is not made contrary to s 61A(2).

[121] **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. Having regard to Schedules B and E, I am satisfied that the Amended Application is not made contrary to s 61A(3).

[122] Having regard to the above, I am satisfied that there is no failure to comply with s 61A. As such, the Amended Application meets the requirements of s 190B(8).

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

[123] 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).[101]

[124] Schedules E and Q confirm that the Amended Application does not claim minerals, petroleum or gas wholly owned by the Crown. Schedule P confirms that the application does not claim exclusive possession of any offshore places. Paragraph 4 of Schedule B confirms that any area where native title rights and interests have been otherwise wholly extinguished is not covered by the Amended Application, and includes a non-exhaustive list including grants of an estate in fee simple, public works and public roads.

[125] For the above reasons, I am satisfied that the Amended Application meets the requirements of s 190B(9).

End of reasons

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

Attachment A

Summary of registration test result

Application name	North Eastern Peninsula Sea Claim Group
NNTT No.	QC2017/003
Federal Court of Australia No.	QUD115/2017
Date of decision	27 March 2025

Section 190B conditions

Test condition	Sub-condition/requirement	Result
Section 190B(2)		**Met**
Section 190B(3)		Overall result: **Met**
	Section 190B(3)(a)	**NA**
	Section 190B(3)(b)	**Met**
Section 190B(4)		**Met**
Section 190B(5)		**Not met**
Section 190B(6)		**Not met**
Section 190B(7)		**Not met**
Section 190B(8)		**Met**
Section 190B(9)		**Met**

Section 190C conditions

Test condition	Sub-condition/requirement	Result
Section 190C(2)		**Met**
Section 190C(3)		**Met**
Section 190C(4)		Overall result: **Not met**
	Section 190C(4)(a)	**NA**
	Section 190C(4)(b)	**Not met**
Section 190C(5)		**Not met**