

Registration test decision

Application name	Bandjalang People #1
Name of applicant	Mr Douglas Steven Wilson, Mr Anthony Edward Wilson
State/territory/region	New South Wales
NNTT file no.	NC96/16
Federal Court of Australia file no.	NSD6034/98
Date application made	17 May 1996
Date application last amended	20 August 2009
Name of delegate	Hamish MacLeod

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

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

Date of decision: 6 October 2009

Hamish MacLeod

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cwlth)¹

¹ Instrument of delegation dated 6 March 2009 pursuant to s. 99 of the Act.

Table of contents

Introduction.....	4
Application overview.....	4
Registration test	5
Information considered when making the decision	5
Procedural fairness steps.....	5
Procedural and other conditions: s. 190C.....	7
Subsection 190C(2) Information etc. required by ss. 61 and 62	7
Delegate’s comment	7
Native title claim group: s. 61(1)	7
Result and reasons.....	7
Name and address for service: s. 61(3).....	8
Result and reasons.....	8
Native title claim group named/described: s. 61(4).....	8
Result and reasons.....	8
Application in prescribed form: s. 61(5).....	8
Result and reasons.....	9
Affidavits in prescribed form: s. 62(1)(a)	9
Result and reasons.....	9
Application contains details required by s. 62(2): s. 62(1)(b)	9
Information about the boundaries of the area: s. 62(2)(a)	10
Result and reasons.....	10
Map of external boundaries of the area: s. 62(2)(b)	10
Result and reasons.....	10
Searches: s. 62(2)(c).....	10
Result and reasons.....	10
Description of native title rights and interests: s. 62(2)(d).....	11
Result and reasons.....	11
Description of factual basis: s. 62(2)(e)	11
Result and reasons.....	11
Activities: s. 62(2)(f)	11
Result and reasons.....	11
Other applications: s. 62(2)(g).....	12
Result and reasons.....	12
Section 29 notices: s. 62(2)(h)	12
Result and reasons.....	12
Subsection 190C(3) No common claimants in previous overlapping applications	12
Result and reasons.....	12
Subsection 190C(4) Authorisation/certification	13

Result and reasons.....	13
Merit conditions: s. 190B	20
Subsection 190B(2) Identification of area subject to native title	20
Information regarding external and internal boundaries: s. 62(2)(a)	20
Map of external boundaries: s. 62(2)(b).....	20
Result and reasons.....	20
Subsection 190B(3) Identification of the native title claim group.....	21
Result and reasons.....	21
Subsection 190B(4) Native title rights and interests identifiable.....	26
Result and reasons.....	26
Subsection 190B(5) Factual basis for claimed native title	27
Result and reasons re s. 190B(5)(a).....	29
Result and reasons re s. 190B(5)(b).....	31
Result and reasons re s. 190B(5)(c).....	33
Combined result for s. 190B(5).....	35
Subsection 190B(6) Prima facie case	35
Result and reasons.....	35
Subsection 190B(7) Traditional physical connection.....	43
Result and reasons.....	44
Subsection 190B(8) No failure to comply with s. 61A.....	45
Delegate's comments.....	45
No approved determination of native title: s. 61A(1)	45
Result and reasons.....	45
No previous exclusive possession acts (PEPAs): ss. 61A(2) and (4)	45
Result and reasons.....	45
No exclusive native title claimed where previous non-exclusive possession acts (PNEPAs): ss. 61A(3) and (4).....	46
Result and reasons.....	46
Combined result for s. 190B(8).....	46
Subsection 190B(9) No extinguishment etc. of claimed native title	46
Delegate's comments.....	46
Result and reasons re s. 190B(9)(a).....	46
Result and reasons re s. 190B(9)(b).....	47
Result and reasons re s. 190B(9)(c).....	47
Combined result for s. 190B(9).....	47
Attachment A	48
Reasons for ss. 190A(1A) and 190A(6A)	48
Subsection 190A(1A).....	48
Subsection 190A(6A).....	48
Attachment B Summary of registration test result.....	50

Introduction

This document sets out my reasons, as the delegate of the Native Title Registrar (the Registrar), for the decision to accept the claimant application NC96/16, Bandjalang People #1, NSD6034/98 for registration.

Note: All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cwlth) which I shall call 'the Act', as in force on 18 September 2009, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

Application overview

This claim is located at Evans Head on the North Coast of NSW.

The applicant lodged the claim with the Tribunal prior to the 1998 amendments to the Act. Following the 1998 amendments, the applicant filed an amended claim with the Federal Court of Australia (the Court) on 30 November 1999. The Registrar of the Court gave a copy of the amended application to the Registrar on 21 August 2009 pursuant to s. 64(4) of the Act. This triggered the Registrar's duty to consider the claim under s. 190A of the Act. The amended application was accepted for registration on 16 February 2000.

The application was further amended on 14 April 2004, and was caught by the transitional provisions to the *Native Title Amendment Act 2007* (Cwlth). The applicant sought and was granted leave to further amend the application in 2008.

In September 2007 the Registrar wrote to inform the applicant that the application was effected by item 1 of schedule 5 of the transitional provisions to the *Native Title Amendment (Technical Amendments) Act 2007* (Cwlth). The Registrar was therefore obliged to use best endeavours to apply the registration test to the application by September 2008. The application was scheduled to have the registration test applied in July 2008.

On 3 October 2008, the applicant filed an amended application with the Court.

On 21 April 2009, as delegate of the Registrar, I decided that the application should not be accepted for registration as it did not satisfy the condition in subsection 190B(3) of the Act.

On 20 August 2009 the Court granted leave to further amend the application. It is this application that is to be considered pursuant to s. 190A.

I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to this claim and Attachment A sets out my reasons.

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

Registration test

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

Pursuant to ss. 190A(6) and (6B), the claim in the application must be accepted for registration because it does satisfy all of the conditions in ss. 190B and 190C. A summary of the result for each condition is provided at Attachment B.

Information considered when making the decision

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

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

The material I have considered in arriving at my decision is all of the material in the Tribunal file marked 'Case Management/Delegates NC96/16 Bandjalang People # 1 2007/00308 Vol 08' and other documents I have referred to throughout the course of my decision being correspondence from the State dated 7 September, and from the applicant, and replies from the applicant dated 14 and 15 September.

I have *not* considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss. 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK, without the prior written consent of the person who provided the Tribunal with that information, either in relation to this claimant application or any other claimant application or any other type of application, as required of me under the Act.

I also have *not* considered any information that may have been provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice' (see s. 136A of the Act). Further, mediation is private as between the parties and is also generally confidential (see also ss. 136E and 136F).

Procedural fairness steps

As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are made in a fair, just and unbiased way. Procedural fairness requires that a person who may be adversely affected by a decision be given the opportunity to put their views to the decision-maker

before that decision is made. They should also be given the opportunity to comment on any material adverse to their interests that is before the decision-maker. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

- On 8 September 2009 the State provided a submission regarding the claim group description in the amended application;
- On 9 September the applicant was provided with a copy of the State's submission;
- On 14 and 15 September 2009 the applicant provided a response to the State's submission;
- On 15 September the State was provided with a copy of the applicant's response. No further response was received from the State.

Procedural and other conditions: s. 190C

Subsection 190C(2)

Information etc. required by ss. 61 and 62

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

Delegate's comment

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

I note that I am considering this claim against the requirements of s. 62 as it stood *prior* to the commencement of the *Native Title Amendment (Technical Amendments) Act 2007* on 1 September 2007. This legislation made some minor technical amendments to s. 62 which only apply to claims made from the date of commencement of that Act on 1 September 2007 onwards, and the claim before me is not such a claim.

Section 190C(2) requires the Registrar to be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by ss. 61 and 62. If the application meets all these requirements, the condition in s. 190C(2) is met.

I note that in the case of *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*) at [16] Mansfield J stated that 'section 190C(2) is confined to ensuring the application, and accompanying affidavits or other materials, contains what is required by ss. 61 and 62'.

His Honour also said at [39] in relation to the requirements of s. 190C(2): '...I hold the view that, for the purposes of the requirements of s 190C(2), the Registrar may not go beyond the information in the application itself.'

I am of the view that *Doepel* is authority for the proposition that when considering the application against the requirements in s. 190C(2), I am not (except in the limited instance which I explore below in my reasons under s. 61(1)) to undertake any qualitative or merit assessment of the prescribed information or documents, except in the sense of ensuring that what is found in or with the application are the details, information or documents prescribed by ss. 61 and 62.

Native title claim group: s. 61(1)

The application must be made by a person or persons authorised by all of the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group.

Result and reasons

The application **meets** the requirement under s. 61(1).

In light of s. 190C(2), I must be satisfied that the application contains all the information required by s. 61(1). If the description of the native title claim group in the application indicates that not all persons in the native title group were included, or that it was, in fact, a subgroup of the native title group, then the requirements of s. 61(1) under s. 190C(2) would not be met and the claim could not be accepted for registration. This reasoning is drawn from *Doepel* at [36].

This consideration does not require me to look beyond the information contained in the application and prescribed accompanying affidavits. It also does not require me to undertake some form of merit assessment of the material to determine whether I am satisfied that the native title claim group has been correctly described: *Doepel* at [36] to [37]. In light of *Doepel* I have only considered the information contained in the application itself.

The description of the persons in the native title claim group is found in Schedule A of the application, which is reproduced in my reasons below at s. 190B(3). Schedule A states the Bandjalang People are those biologically descended from a list of eleven named people, as well as persons adopted or incorporated into the group in accordance with specific criteria. There is nothing in the application before me which suggests that the claim group, as described in Schedule A, is a subgroup of a larger group or that not everyone has been included.

Name and address for service: s. 61(3)

The application must state the name and address for service of the person who is, or persons who are, the applicant.

Result and reasons

The application **meets** the requirement under s. 61(3).

Part B of the application provides the name and address for service of the applicant.

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

The application must:

- (a) name the persons in the native title claim group, or
- (b) otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

Result and reasons

The application **meets** the requirement under s. 61(4).

Schedule A of the amended application does not name the persons in the native title claim group, but contains a description of the persons in the group.

Application in prescribed form: s. 61(5)

The application must:

- (a) be in the prescribed form,
- (b) be filed in the Federal Court,

- (c) contain such information in relation to the matters sought to be determined as is prescribed, and
- (d) be accompanied by any prescribed documents and any prescribed fee.

Result and reasons

The application **meets** the requirement under s. 61(5).

The amended application is in the form prescribed by Regulation 5(1)(a) and (b) of the Native Title (Federal Court) Regulations 1998 and was filed, as required, pursuant to s. 61(5)(a) and (b).

It contains the information prescribed by ss. 61 and 62, and is accompanied by the prescribed documents (that is, an affidavit from each of the persons who comprise the applicant prescribed by s. 62(1)(a)) thereby meeting the requirements of s. 61(5)(c) and (d).

I am not required under s. 190C(2) to consider whether the prescribed fee has been paid to the Court.

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

The application must be accompanied by an affidavit sworn by the applicant that:

- (i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and
- (ii) the applicant believes that none of the area covered by the application is also covered by an approved determination of native title, and
- (iii) the applicant believes all of the statements made in the application are true, and
- (iv) 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) stating the basis on which the applicant is authorised as mentioned in (iv).

Result and reasons

The application **meets** the requirement under s. 62(1)(a).

To satisfy the requirements here the persons comprising the applicant may jointly swear/affirm an affidavit; alternatively each of those persons may swear/affirm an individual affidavit.

Affidavits sworn by each of the named persons comprising the applicant accompany the application. Each affidavit is competently witnessed and addresses each of the criteria stipulated in s. 62(1)(a)(i) to (v).

Application contains details required by s. 62(2): s. 62(1)(b)

The application must contain the details specified in s. 62(2).

The application contains all details and other information required by s. 62(1)(b).

The application does contain the details specified in ss. 62(2)(a) to (h), as identified in the reasons below.

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

The application must contain information, whether by physical description or otherwise, that enables the following boundaries to be identified:

- (i) the area covered by the application, and
- (ii) any areas within those boundaries that are not covered by the application.

Result and reasons

The application **meets** the requirement under s. 62(2)(a).

The information at schedule B of the application enables the boundaries of the application area and the areas not covered by the application to be identified. A qualitative assessment of this material is found in my reasons under s. 190B(2).

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

The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

Result and reasons

The application **meets** the requirement under s. 62(2)(b).

Schedule C directs me to the map contained at attachment C. This map shows the boundaries of the application area in accordance with s. 62(2)(b). A qualitative assessment of this material is found in my reasons under s. 190B(2).

Searches: s. 62(2)(c)

The application must contain the details and results of all searches carried out to determine the existence of any non-native title rights and interests in relation to the land and waters in the area covered by the application.

Result and reasons

The application **meets** the requirement under s. 62(2)(c).

Schedule D of the amended application states that:

The applicant has been provided with a current and historical tenure report dated 20 May 2003 by the State of New South Wales. A copy of the tenure report can be made available should it be requested.

Section 62(2)(c) requires 'details and results of all searches carried out *to determine the existence of any non-native title rights and interests*' (my emphasis). The purpose of the information provided by the State is not stated, nor is it stated whether the information provided is the result of a 'search'. No other details of search results are referred to. In my view, this subsection does not require the applicant to provide details and results of searches carried out by others, even if the applicant is in possession of the search documents. This approach has been confirmed by the amendment to this subsection effected by the Technical Amendments Act which clarifies that the searches required under this subsection are limited to those carried out by or on behalf of the claim group. As

already noted, my role is not to undertake a merit or qualitative assessment, and I am satisfied that the information referred to is sufficient for the purposes of this section.

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

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

Result and reasons

The application **meets** the requirement under s. 62(2)(d).

A description of the claimed native title rights and interests is contained in schedule E of the application. I am satisfied that it is not merely a statement to the effect that all rights and interests that may exist or have not been extinguished are claimed.

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

The application must contain a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist, and in particular that:

- (i) the native title claim group have, and the predecessors of those persons had, an association with the area, and
- (ii) there exist traditional laws and customs that give rise to the claimed native title, and
- (iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Result and reasons

The application **meets** the requirements under s. 62(2)(e).

For s. 62(2)(e) to be satisfied the information in the application needs to be more than a mere recitation of the section, having regard to the authority in *Queensland v Hutchison* [2001] FCA 416 at [17] to [23]. The information contained in schedule F and attachment F of the application addresses the requirements of s. 62(2)(e) and it is not a mere recitation of the legislation.

Activities: s. 62(2)(f)

If the native title claim group currently carries out any activities in relation to the area claimed, the application must contain details of those activities.

Result and reasons

The application **meets** the requirement under s. 62(2)(f).

At schedule G of the application, there is information about the activities that the native title claim group 'currently' carry out in relation to the application area.

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

The application must contain details of any other applications to the High Court, Federal Court or a recognised state/territory body of which the applicant is aware, that have been made in relation to the whole or part of the area covered by the application and that seek a determination of native title or of compensation in relation to native title.

Result and reasons

The application **meets** the requirement under s. 62(2)(g).

I have referred to the changes to schedule H in the introduction above. Additional information provided in the amended application states that:

There is currently no native title application which seeks a determination of native title or determination of compensation in relation to native title over the area covered by this application.

I am satisfied that this meets the requirement that the applicant provide details of any other native title determination or compensation applications of which it is aware.

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

The application must contain details of any notices given under s. 29 (or under a corresponding provision of a law of a state or territory) of which the applicant is aware that relate to the whole or a part of the area covered by the application.

Result and reasons

The application **meets** the requirement under s. 62(2)(h).

Schedule I states that the 'applicant is not aware of any section 29 notices that have been issued in the claim area during the life of the claim'.

Subsection 190C(3)

No common claimants in previous overlapping applications

The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:

- (a) the previous application covered the whole or part of the area covered by the current application, and
- (b) the previous application was on the Register of Native Title Claims when the current application was made, and
- (c) the entry was made, or not removed, as a result of the previous application being considered for registration under s. 190A.

Result and reasons

The application **satisfies** the condition of s. 190C(3).

The Tribunal's Geospatial Services provided an overlap analysis of the application area dated 26 August 2009 (the geospatial report). The geospatial report states that there are no registered applications that fall within the application area as at 26 August 2009.

I therefore do not need to consider the requirements of this condition further.

Subsection 190C(4)

Authorisation/certification

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

- (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
- (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

Under s. 190C(5), if the application has not been certified, the application must:

- (a) include a statement to the effect that the requirement in s. 190C(4)(b) above has been met (see s. 251B, which defines the word 'authorise'), and
- (b) briefly set out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

Result and reasons

I must be satisfied that the requirements set out in either ss. 190C(4)(a) or (b) are met, in order for the condition of s. 190C(4) to be satisfied. As the application is not certified, the requirements of s. 190C(4)(b) are applicable.

For the reasons set out below, I am satisfied the requirements set out in s. 190C(4)(b) are met, including the condition of s. 190C(5).

Section 190C(4)(b) requires that the Registrar (or his delegate) be satisfied that:

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.

The Act imposes two further conditions at s. 190C(5) (a) and (b) which are conditions precedent about which the Registrar must be satisfied before proceeding to consider the requirement at s. 190C(4)(b). The section states that the Registrar may not be satisfied at s. 190C(4)(b) unless the application:

- (a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and
- (b) briefly sets out the grounds on which the Registrar should consider that it has been met.

The role of the Registrar's delegate in relation to these requirements was set out in *Doepel*:

In the case of subs (4)(b), the Registrar is required to be satisfied of the fact of authorisation by all members of the native title claim group. Section 190C(5) then imposes further specific requirements before the Registrar can attain the necessary satisfaction for the purposes of s 190C(4)(b). The interactions of s 190C(4)(b) and s 190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given. The nature of the enquiry is discussed by French J in *Strickland v NTR* at [259]–[260], and approved by the Full Court in *WA v Strickland* at [51]–[52]. Both *Martin* at [13]–[18], and *Risk v National Native Title Tribunal* [2000] FCA 1589 involved consideration of the condition imposed by s 190C(4)(b) – at [78].

The statements required by s. 190C(5) are supplied in the body of the affidavits at attachment R, which are affidavits of each of the two persons who jointly comprise the applicant.

I must now decide whether those persons are members of the native title claim group and are authorised to make the application, and deal with matters arising in relation to it, by all other persons in the group.

Authorisation in relation to native title claims is defined in s.251B of the Act:

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.

Proper authorisation of all the persons making a native title determination application has been recognised by the Court as crucially important under the Native Title Act.

In *Strickland v Native Title Registrar (Strickland)* [1999] FCA 1530, a decision upheld by the Full Court, French J observed:

Nevertheless, this is a matter of considerable importance and fundamental to the legitimacy of native title determination applications. The authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title. It is not a condition to be met by formulaic statements in or in support of applications—at [57].

In *Daniel v State of Western Australia (Daniel)* [2002] FCA 1147, 194 ALR 278 his Honour said:

It is of central importance to the conduct of native title determination applications and the exercise of the rights that flow from their registration, that those who purport to bring such applications and to exercise such rights on behalf of a group of asserted native title holders have the authority of that group to do so—at [11].

His Honour emphasised the importance of the ‘ultimate’ and ‘continuing’ authority of the native title claim group by ensuring ‘the applicant’ is properly authorised: *Daniel* at [16] and [17].

The requirement in s. 190C(4)(b) that authorisation be by ‘all the other persons in the claim group’ is not interpreted literally by the courts.

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

In s 251B(b) there is no mention of "all" and, in my opinion the subsection does not require that "all" the members of the relevant claim Group must be involved in making the decision. Still less does it require that the vote be a unanimous vote of every member. Adopting that approach would enable an individual member or members to veto any decision and may make it extremely difficult if not impossible for a claimant group to progress a claim. In my opinion the Act does not require such a technical and pedantic approach. It is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process—at [25].

This decision does not, in my view, dilute the underpinning importance of authorisation emphasised by the previously mentioned authorities.

I refer also to what was said in *Ward v Northern Territory* 2002 FCA 171 (though this was in consideration of a s.66B application), by O’Loughlin J:

The information concerning the meeting that was held on 27 January 2002, the date of Mr Carlton’s affidavit, is wholly deficient. There is no information about that meeting. Who convened it and why was it convened? To whom was notice given and how was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded? – at [24].

It may not be essential that these questions be answered on any formal basis such as in terms of the convening and conducting of a meeting in a commercial atmosphere, but the substance of those questions must be addressed’ – at [25].

I turn now to the process of authorisation described in the application. Schedule R addresses the two preliminary issues of (a) a statement that 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 other persons in the native title claim group; and (b) the grounds on which the Registrar should consider the statement is correct:

- a) The individuals that comprise the applicant are members of the native title claim group and are authorised to make the further amended application, and deal with all matters arising in relation to it, by all the other persons in the native title claim group. The authority was given at a meeting of the native title claim group held on 11 and 12 September 2007 in Coraki. The meeting arose out of a process of public notification by New South Wales Native Title Services (NSWNTS).

The process of authorisation is further described in 'Attachment R' and in the affidavits of [name removed] and each other persons who jointly comprise the applicant, which are annexed to attachment R and marked R(1), R(2) and R(3).

- b) The grounds upon which the Registrar should consider the statement to be correct are:
- The applicant was authorised by the native title claim group to make the amendments to the application detailed in Attachment R at a meeting of the native title claim group held in Coraki on 11 and 12 September 2007.
 - The applicant is comprised of each of the people authorised by all members of the native title claim group to make this application at a meeting of the native title claim group held in Coraki on 11 and 12 September 2007.
 - The matters are deposed to in the affidavit [name removed] sworn on 16 May 2008, a copy of which is 'Attachment R1'.
 - The affidavit of Anthony Edward Wilson sworn on 9 October 2007, a copy of which is attached hereto and marked 'Attachment R2'.
 - The affidavit of Douglas Steven Wilson sworn on 9 October 2007, a copy of which is attached hereto and marked 'Attachment R3'.

The affidavit of [name removed] contains the following information:

- [Name removed] is a solicitor employed by NTSCORP (formerly NSWNTS) who are a body charged to carry out native title representative functions for the area over this native title determination application.
- The person previously authorised as the applicant on this application passed away in 2007.
- On 11 and 12 September 2007 NSWNTS convened a meeting of approximately 20 Aboriginal people who assert native title rights and interests in the claim area to authorise amendments to the application and replace the applicant.
- Prior to this, NSWNTS had placed an advertisement on 29 August 2007 in three local newspapers, the *Koori Mail*, the *Northern Star* and the *Richmond Express* regarding the meeting and its purpose. Copies of the notice were distributed to members of the claim group who had previously advised that they asserted native title in the claim area. The names of these people were drawn from a database held by NSWNTS which was updated on the basis of meeting attendance sheets. Telephone calls advising of the meeting were also made to these people. Travel assistance was provided to some attendees.

- Some persons of the claim group telephoned NSWNTS to advise that they were unable to attend, and would have family members to come in their place to contribute their views to the meeting. The people unable to attend expressed support for amending the application.
- At the meeting *[name removed]* observed the attendees unanimously pass a resolution that there was no traditional process of decision-making. A process of decision-making was adopted whereby discussion of the issues would continue until there was general consensus. A motion would be read to the meeting, this motion to be forwarded and seconded by Bandjalang People. A decision would be made by voting with a show of hands, a majority being accepted as the decision. The attendees at the meeting agreed that they were sufficiently representative of the Bandjalang People to authorise amendments, and passed a resolution to this effect. A resolution was passed using the agreed decision-making method that the people in attendance were sufficiently representative. They were all descendants of apical ancestors and representative of family members and Elders who could not attend.
- The meeting unanimously passed a resolution using the adopted decision-making method to authorise and appoint Anthony Wilson and Douglas Wilson as the replacement applicant. The meeting also authorised amendment to the content of the application.

Copies of the newspaper advertisement referred to in *[name removed]* affidavit are attached to the application and labelled as 'Annexure B'. Under the heading 'Purpose' in the advertisement, is the subheading of 'Authorisation of amendments to the claim/s including' and lists 'Clarification of claim group description' as one of the topics covered under the subheading.

The invitation to the meeting is extended to: 'all the people who hold or may hold native title for the land and waters in and around' and a list of areas is then provided; 'All descendants, (including adopted descendants), of King Harry, Jack Wilson, George James, Frank Jock Snr and George Robinson.'

At this point I note that the apical ancestors listed in the application are:

- King Harry (b. ca 1820s)
- Jack Wilson (b. ca 1820s)
- Susannah (b. ca 1830) mother of Frank Jock Jnr.
- Michael 'Mundoon' Wilson (b. 1866, d. Coraki 1921)
- George James (b. ca 1885 Woodburn)
- Eliza Breckenridge (ca 1870)
- Jack Breckenridge (b. Coraki 1870, d. Coraki 1944)
- Frank Jock Jnr (b. Coraki 1879, d. Coraki 1930)
- Ada Jock (b. circa 1872, d. Coraki 1922)
- Gibson Robinson (b. Coraki circa 1871, d. Coraki 1947)
- Grace Bond (b. ca 1880)

The last category of invitees is 'Any Indigenous parties to the Bandjalang Peoples Native Title claims No. 1 and No. 2'.

Also attached to the application are the affidavits of Anthony Edward Wilson and Douglas Steven Wilson marked R2 and R3 respectively, affirmed on 9 October 2007. They are identical in content, and reiterate the information supplied in the affidavit of *[name removed]*.

While the number of people in attendance at the meeting was small, 'approximately 20', the Wilson affidavits, at paragraph 9 states that, 'The meeting was well attended by people from many different Bandjalang families who make up the Bandjalang native title claim group'.

I note that a submission by the New South Wales Department of Lands dated 28 October 2008 (the State submission), states:

Without further information such as minutes of the meeting or a list of the attendees, it is difficult to determine whether all the persons who claim to hold common or group rights and interests in the claim area were present and/or agreed to the decision-making process adopted and/or its outcomes.

There has been no change to the authorisation material so this submission remains relevant to this application.

The submission then notes that the affidavit of Anthony Edward Wilson, which states that: 'a unanimous resolution was passed that the meeting was sufficiently representative to make those decisions as each person who was present was attending as a representative of their family members, and other Bandjalang People to whom they had spoken, but who could not be present'.

The submission concludes that:

Prima facie on the information provided it could be seen as sufficient for satisfying the requirements of authorisation concerning the Amended Application, but it is open for the Registrar to determine whether the requirements under s. 190C(4)(b) have been met.

The applicant's response on 21 November 2008 refers to the affidavits of [name removed], Anthony Wilson and Douglas Steven Wilson to support the authority and representative nature of the meeting attendees, and refers to the passage in *Lawson* quoted above. It is asserted that meeting records are confidential and privileged.

In my view the authorisation process is, in this case, sufficient for the purposes of the Act. Information regarding the meeting and its purpose was disseminated by newspaper advertisements in two local, and one national Indigenous specific newspaper two weeks before it took place. This was supplemented by distribution of notices to Aboriginal persons who had previously been identified as asserting native title rights and interests in the claim area. These persons had been identified by means of an NSWNTS database that was updated on the basis of signatures on attendance sheets of claim group meetings. Various telephone calls were made to those persons asserting native title in the claim area.

The decision-making process, in lieu of a mandatory traditional system, was unanimously agreed to, and a written resolution describing the process was unanimously passed. Thereafter, motions were arrived at by consensus, and passed as resolutions on the basis of a show of hands and majority decision. The meeting agreed that it was sufficiently representative of the claim group members to authorise amendments to the application. The views of absent members were presented by *ad hoc* family and other representatives.

It is apparent that resolutions were formulated, passed and recorded in writing. Information about how the meeting was convened, to whom notice was given and how, the agenda, the chair, the status of the chair, some of the resolutions and the means of decision-making are all supplied. The substance of the questions posed by Justice O'Loughlin in *Ward* have, in my view, been addressed.

Records of the meeting have not been supplied due to confidentiality conditions. Sufficient information has been provided for me to find that the authorisation process has been validly exercised, and this section complied with.

Merit conditions: s. 190B

Subsection 190B(2)

Identification of area subject to native title

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

Information regarding external and internal boundaries: s. 62(2)(a)

The application must contain information, whether by physical description or otherwise, that enables identification of the boundaries of:

- (i) the area covered by the application, and
- (ii) any areas within those boundaries that are not covered by the application.

Map of external boundaries: s. 62(2)(b)

The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

Result and reasons

The application **satisfies** the condition of s. 190B(2).

The application complies with ss. 62(2)(a) and (b) as it contains a written description of the area covered (the external boundary) and areas not covered by the application (the internal boundaries) in attachment B and a map showing the external boundary in attachment C.

The State submission in response to the previous application, on considering the information contained in the application as to 'Identification of area subject to native title' concluded that 'it appears that the Registrar can be reasonably certain of the particular land and waters to which the native title rights and interests are claimed in accordance with the requirements of s. 190B(2)'.

The State submission in response to the previous application points out that there is no document entitled 'Description of External Boundaries' as referred to in schedule B of the application. In correspondence from NTSCORP to the Tribunal dated 21 November 2008 in response to the State submissions, (applicant's response), NTSCORP state that 'The title 'Description of External Boundaries' referred to in Schedule B, was inadvertently omitted'. Instead it bears the headings 'Eastern Boundary Description', 'Southern Boundary Description' and other references.

At schedule B of the application, the application refers to attachment B 'Description of external boundaries'. At the conclusion of schedule B, the application further refers to 'Attachment B', 'Attachment B(1)' and 'Attachment B(2)' as providing the description of the external boundaries of the determination area and excluded areas. Attachment B states that both the map and description have been prepared by the Geospatial Unit of the National Native Title Tribunal. The geospatial assessment dated 26 August 2009 includes the finding that the description and map are consistent and identify the application area with reasonable certainty.

Having regard to the comprehensive identification of the external boundary in attachment B and the clarity of the mapping of this external boundary on the map in attachment C, I am satisfied that the external boundaries of the application area have been described such that the location of it on the earth's surface can be identified with reasonable certainty.

A written description of the internal boundaries is also found in attachment B. Excluded areas also defined in attachments B(1) and B(2) – as referred to in schedule B. This is a generic description that excludes from the application any areas subject to a number of acts defined in the Act. It also excludes land covered by acts described in s. 23B of the Act. It is finally stated that the application does not include areas where native title has otherwise been extinguished.

A generic or class formula to describe the internal boundaries of an application is acceptable if the applicant has only a limited state of knowledge about any particular areas that would fall within the generic description provided: see *Daniels & Ors v State of Western Australia* [1999] FCA 686. There is nothing in the information before me to the effect that the applicant is in possession of information such that a more comprehensive description of these areas would be required to meet the requirements of the section. In these circumstances, I find the written description of the internal boundaries is acceptable as it offers an objective mechanism to identify which areas fall within the categories described.

For these reasons, I am satisfied that the information and map in the application required by sections 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular areas of land or waters and the requirements of s. 190B(2) are therefore met.

Subsection 190B(3)

Identification of the native title claim group

The Registrar must be satisfied that:

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

Result and reasons

The application **satisfies** the condition of s. 190B(3).

The application does not name all native title claim group members individually, and consequently s. 190B(3)(a) does not apply.

Section 190B(3)(b) requires me to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

The law

In considering the operation of s. 190B(3)(b) in *Doepel*, Mansfield J stated that:

Its focus also is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the identified native title claim group can be ascertained – at [37].

The focus of s. 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group. Section 190B(3) has two alternatives. Either the persons in the native title claim group are named in the application: subs 3(a). Or they are described sufficiently clearly so it can be ascertained whether any particular person is in that group: subs (3)(b). Although subs (3)(b) does not expressly refer to the application itself, as a matter of construction, particularly having regard to subs (3)(a), it is intended to do so—at [51].

A description that necessitates a further factual inquiry to ascertain whether a person is in the group may still be sufficient for the purposes of s. 190B(3)(b).

The claim group description in this application, reproduced below, is similar to that considered in *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 at [64], where Carr J considered a claim group described as:

1. The biological descendants of the unions between certain named people;
2. Persons adopted by the named people and by the biological descendants of the named people; and
3. The biological descendants of the adopted people referred to in paragraph 2 above.

This method of identification was referred to as the ‘Three Rules’ by his Honour. He stated he was satisfied that the application of these rules described the group sufficiently clearly, his reasoning being:

The starting point is a particular person. It is then necessary to ask whether that particular person, as a matter of fact, sits within one or other of the three descriptions in the Three Rules. I think that the native title claim group is described sufficiently clearly. In some cases the application of the Three Rules may be easy. In other cases it may be more difficult. Much the same can be said about some of the categories of land which were used to exclude areas from the claim. It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently. It is more likely to result from the effects of the passage of time and the movement of people from one place to another. The Act is clearly remedial in character and should be construed beneficially: *Kanak v National Native Title Tribunal* (1995) 61 FCR 103 at 124. In my opinion, the views expressed by French J in *Strickland* at para 55...in relation to definition of areas, apply equally to the issue of sufficient description of the native title group—at [67].

Carr J also referred to what was said by French J in *Strickland v Native Title Registrar* (1999) 168 ALR 242; [1999] FCA 1530 at [55], which was 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. As to their practical application to a particular case, subject to the constraints imposed by the law, that is a matter for the Registrar and his delegates and not for the Court.

The claim group description

Schedule A of the amended application provides the following description of the claim group:

The Bandjalang People are the native title claim group on whose behalf the applicant makes this application. The Bandjalang People are all the descendants of the following apical ancestors:

- King Harry (b. ca 1820s)
- Jack Wilson (b. ca 1820s)
- Susannah (b. ca 1830) mother of Frank Jock Jnr.
- Michael 'Mundoon' Wilson (b. 1866, d. Coraki 1921)
- George James (b. ca 1885 Woodburn)
- Eliza Breckenridge (ca 1870)
- Jack Breckenridge (b. Coraki 1870, d. Coraki 1944)
- Frank Jock Jnr (b. Coraki 1879, d. Coraki 1930)
- Ada Jock (b. circa 1872, d. Coraki 1922)
- Gibson Robinson (b. Coraki circa 1871, d. Coraki 1947)
- Grace Bond (b. ca 1880)

Descendants include persons who are descendants by incorporation and adoption according to traditional law and custom.

Adoption and incorporation are not open-ended or casual processes; they are acknowledged and practised in accordance with Bandjalang traditional law and custom.

If an objective test for **adoption** is required, it can be tested for by the following features based upon Bandjalang traditional laws and customs:

- Has the person been included in one of the Bandjalang descent groups by an adult member of that Bandjalang descent group who raised the child as one of their own? (This is commonly referred to as "growing up" or being "reared up" (by) that person).
- During the time the child was growing up, did they identify as a member of that descent group and were they commonly identified as such by the other members?
- Were they given the same rights within the descent group as other members? If so, this flows on to rights in land as well, since kin relations and relations in connection to country share a common structure – e.g. when one refers to "my father('s) land", the relationship to that land is seen as of a similar order to, and derived from one's relationship to one's father.
- As the child matured, did they become recognised as a member of the adopting adult's descent group and as Bandjalang by the other descent groups, and eventually by the senior people of the Bandjalang native title community?
- Has the adopted person closely associated with the applicant group throughout their life, and held an active association with, and knowledge of the traditional country of the applicant community, comparable to that of the rest of the applicant community, and prior to the native title application?

The membership of one of the Bandjalang descent groups also includes an incorporated person. "**Incorporation**" here applies where the person's biological parentage belongs to a descent group outside the applicant group. Incorporation is acknowledged by the Bandjalang under traditional law and custom. If an objective test for incorporation is required, it can be tested for by the following features based upon Bandjalang traditional laws and customs:

- Has the person been incorporated into one of the Bandjalang descent groups by an adult member of the group?

- Did they identify as a member of that descent group, and were they commonly identified as such by the other members?
- Were they given the same rights within the descent group as other members? If so, this flows on to rights in land as well, since kin relations and relations in connection to country share a common structure – e.g. when one refers to “my mother(s) land”, the relationship to that land is seen as of a similar order to, and derived from one's relationship to one's mother.
- Were they recognised as a member of the incorporating adult's descent group and as Bandjalang by the other descent groups, and eventually by the senior people of the Bandjalang applicant group?
- Have the incorporated person's descendants closely associated with the applicant group throughout their life, and held an active association with, and knowledge of the traditional country of the applicant community, comparable to that of the rest of the applicant community, and prior to the native title application?

The State's submission

The New South Wales Land and Property Management Authority, Native Title Branch, (the State), provided a submission dated 7 September 2009 regarding the claim group description in the amended application.

The State submits that:

The Applicants have set out in the Further Amended Claimant Application of 21 August 2009, five (5) criteria for the objective testing of 'adoption'. These criteria or 'features' (as they are called in the Application) are based upon traditional laws and customs and include, for example, a feature relating to whether or not the particular person has been 'reared up' or 'growing up' by an adult member of the particular Bandjalang descent group.

In the Further Amended Claimant Application it is not clear whether the list of features or criteria are exhaustive or whether one must satisfy all, or just one of some of the criteria, to meet the objective test for identifying a particular person's membership by way of adoption into the native title claim group.

Accordingly, this issue should be clarified – will satisfying one 'feature' represent satisfaction of the objective test.

The submission then deals with the test for incorporation and goes on to say for both adoption and incorporation:

...there is no indication if all the criteria need to be satisfied, or just one or more than one to represent satisfaction of the objective test.

The applicant's response

NTSCORP, the applicant's representative, responded to the State's submission by letters dated 14 and 15 September 2009

At the outset, the applicant reiterates their concept of the Registrar's role with respect to s. 190B(3) and states that 'in relation to Schedule A, the Registrar cannot go beyond the information contained in the application to undertake some form of merit assessment', and cites Mansfield J in *Doepel* at [37] as authority for this. I reproduce this cited authority in full below:

My view that s 190C(2), relevantly to the present argument, does not involve the Registrar going beyond the application, and in particular does not require the Registrar to undertake some form of merit assessment of the material to determine whether he is satisfied that the native title claim group as described is in reality the correct native title claim group, is fortified by s 190B(3). It imposes one of the merit requirements for accepting a claim for registration: s 190A(6)(a). Its focus also is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the identified native title claim group can be ascertained. It, too, does not require any examination of whether all the named or described persons do in fact qualify as members of the native title claim group. Such issues may arise in other contexts, including perhaps at the hearing of the application, but I do not consider that they arise when the Registrar is faced with the task of considering whether to accept a claim for registration – at [37].

The applicant comments, 'by way of observation' that:

- They reiterate their 'principal contention' regarding descendants by adoption or incorporation that 'adoption and incorporation are not open-ended casual processes'. They can be 'precisely defined by reference to an objective process whose five features – defined as a series of questions – are set out in Schedule A of the Bandjalang #1 Application'.
- The relevant test 'is described sufficiently clearly even though some form of factual enquiry may be necessary'.
- The test is not discretionary or subjective but is 'derived from the traditional laws and customs of the applicant's community'.
- 'The five features characteristic of adoption as set out in both order and content, follow a logical progression beginning from early childhood to adolescence through to adulthood'. While incorporation differs from adoption in not involving 'growing up' or 'rearing up', 'the process in both instances is deliberate, well articulated, objective and derived from the traditional laws and customs of the applicant's community'.

In the letter dated 15 September 2009, the applicant makes the following comments in relation to dot point four above for both the concepts of incorporation and adoption:

To attain the status of a member of the native title holding community, all five of the criteria/features – as they relate separately to adoption and incorporation – need to be satisfied to meet the objective test, as the test is expressed with respect to adoption or incorporation.

What the Registrar can have regard to in relation to s. 190B(3)

Mansfield J stated in *Doepel* that the requirements of s. 190B(3) 'do not appear to go beyond consideration of the terms of the application' (at [16]) and that although subsection (b) of the section does not expressly refer to the application itself, as a matter of construction, particularly having regard to subsection (3)(a), it is intended to do so (at [51]).

I must therefore make my decision on the basis of the description contained in the application itself. Submissions or additional information in relation to the claim group description cannot clarify an ambiguity with it, since that is the very thing being tested at s. 190B(3).

My findings in relation to the claim group description

I am of the view that the description in the application satisfies the requirement in s. 190B(3)(b) and enables 'reliable identification of persons in the native title claim group' – *Doepel* at [51].

Membership based on biological descent from a number of named apical ancestors clearly provides an objective method of identification of claim group members. In addition, membership can be based on adoption or incorporation into the group in accordance with specified criteria.

The introduction of the five 'features' to be applied in determining membership by either adoption or incorporation are predicated by the phrases that these processes are 'not open ended or casual processes', and that they are provided 'if an objective test...is required'.

I have come to the view, based on the description in the application, that the five features are sequential and cumulative. Given the stated intent in the description that the features be applied 'if an objective test... is required', it is logical that the features are to be applied as a sequential whole, and no one feature is severable. If this approach is not taken, the description is neither logical nor objective.

In my view, the criteria for adoption and incorporation are clearly defined. When practically applied, they are capable of allowing an enquiry to ascertain membership of that group. They are specific and do not require further clarification.

In coming to this view I have taken account of the following comments of Dowsett J in *Gudjala People 2 v Native Title Registrar (Gudjala)* [2007] FCA 1167, in relation to a claim group description that consisted of two parts:

it is consistent with traditional canons of construction to read the paragraphs as part of one discrete passage, and in such a way as to secure consistency between them, if such an approach is reasonably open— at [34].

I also note the remedial nature of the Act as expressed by Carr J and French J in the cases referred to above.

Subsection 190B(4)

Native title rights and interests identifiable

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

Result and reasons

The application **satisfies** the condition of s. 190B(4).

The rights and interest claimed must be described in a clear and easily understood manner to meet the requirements of this section: *Doepel* at [91] to [92], [95], [98] to [101], [123].

The phrases 'native title' and 'native title rights and interests' are defined by s. 223(1) of the Act which provides as follows:

The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

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

Schedule E of the application sets out a list of 23 claimed rights and interests, which I reproduce in full in relation to my reasons for s. 190B(6) below.

The State submission contends that it is doubtful whether the rights claimed in paragraphs 2 (a), (e), (g), (h), (m) and (r) of schedule E are native title rights and interests as defined in s. 223, according to the decision of *Western Australia v Ward* (2002) 76 ALJR 1098 (*Ward 2002*).

I discuss whether these are native title rights as defined by s. 223 and whether they can be established *prima facie* in relation to the requirements of s. 190B(6) below.

The description of the 22 non-exclusive rights and 1 exclusive right listed in schedule E is clear, understandable and makes sense and accordingly the requirements of this section are met.

Subsection 190B(5)

Factual basis for claimed native title

The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:

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

I consider each of the three assertions set out in the three paragraphs of s. 190B(5) in turn and come to a combined result for s. 190B(5) below.

In *Doepel*, Mansfield J stated that:

Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the 'factual basis on which it is asserted' that the claimed native title rights and interests exist 'is sufficient to support the assertion'. That 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. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. 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 – at [17] (emphasis added).

This paragraph of the *Doepel* judgment was quoted with approval in *Gudjala FC* at [83], with the emphasis in italics as appears above. The Full Court in *Gudjala FC* went on to say:

...Indeed, there is no reason to doubt that this statutory scheme contemplates that it would be open to the Registrar to accept an application based on the application, including the accompanying affidavit, without having regard to other information of the type referred to in s 190A(3). Accordingly, the statutory scheme appears to proceed on the basis that the application and accompanying affidavit, if they, in combination, address fully and comprehensively all the matters specified in s 62, might provide sufficient information to enable the Registrar to be satisfied about all matters referred to in s 190B. This suggests that the quality and nature of the information necessary to satisfy the Registrar will be of the same general quality and nature as the information required to be included in the application and accompanying affidavit. Of course, if an applicant fails to fully and comprehensively furnish the information required by s 62 then there is a risk that the Registrar will not accept the claim although that risk is ameliorated by the power of the Registrar to consider information additional to that contained in the application, including documents (other than the application) provided by an applicant: see s 190A(3)(a) – at [90] (emphasis added).

and at [92]:

Of central importance in this appeal are the details specified by s 62(2)(e), namely details which constitute a general description of the factual basis on which it is asserted that the native title rights and interests claimed existed and, in particular, the matters referred to in ss 62(2)(e) (i), (ii) and (iii). Those details are in aid of the description, with some particularity, required by s 62(2)(d) of the asserted native title rights and interests. 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* (emphasis added).

I have quoted sections of this decision at length, and italicised the parts that directly refer to the assessment of s. 190B(5), the wording of which is similar to ss. 62(2)(e)(i),(ii) and (iii). The Full Court finding in this decision is that, by inference, the high standard of evidentiary detail required under the first instance in *Gudjala* has been modified (although the first instance *Gudjala* did not refer directly to evidentiary standards, that concept is dealt with in the Full Court consideration of the first instance decision).

For the information to be satisfactory it must, on the one hand, 'be in sufficient detail to enable a genuine assessment of the application...and be something more than assertions at a high level of

generality', but, on the other hand it need be no more than 'a general description of the factual basis on which the application is made', and need not 'provide evidence that proves directly or by inference the facts necessary to establish the claim'. Balanced against this is the passage quoted above from the decision in *Doepel* where the Court considered the test the Registrar is required to apply under s. 190B(5). The Full Court chose to quote and emphasize that section of those reasons, namely:

That 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.

I turn now to the quality of the asserted factual basis provided in support of this application. In addressing 'the quality of the asserted factual basis' I note the status and origin of the information supplied.

Schedules E, F, G and M of the application refer to five affidavits of Anthony Edward Wilson, (Attachments F(1) and F(2)), [name removed], (Attachment F(3)), [name removed], (Attachment F(4)) and [name removed], (Attachment F(5)).

The affidavit of [name removed] at Attachment F(4) is the most comprehensive of the affidavits supplied, being 171 paragraphs. [Section removed].

Anthony Edward Wilson is [name removed] son, [name removed] daughter, and [name removed] niece. All grew up in the area subject to this application.

The State submission makes the general observation at page 5 that:

On the basis of the Amended Application alone, it may be difficult for the Registrar to be reasonably satisfied that the factual basis on which it is asserted that the native title rights and interests claimed to exist are sufficient to support the assertion that native title has been continually held by the claim group in accordance with traditional laws and customs.

This submission related to the previous amendment of the application but the material in relation to this condition has not changed so the submission remains relevant.

The State submission raises further objections which I address under the sub-headings below.

Result and reasons re s. 190B(5)(a)

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(a).

The State submission

The State submission as regards this subsection refers to assertions in the application at Attachment F, subparagraphs A(1) to (5) that:

- Members of the claim group had rights and interests prior to 26 January 1788 that continue to the present day;

- The claim group are descended from members of the Bandjalang People who had a presence in the area subject to the claim prior to 1788;
- The claim group have maintained a system of law and custom which has existed since before 26 January 1788 (even though those laws and customs have undergone some changes since white settlement);
- The claim group owns the claim area according to traditional laws and customs.

In the concluding paragraph on this subsection the State submitted, 'The statements contained in the affidavits, namely the Affidavit of *[name removed]*, refer to events which occurred in the early history of settlement'.

The applicant's response

The applicant's response to the State submission of 28 October 2008 is that 'The Applicant relies on Schedule F and the affidavits appearing at Attachment F(1) – (5) of the Application. The claimants also rely on the Affidavit of *[name removed]* (enclosed) dated 27 May 2008.'

This affidavit, sworn on 27 May 2008 by *[name removed]*, identifies *[removed]* as a historian, refers to expert material filed with the Court in relation to the Bandjalang People # 1 application, (but not included with the current amended application under consideration), lists the reports supplied by *[name removed]*, anthropologist, and *[name removed]*, linguist, and refers to a document titled 'Bandjalang People # 1 NC 96/16 (NC6034/98) Native Title Determination Application – Third Anthropologist's Report, November 2005' written by *[name removed]* and provided to the State as a confidential document as part of the credible evidence process. These reports are not supplied with the current application. On 22 January 2008, NTSCORP advised that Tribunal that it would not be sending any further submissions in relation to the affidavits in the Bandjalang #1 application.

The affidavit of *[name removed]*, at paragraphs 55 to 65, lays down the basis for the assertions made under s. 190B(5)(a). *[Section removed]*.

Anthony Wilson, in his 1999 affidavit, states that *[section removed]*.

The respective affidavits contain many other references to examples of activities practised by families and predecessors of the deponents that confirm an association with the area. They mention other Bandjalang people who are not directly associated with the Wilson family. They cite specific locales within the claim area with which there is, and has been an association. *[Section removed]*.

It is unclear to me what shortcomings the State submission identifies in relation to information supplied in the application for the purposes of this subsection. By drawing attention to the assertions in Attachment F that refer to an association with the area prior to sovereignty, and then stating that the information supplied refers to events 'which occurred in the early history of settlement', it may be that, inferentially, the State submission is that the applicant has failed to provide a factual basis for the assertion that the predecessors of the claim group had an association with the area prior to sovereignty. This pre-sovereignty connection is inextricably mixed with the post-sovereignty position. This is more appropriately addressed under s. 190B(5)(b) as I discuss below. I am, however, satisfied that there is a factual basis for this assertion.

Result and reasons re s. 190B(5)(b)

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(b).

Gudjala is of assistance when applying s. 190B(5)(b) to the material in the application:

The decision in *Yorta Yorta* (supra), (*Members of the Yorta Yorta Aboriginal Community v Victoria (Yorta Yorta)* (2002) 194 ALR 538), demonstrates that the requirement that the laws and customs be traditional means that they must have their source in a pre-sovereignty society and have been observed since that time by a continuing society. The applicant submits that this does not lead to the conclusion that the apical ancestors must have comprised a society. I accept that submission – at [63] and

The starting point must be identification of an indigenous society at the time of sovereignty or, for present purposes, in 1850-1860 – at [66].

This approach to the *Yorta Yorta* decision, that the factual basis for s. 190B(5)(b) must include a description of how the laws and customs of the claim group are rooted in the traditional laws and customs of a society that existed at the time of sovereignty, was endorsed in *Gudjala FC* – at [96].

The terms ‘native title’, ‘native title rights and interests’ and ‘traditional’ used in s. 190B(5)(b) are further defined in the Act and relevant case law. Section 223(1) of the Act defines ‘native title’ and ‘native title rights and interests’:

(1) The expression native title or native title rights and interests means the communal, group, or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights or interests are possessed under the traditional laws acknowledged and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders;

The terminology in ss. 190B(5)(b) and (c) is similar to that found in s. 223(1)(a). The High Court in *Yorta Yorta* considered the word ‘traditional’ in the context of s. 223(1)(a). The High Court held that:

“traditional” does not mean only that which is transferred by word of mouth from generation to generation, it reflects the fundamental nature of the native title rights and interests with which the Act deals as rights and interests rooted in pre sovereignty traditional laws and customs—at [79].

The High Court made further reference to the term ‘traditional laws and customs’ in s. 223(1)(a):

First, it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are “traditional” laws and customs.

Secondly, and no less importantly, the reference to rights or interests in land or waters being *possessed* under traditional laws acknowledged and traditional customs observed by the peoples

concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist. And any later attempt to revive adherence to the tenets of that former system cannot and will not reconstitute the traditional laws and customs out of which rights and interests must spring if they are to fall within the definition of native title— at [46] to [47] (emphasis in original).

The State submission

‘The affidavits at Attachment F provide some, but not extensive, evidence of the activities purportedly carried out and detailed at Schedule G. It is submitted that it is unclear as to whether the activities detailed therein, which are asserted as laws and customs traditional in their origin, are continually observed by the present claim group having specific regard for law and custom.’

The applicant's response

- Contemporary evidence of activities practiced by the claim group in exercise of their traditional rights and interests (as articulated in Schedule E) is provided by the ‘lengthy and extensive affidavit evidence’ found at Attachments F(1) – (5).
- The 2003 affidavit of Anthony Edward Wilson provides ‘contemporary examples of activities which are the practical expression of rights and interests derived from the pre-sovereignty normative system of Bandjalang laws and customs’. Examples and paragraph citations are provided for:
 - The telling of stories in relation to sites and places as well as activities of ancestors on the claim area;
 - Upholding customary laws in relation to the claim area;
 - Continuing physical occupation of the area, hunting, fishing, foraging, camping and protecting cultural sites.
- Similar examples can be found in the affidavit of *[name removed]*. Examples and paragraph citations are provided for the maintenance of activities relating to:
 - Upholding customary law including taboos associated with: eating certain foods; approaching certain sites; and behaving in certain ways;
 - Transmission of traditional laws and customs.
- Further examples can be found in the affidavit of *[name removed]* relating to the transmission of traditional laws and customs.
- The 2002 affidavit of *[name removed]* demonstrates a ‘continuing chain of inheritance from the system which pre-dates the British acquisition of sovereignty to the present. The other affidavits ‘demonstrate the maintenance of activities practiced by preceding generations of Bandjalang people who occupied the claim area before the time of colonisation to the present’. Examples and paragraph citations are provided for:
 - hunting fishing and foraging practices;
 - education in Bandjalang laws and customs;
 - physical occupation, including camping and travelling to the claim area;

- the telling of stories in relation to sites of spiritual significance.
- Collectively the affidavits ‘provide conclusive evidence of the Bandjalang people’s continuing acknowledgement of and adherence to traditional laws and customs through the practice of activities outlined in schedule G’.
- Reference is made to *Gudjala FC*: ‘what the applicant is not required to do is provide anything more than a general description of the factual basis on which the applicant is based...the applicant is not required to provide evidence that proves directly or by inference the facts necessary to directly or by inference the facts necessary to establish the claim’ at—[92].
- Schedules F, G and M provide a sufficient factual basis to support the assertion that the native title rights and interests exist.

Application of law and facts

In light of *Yorta Yorta*, the factual basis required by this subsection must describe how the laws and customs currently acknowledged and observed by the native title claim group are rooted in the traditional laws and customs of a society that was in existence at the time of European settlement of the area covered by the application and which has continued in a substantially uninterrupted way since that time. This approach was supported in *Gudjala* and not disturbed by the subsequent *Gudjala FC*.

Dowsett J in *Gudjala* characterised the requisite asserted facts along the following lines:

- that the laws and customs currently observed have their source in a pre-sovereignty society and have been observed since that time by a continuing society — at [63];
- that there existed at the time of European settlement a society of people living according to a system of identifiable laws and customs, having a normative content — at [65] and see also at [66] and [81];
- that explains the link between the claim group described in the application and the area covered by the application, which process, in the case of a claim group defined using an apical ancestry model, may involve ‘identifying some link between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage’ — at [66] and see also at [81].

The affidavit of *[name removed]* *[section removed]*.

The identification of specific sites associated with ancestral beings, foraging techniques and protocols, hierarchical societal structures and descriptive names in Bandjalang language all point to a pre-sovereignty society living according to identifiable laws and customs. An unbroken chain leading back to at least some of the apical ancestors is provided. The information provided in *[name removed]*’s affidavit is of a detailed and precise nature, and confirms a practise of such law and custom, at least until the time of *[removed]* death. The observation and continuity of this law and custom is reiterated in the affidavits of the other four deponents. I expand on the content of the other affidavits in my reasoning below.

Result and reasons re s. 190B(5)(c)

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(c).

The State submission

'Whilst the affidavits attached to the Amended Application indicate that members of the claim group continue to observe some of the traditional laws and customs listed Attachment F (paragraph C), the evidence which has been provided thus far do (sic) not extensively detail the laws and customs said to give rise to a claim of native title as observed and practiced on the land subject to the Amended Application.'

The applicant's response

- The affidavits provide extensive evidence of traditional laws and customs of the Bandjalang People to support the current claim of native title.
- The length and extent of the affidavits make it impractical to set out all the evidence contained in the application which goes to the continued observance of law and custom. Some salient examples of connection are provided as:
 - The maintenance of and visitation of culturally significant sites and stories including [section removed].
 - Traditional beliefs associated with spirit beings and sites of spiritual significance as well as associated activities, customs and rituals. [Section removed].
 - Observation of traditional Bandjalang laws and customs associated with authority and responsibility to care for and protect sites of significance, make decisions and control access to claim area and specific sites of significance. Paragraph citations are then provided.
- The affidavits demonstrate that the native title claim group continues to hold native title in accordance with traditional laws and customs.

Application of law and facts

The assertion in s. 190B(5)(c) is also referable to the second element of what is meant by the term 'traditional laws and customs' in *Yorta Yorta*, namely, that the native title claim group have continued to hold their native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way: see *Yorta Yorta* at [47] and also at [87].

Gudjala indicates that this particular assertion may require the following kinds of information:

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

I agree with the applicant's response to the State submission. The affidavit of [name removed] shows continuity of observation of traditional law and custom stemming back to the time of sovereignty. This is evinced by confirmation by the [removed] deponents of the extensive descriptions provided by [name removed]. While the evidence provided in the affidavits of [removed] is strong, the affidavit

of [name removed], refers at paragraph 27 to [section removed] Despite this, [name removed] evidence is corroborative of that of [reference removed].

As mentioned above, some of the material evidencing observance of law and custom is not as comprehensive as that of [name removed], but it is still extensive and associated with language and specific site location that precedes European settlement, and is contemporaneously practised.

Combined result for s. 190B(5)

The application **satisfies** the condition of s. 190B(5) because the factual basis provided is **sufficient** to support each of the particularised assertions in s. 190B(5), as set out in my reasons above.

Subsection 190B(6)

Prima facie case

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

Result and reasons

The application **satisfies** the condition of s. 190B(6). The claimed native title rights and interests that I consider can be established, prima facie, are identified in my reasons below.

Under s. 190B(6), I must consider that, prima facie, at least some of the rights and interests claimed can be established. The term 'prima facie' was considered in *North Ganalanja Aboriginal Corporation v Qld* 185 CLR 595 (*North Ganalanja*) by their Honours Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, who noted:

The phrase can have various shades of meaning in particular statutory contexts but the ordinary meaning of the phrase "prima facie" is: "At first sight; on the face of it; as it appears at first sight without investigation." [citing Oxford English Dictionary (2nd ed) 1989].

This test was recently considered and approved in *Doepel* where the Court concluded that although the above case was decided before the 1998 amendments of the Act there is no reason to consider the ordinary usage of 'prima facie' there adopted is no longer appropriate when considering the condition in s. 190B(6).

I have adopted the ordinary meaning referred to in *North Ganalanja* in considering whether some of the claimed native title rights and interests claimed can be established on a prima facie basis.

The application contains the following description of claimed exclusive native title rights and interests:

1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s. 238 and/or ss. 47, 47A and 47B apply), the Bandjalang People as defined in Schedule A of this application, claim the right to possess, occupy, use and enjoy the lands and waters of the area to the exclusion of all others subject to the valid laws of the Commonwealth and the State of New South Wales.

It was confirmed in the High Court case *Western Australia v Ward* (2002) 213 CLR 3; (2002) 191 ALR 1 (*Ward HC*) at [49] to [52] that such a claim to exclusivity can be established prima facie in relation to parts of a claim area, such as those parts of the claim area where there has been no previous extinguishment of native title, or where the non-extinguishment principle found in s. 238 of the Act is enlivened. This applies, for example, to areas where ss. 47, 47A or 47B apply and in relation to areas affected by category C and D past and intermediate period acts. I do not find that such a claim can be established in this instance.

There is not sufficient material before me to show, prima facie, that the claim group specifically exercised the rights of possession, occupation, use and enjoyment of the claim area to the exclusion of all others.

Result: Right is not established.

A list of non-exclusive rights and interests is listed at paragraph 2 of schedule E:

2. Over areas where a claim to exclusive possession cannot be recognised, the Bandjalang People claim the following non-exclusive rights and interests subject to the valid laws of the State of New South Wales and the Commonwealth (including the right to conduct activities necessary to give effect to them) to:

- a) Access, move about, use and enjoy the application area;
- b) Hunt and fish in the application area;
- c) Occupy, camp and live on the application area;
- d) Light camp fires on the application area;
- e) Construct shelters and other structures for that purpose on the application area;
- f) Protect and care for the natural and cultural resources of the application area;
- g) Maintain and protect sites and areas of significance to the Native Title Holders under traditional law and custom within the application area;
- h) Hold ceremonies on and concerning the land;
- i) Take natural resources from the application area;
- j) Manufacture materials, artefacts, objects and other products from the natural resources of the application area;
- k) Engage in customary barter, exchange or gift with other Aboriginal people with cultural resources and manufactured items derived from the natural resources of the application area;
- l) Engage in production, customary barter and other customary economic activities on the land as they relate to other Aboriginal people with respect to Bandjalang cultural resources;
- m) Care for the area for the benefit of the native title holders;
- n) Use the area covered by the application for social, customary, religious, spiritual and traditional purposes;
- o) Speak for, on behalf of and authoritatively amongst Aboriginal people about the application area;
- p) Speak for, on behalf of and authoritatively amongst Aboriginal people about the use of and access under traditional law and custom to the application area;
- q) Confer customary use and access rights on other Aboriginal people who seek to use and access the application area under the traditional law and customs of the native title claim group;
- r) Inherit and transmit the native title rights and interests;

- s) Determine as between the native title claim group what are the particular native title rights and interests that are held by particular members of the native title claim group in relation to particular parts of the application area;
- t) Uphold, regulate, monitor and enforce the customary laws of the native title claim group in relation to the use and access of the application area by other Aboriginal People;
- u) Carry out traditional practices with respect to birth on the application area;
- v) Be buried on, and to bury members of the native title claim group on, the application area.

Paragraph 3 of schedule E lists further qualifications on the rights claimed:

3. The native title rights and interests claimed:

- a) are pursuant to the traditional laws and customs of the native title holders;
- b) are not exclusive rights and interests if they relate to tidal waters;
- c) do not include ownership of any minerals, petroleum or gas wholly owned by the Crown;
- d) over any areas covered by the application that are subject to a Previous Non-Exclusive Possession Act (PNEPA), as defined by s23F of the Native Title Act 1993 (Cth) do not confer possession, occupation, use and enjoyment of the area covered by the application to the exclusion of all others, except to the extent that they non-extinguishment principle as defined in section 238 of the Native Title Act 1993 (Cth) applies, including those areas to which any sections 47, 47A, or 47B of the Native Title Act 1993 (Cth) apply where one of those provisions means that the prior extinguishment of native title rights and interests for an area described must be disregarded;
- e) that are subject to a validly granted PNEPA, as defined by s23F of the Native Title Act 1993 (Cth), do not include any native title rights or interests which were extinguished by that PNEPA, except to the extent that any of sections 47, 47A or 47B of the Native Title Act 1993 (Cth) apply where one of those provisions means that prior extinguishment of native title rights and interests for an area described must be disregarded of the non-extinguishment principle as defined in section 238 of the Native Title Act 1993 (Cth) may apply';
- f) do not include rights and interests that have been extinguished by application of the common law.

Finally, a definition of 'natural resources', 'cultural resources' and 'cultural activities' is provided at schedule E:

For the purposes of this application "natural resources" include bush foods and medicinal plants and trees and foodstuffs, animal and plant products, timber, charcoal, ochre, vegetation, food stuffs, stone and wax and resin.

For the purposes of this application "cultural resources" include

- all bush foods and medicinal plants, trees and foodstuffs, animal and plant products, timber, charcoal, ochre, vegetation, stone, wax and resin necessary to maintain, protect, care for and preserve places and areas of importance on or in the land and waters within the claims area;
- preserving rock art engraving sites within the claim area;
- making ceremonial stone arrangements within the claim area;
- conducting ceremonies within the claim area;

- "cultural activities" within the claim area include activities in relation to the above and those related to birth and death and transmitting cultural knowledge.

The arguments for and against

As noted above, the State submission in relation to s. 190B(4) identified concerns they held in relation to specific claimed rights and interests. They submitted:

that there is doubt as to whether the following rights are rights in the land and waters of the claim area, and therefore, whether they are native title rights and interests as defined in s. 223, according to the decision of *Western Australia v Ward (Ward)* (2002) 76 ALJR 1098

The submission then lists the claimed rights of paragraphs 2(a), (e), (g), (h), (m) and (r).

This submission is based on the *Ward HC* decision, which has been superseded by later decisions that recognise the specific rights that the State nominates as unsustainable. I have listed the decisions that accept those rights by way of rebuttal to the State's concern. Albeit some of the rights recognised are as a result of consent determination, it is my view that the rights and interests are still capable of being recognised as native title rights and interests.

As regards s. 190B(6), the State submission refers back its previous submissions of 28 October 2008, and asserts that 'in view of the comments made in relation to ss. 190B(3), 190B(4) and 190B(5) and comments below, the position as to whether the requirements of s. 190B(6) have been met is uncertain'. In their submissions regarding these three previous subsections, the only mention of specific claimed rights and interests is with reference to s. 190B(4) which I have referred to above, and I have considered other case law below which supplements the decision in *Ward HC*.

The applicant's response is that the requirements of s. 190B(6) have been satisfied, and they rely upon all their submissions in the 24 various preceding subparagraphs taken from paragraphs 2 to 4 in which they rebut the State submissions in subsections 190B(3) to 190B(5).

In addition to this, in their response to the State submission regarding s. 190B(4), the applicant provides authorities that support the claimed rights and interests upon which the State submission casts doubt.

The application refers to the applicant affidavits and schedules F, G and M for further examples of cultural activities.

Schedule G, 'Activities', and schedule M, 'Traditional physical connection' paragraph 1 and 2 provide examples of the practice of some of the rights claimed, while the affidavits of attachment F provide instances of specific individual practice and experiences of the four deponents which cite further examples.

Schedule M, at paragraph 1, refers to Anthony Wilson, Douglas Wilson, [names removed] who 'have previously and currently hunt, fish, gather walk and camp in the claim area and adjacent areas in Bandjalang country in accordance with traditional law and custom, as to other members of the native title claim group'. At paragraph 2 reference is made to 14 'current activities of claim group members as part of their ongoing observation of traditional laws and customs by which they continue their traditional physical connection to the claim area'. The reference to specific individuals and activities raises the evidence provided to something greater than 'a high degree of generality'.

Non-exclusive rights and interests

I note from the outset that rights a) to v) are claimed in a non-exclusive capacity. I will consider each right and interest separately, or, where they are of a like nature, as a group.

- a) Access, move about, use and enjoy the application area;
- c) Occupy, camp and live on the application area;
- d) Light camp fires on the application area;
- e) Construct shelters and other structures for that purpose on the application area

Result: Rights established.

In *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 (*Alyawarr*) and *Ward* the Full Federal Court considered similarly worded non-exclusive rights. They concluded that this right was sustainable. *Alyawarr* had words akin to the present rights (a), (c), (d) and (e) under consideration, and contains the same elements as follows:

In *Attorney-General (NT) v Ward* [2003] FCAFC 283; (2003) 134 FCR 16 (*Ward FC 2*), the Full Court, on remittal from the High Court, determined by consent native title rights and interests held by the applicants by way of non-exclusive rights to occupy, use and enjoy land and waters in accordance with their traditional laws and customs including as an incident of that entitlement:

(b) the right to live on the land, to camp, to erect shelters and to move about the land.

The pastoral leases which have affected the claim area in the present case are historical grants. The relevant extinguishment of native title rights and interests derives only from inconsistency with the rights historically conferred by those leases. No question of prospective activity under a subsisting pastoral lease arises. Consistently with what was said by Nicholson J in *Daniel (No 2)* and Sundberg J in *Neowarra*, the right to 'live' on the land can be interpreted as a right to live permanently on the land without any conflict with pastoral leaseholders' rights. That right does not necessarily involve permanent settlement at a particular place. The issue therefore reduces to the question whether a native title right of permanent settlement is inconsistent with a pastoral leaseholder's rights. There is no logical reason why it must be so. Just as the right to live permanently on the land does not necessarily give rise to inconsistency with the pastoral leaseholder's rights, neither does the right to erect a permanent structure. The existence of such a structure does not preclude a pastoralist's right to require its removal in the event that it conflicts with a proposed exercise by the pastoralist of a right under the lease. It is not inevitable that such a conflict will arise.

The inconsistency posited by the Northern Territory in respect of the grant of historical pastoral leases long expired, is based on a theoretical conflict which would not inevitably have occurred. No inconsistency of rights giving rise to extinguishment of the native title right to live on the land and to erect permanent structures thereon is demonstrated. The concept of 'permanency' referred to here is, in any event, a relative one.

The right defined in par 3(b) to live on the land, to camp, to erect shelters and other structures, and to travel over and visit any part of the land and waters, should stand—at [129 – 133].

The applicant, in response to the State submission, cites the right to 'Access, move about, use and enjoy the application area' which was recognised in *Daniel v Western Australia* [2003] FCA – at [510] to [520] and *De Rose v South Australia (No 2) (De Rose)* [2005] where the Full Court recognised 'The right to access and move about the determination area'. The applicant response also refers to the *Alyawarr* decision and the Full Court decision of *Western Australia v Ward* [2000] 170 ALR per Beaumont and von Doussa JJ which recognised a right to use and enjoy 'traditional resources'. I accept that these cases establish that such rights are capable of recognition.

As to right '(e)', the right to construct shelters and other structures, the applicant refers to *Daniel v Western Australia (Daniel)* [2003] FCA 666 per Nicholson J – at [1163], and *Attorney General (NT) v Ward* [2003] 134 FCR 16, and again *Alyawarr*. I agree that these authorities support the proposition that such rights are capable of recognition.

Schedules G and M, and the affidavits of the four deponents in attachment F refer to the ongoing exercise of the rights and interests (a), (c), (d) and (e) in the claim area, and specific examples are referred to in the affidavits in Attachment F. The *Alyawarr* decision establishes that these rights and interests can be sustained, and assuage doubts aired by the state as to (a) and (e) as to whether 'they are native title rights and interests as defined in s. 223'.

b) Hunt and fish in the application area;

i) Take natural resources from the application area;

j) Manufacture materials, artefacts, objects and other products from the natural resources of the application area

Result: Rights established.

These rights have been recognised as non-exclusive in nature in several cases including in *Sampi v State of Western Australia (No 3)* [2005] FCA 1716 (*Sampi (No 3)*) and *De Rose v South Australia (De Rose1)* [2002] FCA 1341.

Schedule M paragraph 2 (h) refers to the collection of bark and ochre for artwork and painting, and (i) to collecting materials for the making of boomerangs, clap sticks, coolamons and spears. The 2002 affidavit of [name removed] at paragraph 6 [section removed]. The instances of hunting and fishing are almost too numerous to mention throughout the affidavits of the four deponents. At paragraph 31 of the 2002 affidavit of [name removed], [section removed].

k) Engage in customary barter, exchange or gift with other Aboriginal people with cultural resources and manufactured items derived from the natural resources of the application area;

l) Engage in production, customary barter and other customary economic activities on the land as they relate to other Aboriginal people with respect to Bandjalang cultural resources

Result: Rights established

In *Alyawarr* the view of the Court was that:

The right to trade is a right relating to the use of the resources of the land. It defines a purpose for which those resources can be taken and applied. It is difficult to see on what basis it could not be a right in relation to land – at [153].

Schedule G, paragraph 22 refers to ‘Utilising natural resources taken from the application area for manufacture, exchange and barter’.

The affidavit of *[name removed]* at paragraph 91 refers to *[section removed]*.

- f) Protect and care for the natural and cultural resources of the application area;**
- g) Maintain and protect sites and areas of significance to the Native Title Holders under traditional law and custom within the application area;**
- m) Care for the area for the benefit of the native title holders**

Result: Rights established.

These rights have been recognised as non-exclusive in nature in *Wik Peoples v State of Queensland (determination 2)* [2004] FCA 1306 (*Wik 2*) and *Alyawarr* at [3(d)] respectively. The State submitted that these rights were not capable of recognition, however I refer to these cases as authority for the proposition that these rights can be recognised.

In *Mary Yarmirr v Northern Territory* [1998] 1185 FCA, the Court accepted a right to maintain and protect places of cultural importance over an area where a claim to exclusive possession was not available. For this reason, this right appears to be capable of being established prima facie over such areas.

More recently in the determination *Rubibi v State of Western Australia (Rubibi)* per Merkel J [2001] FCA 1553, the right claimed was ‘the right to care for and maintain and protect the land and waters, including places of spiritual or cultural significance.’

The applicant response also correctly, in my view, cites *Daniel* – at [1163], *Alyawarr* – at [136] and *De Rose* – at [3].

Schedule G, paragraph 1, and M paragraph 2 (l) refer to this caring, maintenance and protection role. The various affidavits refer to *[section removed]*.

- h) Hold ceremonies on and concerning the land;**
- n) Use the area covered by the application for social, customary, religious, spiritual and traditional purposes**

Result: Rights established

In *Mundraby v Queensland (Mundraby)* [2006] FCA 436 the right to '(vi) perform social, cultural, religious, spiritual or ceremonial activities thereon and to invite others to participate in those activities in accordance with traditional laws and customs [para 3(b)(vi)]' was recognised as a right in a non-exclusive sense.

The applicant's response to the State's submission also refers to, correctly in my view, *Rubibi, Daniel* – at [1163] and *De Rose* to support the establishment of these rights.

At paragraph 86 of *[name removed]* affidavit, *[name removed]* refers to *[section removed]*.

- o) Speak for, on behalf of and authoritatively amongst Aboriginal people about the application area;**
- p) Speak for, on behalf of and authoritatively amongst Aboriginal people about the use of and access under traditional law and custom to the application area;**
- q) Confer customary use and access rights on other Aboriginal people who seek to use and access the application area under the traditional law and customs of the native title claim group**

Result: Rights established

In *Wandarang, Alawa, Marra & Ngalakan Peoples v Northern Territory* [2004] FCAFC 187 (3 June 2004) 'a right to speak for the determination area' [para 3(b)] was considered. The right was accepted where the claim is, as in this case, non-exclusive.

While in *Neowarra v State of Western Australia* [2003] FCA 1402 Sundberg J was of the view that 'the right to speak for country involves a claim to ownership – at [494]', the claimed right in this application can be distinguished, as the wording only applies to the right to speak in the course of interaction with Aboriginal people, and not the world at large.

In the 2003 affidavit of Anthony Edward Wilson, at paragraph 40, he refers to *[section removed]*

- r) Inherit and transmit the native title rights and interests**

Result: Right established

In *Mundraby* the right to 'pass on native title in relation thereto in accordance with traditional laws and customs' was granted in a consent determination.

In addition, the applicant's response cites *Yorta Yorta* – at [46] and *Alyawarr* – at [76] as authority for this right as concomitant and cognisable respectively.

At paragraph 138 of *[name removed]* 2002 affidavit *[name removed]* refers to having the responsibility and authority to pass on to the next generation Bandjalang traditions laws and customs. Further on *[name removed]* refers to the inherited custodianship for the area.

s) Determine as between the native title claim group what are the particular native title rights and interests that are held by particular members of the native title claim group in relation to particular parts of the application area;

t) Uphold, regulate, monitor and enforce the customary laws of the native title claim group in relation to the use and access of the application area by other Aboriginal People

Result: Rights not established.

In *Neowarra v State of Western Australia (Neowarra)* [2003] FCA 1402 the Court found that 'In this case the right is, in my view, a right to uphold and enforce laws and customs. That is a right in relation to people and not in relation to land or waters – at [488]'. The mention of the phrase 'in relation...to the application area' does not save this claimed right.

In my view, these rights are not capable of being established prima facie as 'native title rights and interests'.

u) Carry out traditional practices with respect to birth on the application area;

v) Be buried on, and to bury members of the native title claim group on, the application area.

Result: Rights established.

In *Alyawarr*' the right to 'participate in cultural practices relating to birth and death, including burial rights – at [135]' was recognised as a native title right and interest.

Burial practices are referred to in the affidavit of Anthony Edward Wilson at paragraph 65, and paragraph 148 of that of *name removed*. [*Name removed*] refers to birth rituals and taboos at paragraph 35 and onwards.

Subsection 190B(7)

Traditional physical connection

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

- (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or
- (b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:
 - (i) the Crown in any capacity, or
 - (ii) a statutory authority of the Crown in any capacity, or
 - (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

Result and reasons

The application **satisfies** the condition of s. 190B(7).

I understand the phrase 'traditional physical connection' to be a physical connection in accordance with the particular traditional laws and customs of the claim group, in accordance with *Yorta Yorta* as referred to above. At [29.19] of the Explanatory Memorandum to the *Native Title Amendment Act 1998*, further clarification is given to the term 'connection' as described in s. 190B(7) in that it 'must amount to more than a transitory access or intermittent non-native title access'.

The State submission is equivocal. It refers to the information regarding activities currently being carried out by the native title claim group at schedules G and M stating that the list contained in the latter is 'substantially similar' to the former. It notes that the latter affidavits of [name removed] [references removed] 'are not entirely explanatory in confirming whether the 'Bandjalang People' carry out activities on the land and waters covered by the amended application'. It goes on to say, noting that these latter affidavits are often couched in the past tense that: 'It is queried whether these general statements and on the basis of the Amended Application alone adequately demonstrate that, at least, one of the *present* (italics in original) named Applicants and other members of the claim group have maintained a traditional physical connection in the claim area'. The submission then concedes that: 'As stated above, however, the evidence that has been provided in the past may well satisfy the 'traditional physical connection' requirement. Further, the requirement in 190B(7)(a) that "the Registrar must be satisfied that at least one member of the native title claim group currently or previously had a traditional physical connection..." has been met by virtue of the extensive evidence of [name removed]'. This latter statement apparently acknowledges that the content of the Attachment F affidavit of [name removed] meets the requirement of this section. I agree that it does.

The applicant's response is that the requirements of this section have been satisfied, and then cites a number of subparagraphs in their submission that support this. Their submission as regards s. 190B(7), adequately refers to the contemporary current connection activities of the present named applicants about which the State submission has doubts, and provides the evidence that satisfies me as to the content of the application in regards to this condition. For example, the applicant's response points to the affidavit of Anthony Edward Wilson which describes [section removed].

In my view at least two of the persons comprising the applicant describe a current traditional physical connection, and I am satisfied on that basis.

Subsection 190B(8)

No failure to comply with s. 61A

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

Delegate's comments

Section 61A contains four subsections. The first of these, s. 61A(1), stands alone. However, ss. 61A(2) and (3) are each limited by the application of s. 61(4). Therefore, I consider s. 61A(1) first, then s. 61A(2) together with (4), and then s. 61A(3) also together with s. 61A(4). I come to a combined result below.

No approved determination of native title: s. 61A(1)

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

Result and reasons

The application **meets** the requirement under s. 61A(1).

The geospatial report dated 21 October 2008 states that 'No determinations as per the National Native Title Register fall within the external boundary of this application as at 21 October 2008'. The most recent geospatial report dated 26 August 2009 confirms this status.

No previous exclusive possession acts (PEPAs): ss. 61A(2) and (4)

Under s. 61A(2), the application must not cover any area in relation to which

- (a) a previous exclusive possession act (see s. 23B)) was done, and
- (b) either:
 - (i) the act was an act attributable to the Commonwealth, or
 - (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act.

Under s. 61A(4), s. 61A(2) does not apply if:

- (a) the only previous exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
- (b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

Result and reasons

The application **meets** the requirement under s. 61A(2), as limited by s. 61A(4).

At Schedule B, paragraphs 1 and 3, any areas over which there is a PEPA and in respect of which ss. 47, 47A or 47B do not allow extinguishment to be disregarded, have been excluded from the application area.

No exclusive native title claimed where previous non-exclusive possession acts (PNEPAs): ss. 61A(3) and (4)

Under s. 61A(3), the 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) a previous non-exclusive possession act (see s. 23F) was done, and
- (b) either:
 - (i) the act was an act attributable to the Commonwealth, or
 - (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act.

Under s. 61A(4), s. 61A(3) does not apply if:

- (a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
- (b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

Result and reasons

The application **meets** the requirement under s. 61A(3), as limited by s. 61A(4).

At Schedule E, paragraph 3, reproduced above under s. 190B(6), it is stated that exclusive possession is not claimed over any areas subject to a previous non-exclusive possession act.

Combined result for s. 190B(8)

The application **satisfies** the condition of s. 190B(8), because it **meets** the requirements of s. 61A, as set out in the reasons above.

Subsection 190B(9)

No extinguishment etc. of claimed native title

The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:

- (a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
- (b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
- (c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss. 47, 47A or 47B.

Delegate's comments

I consider each subcondition under s. 190B(9) in turn and I come to a combined result below.

Result and reasons re s. 190B(9)(a)

The application **satisfies** the subcondition of s. 190B(9)(a).

Schedule Q states 'The Applicant does not claim ownership of minerals, petroleum or gas wholly owned by the Crown'.

Result and reasons re s. 190B(9)(b)

The application **satisfies** the subcondition of s. 190B(9)(b).

At Schedule P of the application, it is stated that 'The Applicant does not claim exclusive possession over any offshore place'.

Result and reasons re s. 190B(9)(c)

The application **satisfies** the subcondition of s. 190B(9)(c).

I am not aware, and nothing in the application or accompanying documents before me discloses, that the claimed native rights and interests have otherwise been extinguished. I note that Schedule B, paragraph 1 (c) excludes areas where native title has otherwise been wholly extinguished.

Combined result for s. 190B(9)

The application **satisfies** the condition of s. 190B(9), because it **meets** all of the three subconditions, as set out in the reasons above.

[End of reasons]

Attachment A

Reasons for ss. 190A(1A) and 190A(6A)

Subsection 190A(1A)

Despite subsection (1), if:

- (a) The Registrar is given a copy of an amended application under subsection 64(4) that amends a claim; and
- (b) The application was amended because an order was made under section 87A by the Federal Court; and
- (c) The Registrar has already considered the claim, as it stood before the application was amended;

The Registrar need not consider the claim made in the amended application

Subsection 190A(1A) **does not** apply to this claim for the reasons given below.

The application was not amended pursuant to an order under section 87A, and subsection 190A(1A) does therefore not apply.

Subsection 190A(6A)

The Registrar must accept the claim (the **later claim**) for registration if:

- (a) a claim (the **earlier claim**) was made in an application given to the Registrar under section 63 or subsection 64(4) (the **earlier application**); and
- (b) the Registrar accepted the earlier claim for registration under subsection (6) of this section; and
- (c) the later claim was made in an application given to the Registrar under subsection 64(4) that amends the earlier application; and
- (d) the Registrar is satisfied that the only effect of the amendment is to do one or more of the following:
 - (i) reduce the area of land or waters covered by the application, in circumstances where the information and map contained in the application, as amended, are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters;
 - (ii) remove a right or interest from those claimed in the application;
 - (iii) change the name in the application of the representative body, or one of the representative bodies, recognised for the area covered by the application, in circumstances where the body's name has been changed or the body has been replaced with another representative body or a body to whom funding is made available under section 203FE;
 - (iv) change the name in the application of the body to whom funding was made available under section 203FE in relation to all or part of the area covered by the application, in circumstances where the body's name has been changed or the body has been replaced by another such body or representative body;
 - (v) alter the address for service of the person who is, or persons who are, the applicant.

Subsection 190A(6A) **does not** apply to this claim for the reasons given below.

The amendment to Schedule A of the application is a significant change in the description of the native title claim group for the purposes of subsection 190B(3). The amendment falls outside the five conditions listed in subsection 190A(6A)(d), and therefore obviates the mandate of that section for the Registrar to accept the later claim for registration.

Attachment B

Summary of registration test result

Application name:	Bandjalang People # 1
NNTT file no.:	NC96/16
Federal Court of Australia file no.:	NSD6034/98
Date of registration test decision:	6 October 2009

Section 190C conditions

Test condition	Sub-condition/requirement	Result
s. 190C(2)		Aggregate result: Met
	re s. 61(1)	Met
	re s. 61(3)	Met
	re s. 61(4)	Met
	re s. 61(5)	Met
	re s. 62(1)(a)	Met
	re s. 62(1)(b)	Aggregate result: Met
	s. 62(2)(a)	Met
	s. 62(2)(b)	Met
	s. 62(2)(c)	Met
	s. 62(2)(d)	Met
	s. 62(2)(e)	Met
	s. 62(2)(f)	Met
	s. 62(2)(g)	Met

Test condition	Sub-condition/requirement	Result
	s. 62(2)(h)	Met
s. 190C(3)		Met
s. 190C(4)		Overall result: Met
	s. 190C(4)(a)	Not applicable
	s. 190C(4)(b)	Met

Section 190B conditions

Test condition	Sub-condition/requirement	Result
s. 190B(2)		Met
s. 190B(3)		Overall result: Met
	s. 190B(3)(a)	Not applicable
	s. 190B(3)(b)	Met
s. 190B(4)		Met
s. 190B(5)		Aggregate result: Met
	re s. 190B(5)(a)	Met
	re s. 190B(5)(b)	Met
	re s. 190B(5)(c)	Met
s. 190B(6)		Met
s. 190B(7)(a) or (b)		Met
s. 190B(8)		Aggregate result: Met
	re s. 61A(1)	Met
	re ss. 61A(2) and (4)	Met

Test condition	Sub-condition/requirement	Result
	re ss. 61A(3) and (4)	Met
s. 190B(9)		Aggregate result: Met
	re s. 190B(9)(a)	Met
	re s. 190B(9)(b)	Met
	re s. 190B(9)(c)	Met

[End of document]