National Native Title Tribunal

Registration test decision

Application name	Gudjala People #2
Name of applicant	[Applicant 1 - name deleted], [Applicant 2 - name deleted], [Applicant 3 - name deleted], [Applicant 4 - name deleted], [Applicant 5 - name deleted] and [Applicant 6 - name deleted]
State/territory/region	State of Queensland
NNTT file no.	QC06/8
Federal Court of Australia file no.	QUD147/2006
Date application made	21 April 2006
Name of delegate	Renee Wallace

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: 30 June 2010

_____[signed]_____

Renee Wallace

Delegate of the Native Title Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D of the ***Native Title Act 1993*** (Cwlth) under an instrument of delegation dated 16 November 2009 and made pursuant to s. 99 of the Act.

Reasons for decision

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Introduction

This document sets out my reasons, as the delegate of the Native Title Registrar (the 'Registrar'), for the decision to **accept** the application for registration pursuant to s. 190A of the Act.

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 the day this decision is made, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

Application overview

The Registrar of the Federal Court of Australia (the 'Court') gave a copy of the Gudjala People #2 claimant application to the Registrar on 24 April 2006 pursuant to s. 63 of the Act. This triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

On 1 November 2006, a delegate of the Registrar (original delegate) decided not to accept the Gudjala People #2 claimant application for registration. The applicant sought review of that decision pursuant to s. 190D(2) of the Act. That application for review was dismissed by Dowsett J on 7 August 2007— *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala [2007]*). The applicant subsequently appealed this decision.

On 27 August 2008, the Full Court (French, Moore and Lindgren JJ) allowed the appeal, setting aside the decision of Dowsett J and remitting it to his Honour for reconsideration in accordance with their reasons—*Gudjala People #2 v Native Title Registrar* (2008) 171 FCR 317; [2008] FCAFC 157 (*Gudjala FC*).

Further, on 23 December 2009 after reconsideration in accordance with the reasons of the Full Court decision, Dowsett J again dismissed the application for review— *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala [2009]).*

In 2007, the Registrar of the Tribunal corresponded with the applicant, via their legal representatives, explaining that the application was affected by item 89 of the transitional provisions of the *Native Title Amendment Act 2007* (Cwlth) (Amendment Act) and that as the application did not meet the conditions of the registration test on 1 November 2006, the Registrar (or a delegate of the Registrar) was required to re-test the application. However, as the application was then subject to judicial review, the Registrar's delegate took the view that it was appropriate to await the outcome of the appeal before applying the registration test.

Given the various appeals that occurred in this matter during 2007-2009, it was not until 3 February 2010, that a delegate of the Registrar took the step of writing to the applicant to inform them that the registration test would be applied to the application. At that time, the delegate proposed that the registration test would be applied on or around 9 April 2010, giving the applicant until 12 March 2010 within which to provide any additional material to support the application.

On 8 February 2010, the North Queensland Land Council (NQLC), as representative for the applicant, wrote to the Tribunal requesting that the delegate exercise his/her discretion and extend the date for the provision of additional material until the end of October 2010. In detailing the applicant's reasons for the extension of time request, various matters were outlined, including

that the external consultant and legal officer assigned to the matter were not in a position to undertake the proposed research, interviews or complete the necessary affidavits in the period to 12 March 2010.

On 23 February 2010, a delegate of the Registrar wrote to NQLC indicating that the request for an extension of time was refused. It was the delegate's view that the testing of the claim should proceed expeditiously, in light of the statutory timeframe imposed by the transitional provisions to the Amendment Act. The delegate reiterated that the registration test would proceed on or shortly after 9 April 2010, giving the applicant the opportunity to file any additional information prior to that date with the prospect of a revised testing timetable in the event that such additional information/material was received prior to that date.

On 30 March 2010, the applicant provided the Registrar with additional material, in the form of a draft anthropologist report of [Author of Anthropological Report 2 - name deleted]. As such, and in order to give the State of Queensland the opportunity to provide comments on the material, the timetable for testing was extended.

Registration test

I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to this claim and my reasons are as follows:

- I am satisfied that s. 190A(1A) does not apply as the application was not amended because of an order made under s. 87A by the Federal Court; and

- I am satisfied that s. 190A(6A) does not apply as an earlier claim for registration, given to the Registrar, has not been accepted for registration under s. 190A(6).

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.

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

Pursuant to s. 190A(6), 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 A.

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.

However, given that the registration test is in this instance governed by item 89 of the transitional provisions of the Amendment Act, I must also abide by item 89(4). This requires me to apply the registration test under s. 190A as if the conditions in ss. 190B and 190C that require the

application to be accompanied by certain information or other things, or to be certified or have other things done, also allowed the information or other things to be provided, and the certification or other things to be done, by the applicant or another person after the application was made.

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.

For the purpose of the registration test, I have had regard to the information contained in the following documents:

- Form 1 application (including document entitled 'A brief examination of matters pertaining to Schedule F of the Gudjala core country Native Title claim' by anthropologist [Author of Anthropological Report 1 - name deleted] ([Author of Anthropological Report 1 - name deleted] report), affidavit of [Applicant 3 - name deleted] sworn 24 January 2006 and affidavit of [Clan Group 1 - name deleted] sworn 25 January 2006);
- Affidavit of [Applicant 3 - name deleted], sworn 11 September 2006;
- Document entitled 'Draft Anthropologist's Report: Gudjala #1 (QUD80/05), Gudjala #2 (QUD147/06)' by [Author of Anthropological Report 2 - name deleted] ([Author of Anthropological Report 2 - name deleted] report).

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.

Also, I 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'. Further, mediation is private as between the parties and is also generally confidential: see ss. 136A, 136E and 136F of the Act).

The role of an administrative decision maker

As canvassed above in the overview, this application has previously been the subject of three (3) Court decisions, including two (2) decisions of Dowsett J and one (1) decision of the Full Court.

Whilst it is appropriate for an administrative decision maker to have regard to such decisions (and, of course such decisions are binding upon the Registrar or her delegate, in so far as they pronounce the law), I am mindful that the law mandates a requisite standard of conduct and that '[t]he general rule is that a tribunal that is required to decide an issue will be in breach of that obligation if it merely adopts the decision of the judge on the same issue'— *Cadbury Uk Ltd v Registrar of Trade Marks* [2008] FCA 1126 (*Cadbury*) at [18]. I take this statement to be relevant to the role of a delegate of the Registrar in applying the statutory conditions of the registration test.

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.

Part of that content of procedural fairness in this matter is that when I received further material/information from the applicant, namely the [Author of Anthropological Report 2 - name deleted] report, I was obliged to provide a copy of that material to a person/s who may be adversely affected and to give that person/s a reasonable opportunity to comment. In my view, this is the State of Queensland—see *Western Australia v Native Title Registrar* [1999] FCA 1591 at [38].

On 1 April 2010, a letter was sent by the Tribunal to the representative for the State of Queensland informing them that on 30 March 2010 the applicant had provided additional material in support of this application for the purpose of the registration test. That letter set out the conditions that the Registrar intended to impose upon the State of Queensland in relation to the supply of copies of the additional material, including a confidentiality undertaking. Subsequently, on 12 April 2010, a signed copy of the confidentiality undertaking was received by the Tribunal from the representative for the State of Queensland.

On 14 April 2010, a letter was sent by the Tribunal to the representative for the State of Queensland providing copies of the additional material. That letter confirmed that any comment or response to the additional material should be provided to the Registrar by close of business on 12 May 2010. No such comment or response was received by the Registrar from the State of Queensland on or before 12 May 2010, and indeed as at the date of this decision the Tribunal is not in receipt of any comment or response 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.

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* 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 the Act on 1 September 2007 onwards, and the claim before me is not such a claim.

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

It is also my view that I need only consider those parts of ss. 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s. 190C(2)). I therefore do not consider the requirements of s. 61(2), as it imposes no obligations of this nature in relation to the application.

In relation to s. 61(5), I briefly address these requirements below, but only to the extent that I consider appropriate. For instance, paragraphs 61(5)(c) and (d), which require that the application contain such information as is prescribed and be accompanied by any prescribed documents and fee, do not need to be considered by me separately under s. 190C(2), as I already test these things under s. 190C(2) where required by those parts of ss. 61 and 62 which actually identify the details/other information that must be in the application and the accompanying prescribed affidavit/documents.

Turning to each of the particular parts of ss. 61 and 62 which require the application to contain details/other information or to be accompanied by an affidavit or other documents:

Native title claim group: s. 61(1)

> 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.

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

The nature of the task at s. 61(1)

In light of the decision in *Doepel*, the level of satisfaction to be reached by the Registrar or her delegate on this aspect of the test is curbed by the procedural nature of the task. Thus, in undertaking this task, I have confined my assessment of this requirement to the information contained in the application itself. This assessment does not involve me going beyond the application, nor does it require me to undertake any form of merit assessment of the material to determine if I am satisfied whether 'in reality' the native title claim group described is the correct native title group— *Doepel* at [16] and [35] to [39].

It is, however, concerned with ensuring 'that the claim, on its face, is bought on behalf of all members of the native title claim group'—*Doepel* at [35]. A clear reading of s. 61(1) is that the native title claim group referred to in that section constitutes 'all 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'. Thus, according to Mansfield J in *Doepel*, if the description of the claim group was such that it failed to include all of the persons in the native title claim group, then the application could not satisfy the requirements of s. 190C(2)—at [36].

The details/information in the application

The relevant description of the persons in the native title claim group is found in Schedule A of the application. It is set out as follows:

> The criteria for membership of the Gudjala native title claim group is in accordance with traditional laws acknowledged and customs observed by the Gudjala people who are traditionally connected to the area described in Schedule B ('application area') through:
>
> 1. physical, spiritual and religious association; and
> 2. genealogical descent; and
> 3. processes of succession; and
>
> who have communal native title in the application area, from which rights and interests derive.
>
> The Gudjala native title claim group is comprised of all persons descended from the following anscestors:
>
> - [ancestor 1 - name deleted]
> - [ancestor 2 - name deleted]
> - [ancestor 3 - name deleted]
> - [ancestor 4 - name deleted].

Consideration and my decision

Section 190C(2) is framed in a way that 'directs attention to the contents of the application' and its purpose is to ensure that the application contains all the details and information required by ss. 61 and 62—*Doepel* at [35].

Having examined the description of the native title claim group in Schedule A and the application in its entirety, there is, in my view, nothing on the face of the application to indicate that the application does not include all the persons in the native title claim group. I have formed this view, on the description in the application, in line with the meaning the Act attributes to the term 'native title claim group': see ss. 61(1) and 253.

I am satisfied that the application contains all the details/information required by s. 61(1).

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.

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

The application states the name and address for service of the person who is, or persons who are, the applicant. I note that the address for service given is that of the Central Queensland Land Council Aboriginal Corporation (CQLC). Because of information I have received outside of the application, I am aware that changes in boundaries to representative bodies means that the NQLC is now the relevant representative body for this area. I note also that the NQLC has informed the Tribunal that it now acts for the applicant. The application has not been amended in the time since this change has occurred.

While the details and other information contained in the application (in accordance with this requirement of s. 61(3)) are now outdated, I am not required to undertake any form of merit assessment of the details or information contained within the application and nor should I be concerned with their correctness. Also, as previously stated, the nature of the task at s. 190C(2) is such that its attention is focused on the content of the application only, and I am not to have regard to extraneous details/information—*Doepel* at [16] and [35] to [37].

I am satisfied that the application contains the details and other information required by s. 61(3).

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

> A native title determination application that persons in native title claim group authorise the applicant to make 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.

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

The nature of the task at s. 61(4)

In *Gudjala [2007]*, Dowsett J considered the nature of the task at this section (in comparison to that at s. 190B(3)) and held that the assessment should concentrate squarely upon the content of the application, in order to determine if the application meets the procedural requirements of s. 190C(2)—at [31].

This, in my view, appears to concur with Mansfield J's reading of the task of the Registrar at s. 190C(2) in relation to s. 61(4), that is to consider only 'whether the application sets out the native title claim group in the terms required'—*Doepel* at [36]. Thus, I do not have to ascertain whether the description operates 'effectively to describe the claim group', but I do have to consider whether there is the appearance of a description which meets the requirements of the Act—*Gudjala [2007]* at [32].

I am also mindful of the meaning the Act attributes to 'native title claim group': see ss. 253 and 61(1) and the discussion above at s. 61(1).

Consideration and my decision

From the description outlined above at s. 61(1), it follows that the provisions of s. 61(4)(b) apply and that the application must otherwise describe the persons in the native title claim group (that is, those persons in the native title claim group that authorise the applicant) sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

While the only task at s. 61(4) is to provide details/information which either names or describes the persons in the native title claim group, my view is that task should also be interpreted in line with the overall purpose of s. 190C(2) of ensuring that a claim 'on its face, is brought on behalf of all members of the native title claim group'—*Doepel* at [35].

In light of my decision in relation to the requirements of s. 61(1), it also follows that I am satisfied in relation to s. 61(4). Namely, it appears, on the face of the application that it 'describes 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.'

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

Application in prescribed form: 61(5)

> An application must:
> (a) be in the prescribed form; and
> (b) be filed in the Federal Court; and
> (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.

The application **is** in the form prescribed by s. 61(5).

The application is within the prescribed form, filed with the Federal Court on 21 April 2006.

As to whether the application contains the information prescribed and any prescribed documents, I test these things under s. 190C(2) where required by those parts of ss. 61 and 62 which actually identify the details/other information that must be in the application and the accompanying prescribed affidavits/documents.

Whether the application is accompanied by the prescribed fee is not information/details or documents required by ss. 61 or 62 and I am not, in my view, required to test this at s. 190C(2).

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 entry in the National Native Title Register, 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).

The application **is** accompanied by the affidavit required by s. 62(1)(a).

I note that I am considering this claim against the requirements of s. 62(1)(a) as it stood *prior* to the commencement of the *Native Title Amendment (Technical Amendments) Act* 2007 on 1 September 2007.

The persons jointly comprising the applicant in the application, namely [Applicant 1 - name deleted], [Applicant 2 - name deleted], [Applicant 3 - name deleted], [Applicant 4 - name deleted], [Applicant 5 - name deleted] and [Applicant 6 - name deleted] swore affidavits in January 2006, which meet the requirements of s. 62(1)(a) (in its pre-amended form, as stated above).

These affidavits accompanied the application, filed with the Court on 21 April 2006.

The requirements of s. 62(1)(a) have been met.

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.

The application **contains** all details and other information required by s. 62(2)(a).

The application contains all details and information required by s. 62(2)(a). Schedule B and Attachment B of the application provide a written description of the external boundaries of the area covered by the application and a written description of any areas within that boundary that are not covered by the application.

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).

The application **contains** all details and other information required by s. 62(2)(b).

Attachment C of the application contains a map of the external boundaries of the area mentioned in s. 62(2)(a)(i).

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.

The application **contains** all details and other information required by s. 62(2)(c).

The application states that 'CQLC, on behalf of the applicant, has not carried out any searches.'

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.

The application **contains** all details and other information required by. 62(2)(d).

Schedule E of the application contains a description of the native title rights and interests claimed in relation to particular lands and waters and does not merely consist 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.

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.

The application **contains** all details and other information required by s. 62(2)(e).

The nature of the task at s. 62(2)(e)

In *Gudjula FC*, the Full Court discussed the fact that 'the detail specified by s 62(2)(e) is described as "a general description of the factual basis"'. Accordingly, '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 the general description are true.' Nonetheless, the general description 'must be in sufficient detail to enable a genuine assessment of the application'— *Gudjala FC* at [92].

In my view, any 'genuine assessment' of the details/information contained in the application at s. 62(2)(e) is to be undertaken by the Registrar when assessing the applicant's factual basis for the purposes of s. 190B(5). All that is required at s. 62(2)(e) is that the application contain the details

and other information amounting to a 'general description' of the factual basis on which it is asserted that the native title rights and interests claimed exist—*Gudjala FC* at [92].

The details/information in the application

Schedule F, Attachment F (including the [Author of Anthropological Report 1 - name deleted] report, dated March 2005 and affidavit of [Applicant 3 - name deleted], sworn 24 January 2006) and Attachment M (affidavit of [Clan Group 1 - name deleted], sworn 25 January 2006) all contain information about the factual basis provided to support the assertion that the native title rights and interests claimed exist and, specifically, for the assertions found in s. 62(2)(e)(i), (ii) and (iii). There is, in my view, also information contained in Schedules A and G that is relevant to the requirement of s. 62(2)(e) that the application contain a general description of the factual basis.

Further, given the effect of item 89(4) of the transitional provisions of the Amendment Act (as detailed above in my reasons) I am to treat the [Author of Anthropological Report 2 - name deleted] report as forming part of the application.

My decision

The application contains the required details and other information, namely a general description of the factual basis on which it is asserted that the claimed rights and interests exist, and meets the requirements of s. 62(2)(e) for the purpose of s. 190C(2).

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.

The application **contains** all details and other information required by s. 62(2)(f).

Schedule G of the application contains details and other information of the activities the claim group currently carries out in relation to the application area. There are also details and information about such activities at Attachment F of the application (including the affidavit of [Applicant 3 - name deleted], sworn 24 January 2006).

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.

The application **contains** all details and other information required by s. 62(2)(g).

Schedule H of the application contains a statement indicating that the applicant is not aware of any such applications.

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.

The application **contains** all details and other information required by s. 62(2)(h).

Schedule I of the application contains a statement indicating that the applicant has made no inquiries as to the existence of such notices.

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.

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

The Tribunal's Geospatial Services prepared an overlap analysis on 30 March 2010 (GeoTrack:2010/0532) (overlap analysis). That overlap analysis states that no applications as per the Register of Native Title Claims fall within the external boundary of this application (as at 30 March 2010). An overlap analysis report, produced from internal Tribunal resources on 24 June 2010, confirms that information remains current.

I accept the above analysis. There is no other information in the material before me that would suggest that the application does not comply with this section.

I am satisfied that the application complies with s. 190C(3).

Subsection 190C(4)
Authorisation/certification

> Under s. 190C(4) the Registrar/delegate must be satisfied that either:
> (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
> (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
>
> Under s. 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

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.

Attachment R of the application is a certificate, made under Part 11 of the Act, by CQLC. Thus, s. 190C(4)(a) is the applicable subsection for the application.

For the reasons set out below, I am satisfied that the requirements set out in s. 190C(4)(a) are met because the application has been certified by each representative Aboriginal/Torres Strait Islander body that could certify the application.

The nature of the task at s. 190C(4)(a)

Section 190C(4)(a) imposes upon the Registrar conditions which, according to Mansfield J in *Doepel,* are straightforward—at [72]. All that the task requires of me is that I be 'satisfied about the fact of certification by an appropriate representative body'—*Doepel* at [78], which necessarily entails:

- identifying the relevant native title representative body and being satisfied of their power under Part 11 to issue the certification; and
- being satisfied that the certification meets the requirements of s. 203BE —*Doepel* at [80] and [81].

Identification of the representative body

The application was certified by CQLC on 7 April 2006. It is signed by the Council's Chief Executive Officer, [CEO CQLC - name deleted]. I note that CQLC is no longer the relevant representative body. Section 190C(4), however, has the effect that where the recognition of the body is withdrawn or otherwise ceases to have effect, the certification retains its validity.

I am, however, required to be satisfied that, as at 7 April 2006, CQLC was the relevant native title representative body and that it had the power, under Part 11 of the Act, to issue the certification.

Schedule K of the application (the truth of which is sworn to in the applicant's affidavits) identifies CQLC as the representative body for the area covered by the agreement.

On 22 May 2006, the Tribunal's Geospatial Services produced a geospatial assessment and overlap analysis (GeoTrack:2006/0725) (2006 geospatial assessment). That 2006 geospatial assessment indicates that, as at the date of the assessment, CQLC was the relevant representative body for the whole of the area covered by the application. I accept that assessment.

Section 203BE(1) of the Act is to the effect that a representative body is empowered with certification functions, including the ability to certify (in writing) applications for determination of native title in relation to land and waters that fall wholly or partly within the areas for which that body is the representative body: see ss. 203BE(1)(a).

I am satisfied that as at 7 April 2006, CQLC was the relevant representative body for the application area and that it was within its power to issue the certification.

The requirements of 203BE

To be satisfied about 'the fact of certification'—*Doepel* at [78], the certification must meet the requirements of s. 203BE, namely s. 203BE(4)(a) to (c).

Subsection 203BE(4)(a)

Subsection 203BE(4)(a) requires a statement from the representative body confirming that they hold the opinion that the requirements of subsections (2)(a) and (2)(b) have been met.

The certificate contains the required statement.

Subsection 203BE(4)(b)

Pursuant to s. 203BE(4)(b) the certificate must also briefly set out the body's reasons for being of the opinion set out in s. 203BE(4)(a). The certificate accompanying the application, at Attachment R, sets out that CQLC through its staff (including contract consultants) undertook extensive research and community consultation when preparing the application for a determination, with a view to identifying all persons in the native title claim group. CQLC staff also attended a series of meetings with claimants and observed the authorisation process undertaken. On 10 and 11 December 2005 a meeting of the claimants was held at Charters Towers, where the named applicants were authorised, in accordance with their adopted decision making process, to make this application.

The certificate briefly sets out the body's reasons for being of the opinion in s. 203BE(4)(a).

Subsection 203BE(4)(c)

Where applicable, the certificate must also set out what has been done by the representative body to meet the requirements of s. 203BE(3) in order to comply with s. 203BE(4)(c). If the area of the application being certified is covered wholly or partly by one or more applications (including proposed applications) of which the representative body is aware, s. 203BE(3) requires the representative body to make all reasonable efforts to achieve agreement between the persons involved in those overlapping applications and minimise the number of applications covering the area.

As at 22 May 2006, the geospatial assessment confirmed that no applications as per the National Native Title Register fell within the external boundary of this application area. I accept that assessment.

In my view, the requirements of s. 203BE(3) were not applicable to the area covered by this application, and therefore, it is appropriate that the certification is silent on s. 203BE(4)(c).

My decision

For the above reasons, I am satisfied that the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, thereby complying with s. 190C(4)(a).

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.

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

Schedule B and Attachment B of the application contain a written description of the external boundaries of the application area. Schedule B of the application identifies the external boundary in reference to the description at Attachment B and the map at Attachment C. Attachment B describes the external boundary of the application area by metes and bounds, referencing cadastral land parcels, abutting native title determination applications, co-ordinate points, and notes relating to the source, currency and datum of information used to prepare the description.

Schedule B lists general exclusions to the application area. The use of such a general formulaic approach was discussed in *Daniel for the Ngaluma People & Monadee for the Injibandi People v Western Australia* [1999] FCA 686, in relation to the information required by s. 62(2)(a) and its sufficiency for the purpose of s. 190B(2). Nicholson J was of the view that such an approach 'could satisfy the requirements of the paragraphs where it was the appropriate specification of detail in those circumstances'. His Honour examined the probable state of knowledge of the applicant at the time of filing the application as a factor in determining what may be appropriate in the circumstances—at [32]. There is nothing before me that would indicate the applicant's state of knowledge, at the time of filing the application, was such that something other than the general exclusions listed should have been included in the description of the internal boundaries of the application area.

Schedule C refers to Attachment C of the application. Attachment C is an A4 monochrome copy of a map titled 'Gudjala People #2', prepared by CQLC and dated 2 March 2006. This map includes:

- the external boundary of the application area depicted by a bold dashed line and the actual area subject to claim by a bold line and stippled;
- background topographic image showing major towns, rivers and roads;
- scalebar, north point and coordinate grid; and
- notes relating to the source, currency and datum of data used to prepare the map.

The Tribunal's 2006 geospatial assessment, opines that the description and map are consistent and locate the application area with reasonable certainty.

There has been no amendment to this description and map as filed in the application on 21 April 2006. Accordingly, On 7 June 2010, an email from the Tribunal's Geospatial Services confirmed that their position as to the consistency of the map and description remains unchanged, as does their opinion that the map and description locate the application area with reasonable certainty.

I agree with the above assessment and opinion proffered.

I am 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.

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.

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

The nature of the task at s. 190B(3)

Again, my task here continues to be informed by the principles enunciated in *Doepel* on the Registrar's general functions under ss. 190A to 190C of the Act. That task is neither to find the real facts nor to replace the court by adjudicating upon the application for determination—at [16]. Rather, as set out by Mansfield J in *Doepel*, the limitations upon the Registrar in undertaking this task are evident in the following passage:

> 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—at [37].

Deopel is also authority for the understanding that for some parts of s. 190B, including subsection 190B(3), the Registrar's consideration will not need to go beyond the application—at [16] and [51]: see also *Gudjala [2007]*, where Dowsett J accepted that s. 190B(3) only required the delegate to address the content of the application—at [30].

The requirements in relation to s. 190B(3)(b)

From the description of the native title claim group contained in Schedule A (outlined above in my reasons at s. 190C(2) in relation to 61(1), in full), it is evident that the conditions of s. 190B(3)(b) are applicable to this assessment. Thus, I am required to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can ascertained whether any particular person is in that group.

The question, as it was for the court in *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591(*WA v NTR*), is whether applying the conditions (or rules) specified in Schedule A will allow for a sufficiently clear description of the native title claim group in order to ascertain whether a particular person is in that group—at [67].

Of this, Carr J in *WA v NTR* stated that:

> 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 – at [67].

Consideration

That question, in relation to this description of the Gudjala native title claim group, was addressed by Dowsett J in *Gudjala [2007]*—at [27] to [34]. His Honour conveyed the following:

> The question is not without difficulty. The better view is that the identification of the claim group descendants of the apical ancestors is the asserted outcome of the correct application of traditional laws and customs observed by the Gudjala People, although those laws and customs are not identified. It is curious that laws and customs concerning physical, spiritual and religious association, genealogical descent and processes of succession should lead to the outcome that the only people who have '*communal native title*' in the area are the descendants of four apical ancestors. One would have thought it more likely than not that some descendants, although satisfying the laws relating to genealogical descent, would fail in connection to the physical, spiritual and religious association and/or processes of succession. As the laws and customs in question are not identified, this curiosity cannot be resolved. However, subs 190B(3) requires only that members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification – at [33].

His Honour then concluded that the description, as contained in Schedule A, 'sufficiently identifies the members of the claim group by reference to apical ancestors'—at [34].

While not pertinent to the test at s. 190B(3)(b), the curiosity observed by his Honour, in my view, has now been addressed in the applicant's factual basis, with a clearer identification of the traditional laws and customs of the native title claim group, in particular the factual basis as to the assertion that all members (that is the descendants of the four apical ancestors) are connected to the land through 'physical, spiritual and religious association, genealogical descent and the processes of succession'. As to whether such an assertion or factual basis retains its 'curiosity', that is not an issue which concerns the Registrar or her delegate in the application of the registration test.

Importantly, the focus for the test at s. 190B(3)(b) is one of identification, that is whether the 'members of the claim group [can] be identified' by the application of the rule. His Honour was satisfied of such in relation to this description of the native title claim group—*Gudjala [2007]* at [33].

Given that at s. 190B(3) I am only concerned with the 'clarity of the description of persons making up the claim group ... '—*Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 at [38], and having examined that description contained in Schedule A of the application, I am of the view that it is clear and that with some factual inquiry it will be possible to establish whether a person is a member.

My decision

Focusing only upon the adequacy of the description of the native title claim group, I am satisfied of its sufficiency for the purpose of s. 190B(3)(b).

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.

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

In reference to the task at s. 190B(4), Mansfield J in *Doepel* accepted it was a matter for the Registrar or her delegate to exercise 'judgement upon the expression of the native title rights and interests claimed'. Further, his Honour felt that it was open to the decision-maker to find, with reference to s. 223 of the Act, that some of the claimed rights and interests may not be 'understandable' as native title rights and interests— at [99] and [123].

Primarily, the test is one of 'identifiability', that is 'whether the claimed native title rights and interests are understandable and have meaning'—*Doepel* at [99].

The native title rights and interests claimed appear at Schedule E of the application, and are as follows:

> The rights and interests claimed in relation to
>
> (1) Land and waters where there has been no prior extinguishment of Native Title or where section 238 (the non-extinguishment principle) applies:
>
> The native title rights and interests claimed are the right to possession, occupation, use and enjoyment of the claim area as against the whole world, pursuant to the traditional laws and customs of the claim group but subject to the valid laws of the Commonwealth of Australia and the State of Queensland.
>
> (2) All remaining land and waters within the claim area the Native Title rights and interests claimed are not to the exclusion of all others and are the rights to use and enjoy the claim area in accordance with traditional laws acknowledged and customs observed by the Gudjala for the purposes of:
>
> - Accessing land and waters;
> - Entering and remaining on the land being claimed;
> - Hunting;
> - Fishing;
> - Gathering and using the products of the claim area such [as] food, medicinal plants, timber, bark, ochres and earths, stone and resin, minerals, and using natural water resources of the area;
> - Camping and erecting shelters;
> - Engaging in cultural activities;
> - Conducting ceremonies and holding meetings;
> - Teaching the physical and spiritual attributes of locations and sites;
> - Participating in cultural practices relating to births, marriages and death on the claim area; and
> - Making decisions, pursuant to Aboriginal law and custom about the use and enjoyment of the land by Aboriginal people.
>
> The application does not include a claim for exclusive possession over previous non-exclusive possession act areas as defined under section 23F of the *Native Title Act 1993* save where the

Native Title Act 1993 and/or the common laws allows such a claim to the [sic] be part of the a [sic] Native Title Determination application.

I am satisfied that the native title rights and interests claimed in the application are understandable and have meaning. The description contained in the application is sufficient to allow the native title rights and interests to be readily identified.

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.

Combined result and reasons 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 below.

I have considered each of the three assertions set out in the three paragraphs of s. 190B(5) in turn before reaching this decision.

The nature of the task at s. 190B(5)

Noting that section 190B(5) 'is carefully expressed' and that the Registrar is required to consider the quality of the factual basis asserted in support of the claimed rights and interests, I am mindful that this task must be completed in line with the Registrar's general function under s. 190A. That function is to assess whether the requirements of s. 190B and s. 190C have been met 'according to their terms', not to 'embark upon some general fact finding exercise, balancing and weighing conflicting evidence, to determine whether to accept a claim for registration'—*Doepel* at [17] and [47].

The Full Court in *Gudjala FC* was of the view that a 'general description' (as required by s. 62(2)(e)) could certainly be of a sufficient quality to satisfy the Registrar for the purpose of s. 190B(5)—at [90] to [92]. Thus, the nature and quality of the information required for s. 62 purposes is indicative of what may satisfy the Registrar for the purpose of s. 190B(5), but '[o]f course the general description must be in ***sufficient detail to enable a genuine assessment*** [emphasis added] of the application by the Registrar under s 190A and related sections ...'—*Gudjala FC* at [92].

Further to this, the Full Court in *Gudjala FC* held that the provision of a sufficient factual basis does not necessitate that the applicant 'provide evidence of the type, which if furnished in

subsequent proceedings, would be required to prove all matters needed to make out the claim'—at [92]. Nor, in the Court's view, is it appropriate for either the Registrar or her delegate to test whether facts may be ultimately proved or to in any way 'assess the strength of the evidence'—*Gudjala FC* at [83] adopting the reasoning of Mansfield J in *Doepel* at [57].

Consideration of the findings of the Federal Court

As previously noted there are certain expectations upon an administrative decision maker, in the course of making a decision and giving weight to findings of a judge. Finklestein J in *Cadbury* made the following pertinent observations:

> A tribunal may also accept as evidence the reasons for judgement given by a judge in other proceedings. But if the tribunal takes the approach that it should not disagree with findings made by the judge then the tribunal has fallen into error...I do not mean to imply that reasons for decision given by a judge are irrelevant to an administrative tribunal. First of all, those reasons may, as I have said, be received into evidence. They must then be given some weight. Indeed, the judge's findings may be treated as prime facie correct. On the other hand, if the judge's findings are challenged, the tribunal must decide the matter for itself on the evidence before it: *General Medical Council v Spackman* [1943] AC 627—at [18].
>
> Of course, when the tribunal is required to decide the matter for itself it is entitled to have regard to the judge's findings. What weight it attaches to those findings will depend on a variety of considerations. Without in any way wishing to be exhaustive, the considerations can include (a) whether the tribunal has available to it more evidence than was before the judge; (b) whether the arguments put to the tribunal were made to the judge; and (c) whether the tribunal is a specialist body with expert knowledge of the subject matter—at [19].

I have given particular thought to the observations made in *Cadbury* (outlined above). In my view, it is pertinent to note that I have before me the [Author of Anthropological Report 2 - name deleted] report, which was not before either the Single or Full Court in this matter.

All three decisions of the Federal Court have in considerable part focussed on the requirements of s. 190B(5) and I intend to have regard to those reasons and findings for the purpose of examining whether I am satisfied that the application meets those requirements. I do so, however, with the understanding that my role is not to decide upon whether I agree or disagree with the findings of the Court, but rather to examine the material before me and to decide if I am satisfied of the sufficiency of the factual basis upon which it is asserted that the native title rights and interests claimed exist. In examining both the new and previously considered material, I appreciate the need to form a view, independent of those reasons.

Consideration and treatment of the anthropological material

I have before me two anthropological documents, namely the [Author of Anthropological Report 1 - name deleted] report and the [Author of Anthropological Report 2 - name deleted] report.

The treatment of the [Author of Anthropological Report 1 - name deleted] report by Dowsett J was a decisive matter in the Full Court's review of His Honour's decision in *Gudjala [2007]*, with the conclusion that '[t]he general approach the primary Judge took[1] in relation to the evidence of

[1] See, in particular *Gudjala [2007]* at [52], where Dowsett J formed the view that rather than offering any factual basis, the Hagen report merely contained opinions and conclusions.

[Author of Anthropological Report 1 - name deleted] affected his approach in assessing the matters required to be considered by s 190B(5)'—*Gudjala FC* at [94] to [96].

In considering the anthropological material, it is my view that it is appropriate to have regard to the observations and principles formed in *Gudjala FC*, where the Full Court outlined extracts from *Bodney v Bennell* [2008] FCAFC 63 (*Bodney FC*), citing a number of authorities for the proposition that the opinions contained within the [Author of Anthropological Report 1 - name deleted] report could be accepted as a 'recitation of facts'—at [94] to [96].

In *Bodney FC*, the Court examined the role of anthropological material in native title proceedings, noting:

> Before the *Evidence Act* it was well established that experts are entitled to rely upon reputable articles, publications and material produced by others in the area in which they have expertise, as a basis for their opinions...Experts may not only base their opinions on such sources, but may give evidence of fact which is based on them. They may do this although the data on which they base their opinion or evidence of fact will usually be hearsay information, in the sense that they rely for such data not on their own knowledge but on the knowledge of someone else—at [92].

Further, the Court in *Bodney FC* referred to a number of cases, including *Neowarra v Western Australia (No 1)* [2003] FCA 1399, where Sundberg J formed the view that 'there is no requirement that the facts upon which the expert's opinion has been formed be supported by admissible evidence ... '—at [37]. Also, reference is made to *Sampi v Western Australia* [2005] FCA 777 (*Sampi*)—at [799], and I would note the comments of French J (as his Honour then was) in *Sampi*, where his Honour stated:

> There are, in any event, significant practical obstacles in requiring the proof of every item of factual material upon which opinions of this kind are based [referring to the information on which the anthropologist formed his conclusions]..A number of the opinions offered by Mr Bagshaw and Ms Glaskin are best described as argumentative inferences upon which the Court will draw its own conclusions – at [803].

While noting that I am not bound by the rules of evidence and am conscious that the task at s. 190B(5) is not analogous to that of the evidentiary one required of the Court at the determination stage, I am persuaded by the relevance of the observations to the way in which both the [Author of Anthropological Report 1 - name deleted] report and the [Author of Anthropological Report 2 - name deleted] report should be regarded for the purpose of considering the requirements of s. 190B(5).

Certainly, the Full Court in *Gudjala FC* was confident of the general application of such principles to the way in which the task at s. 190B(5) should be viewed and interpreted, concluding that '[Author of Anthropological Report 1 - name deleted]'s report of March 2005 contained much material which, if accepted as a recitation of facts, went a considerable way towards establishing the factual basis asserted by the applicant ... '—at [94]. Thus, I intend to consider both the [Author of Anthropological Report 1 - name deleted] and [Author of Anthropological Report 2 - name deleted] report in the way in which the Full Court has held that it is appropriate to do so.

Assessing the sufficiency of the factual basis

Of course, any recitation of fact must be in 'sufficient detail to enable a genuine assessment' and 'be something more than assertions at a high level of generality'—*Gudjala FC* at [92].

Whilst the Full Court in *Gudjala FC* defined the general nature of the task and set down some fundamental principles applicable to the test at s. 190B(5)—at [82] to [85] and [90] to [96], the decisions of Dowsett J in *Gudjala [2007]* and *Gudjala [2009]* also give specific content to each of the elements of the test at s. 190B(5)(a) to (c). The Full Court, in *Gudjala FC,* did not criticise generally the approach that Dowsett J took in relation to these elements in *Gudjala [2007]*[2], including his assessment of what was required within the factual basis to support each of the assertions at s. 190B(5). His Honour, in my view, took a consonant approach in *Gudjala [2009]*, while mindful of the Full Court's direction on how he was to treat the report of [Author of Anthropological Report 1 - name deleted]: see his Honour's reasons at [18] to [77]. Thus, each of the three (3) decisions must inform the Registrar or her delegate when assessing the adequacy of the factual basis.

The task at s. 190B(5), in my view, is a significant one and ultimately I must be satisfied of the sufficiency of the factual basis upon which the assertions are based, and 'be careful not to treat, as a description of that factual basis, a statement which is really only an alternative way of expressing the claim or some part thereof' —*Gudjala [2009]* at [29].

It would not, according to Dowsett J, be sufficient for an applicant to simply assert that the claim group's laws and customs are traditional because they derive from a pre-sovereignty society of which they are descendant. That would merely be a restatement of the claim without any factual basis. Thus, 'there must at least be an outline of the facts' upon which the applicant relies—*Gudjala [2009]* at [29].

In my view, it is fundamental to the test at s. 190B(5) that the applicant describe the basis upon which the claimed native title rights and interests are alleged to exist. According to Dowsett J:

> This is clearly a reference to the existence of rights vested in the claim group. Thus, it was necessary that the Delegate be satisfied that there was an alleged factual basis sufficient to support the assertion that the claim group was entitled to the claimed Native Title rights and interests. In other words, ***it was necessary that the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests***) [emphasis added]—*Gudjala [2007]* at [39].

In that context, I am to 'address the ***quality*** [emphasis added] 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'—*Doepel* at [17]; *Gudjala FC* at [80] to [85].

The applicant's factual basis in support of the assertions at s. 190B(5)

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[2] Whilst his Honour was found to have erred in his approach to, and treatment of, [Author of Anthropological Report 1] report, the Full Court did not find error with what Dowsett J held in relation to the specific requirements of satisfying the Registrar of the sufficiency of the factual basis to support the assertions in s. 190B(5)(a) to (c)—*Gudjala FC* [90] to [96]. In fact, the Full Court directly addressed and approved some of the specific requirements, including that the factual basis must be sufficient to support the assertion that there was a pre-sovereignty society observing identifiable laws and customs—*Gudjala FC* at [96].

For the application before me I have, in support of the assertions at s. 190B(5), the information provided within the application (including the affidavit material and the [Author of Anthropological Report 1 - name deleted] report), the additional affidavit of [Applicant 3 - name deleted], sworn 11 September 2006, and the [Author of Anthropological Report 2 - name deleted] report.

Section 190B(5)(a) - that the native title claim group have, and the predecessors of those persons had, an association with the area

The Law

On this aspect of the factual basis, which was not criticised by the Full Court, Dowsett J directed that one must look for an association 'between the whole group and the area' but without the necessity for each member to have had an association at all times. There must also be material to support an association between the predecessors of the group and the claim area since sovereignty—*Gudjala [2007]* at [52] and *Gudjala FC* at [90] to [96].

The [Author of Anthropological Report 2 - name deleted] report

Before exploring some of the factual basis provided in the [Author of Anthropological Report 2 - name deleted] report, it is important to acknowledge that when [Author of Anthropological Report 2 - name deleted] is speaking of the claim area, he is referring to the entirety of the area encompassed by the Gudjala People #1(QUD80/05) and Gudjala People #2 (QUD147/06) claimant applications. He does not appear to make the distinction between the two areas. If one is to present a picture of the proximity between the two claim areas, it is in my view appropriate to describe the Gudjala People #2 (QUD147/06) claimant application area as a number of small portions, each of which is almost entirely encompassed within the Gudjala People # 1(QUD80/05) claimant application area. They are, in fact, widely spread out over the Gudjala People #1 (QUD80/05) claimant application area. The proximity of the areas, together with the range of information relating to numerous places within, suggests, in my view, that [Author of Anthropological Report 2 - name deleted]'s approach is appropriate.

The ethno-historical record relating to the claim area shows the use and occupation of the claim area in the mid 1800's, including:

- that the presence of frequent camp sites along the Burdekin River in 1845 and Aborigines were encountered in surrounding country, now known to be in Gugu Badhun country in 1847—at [128];
- that the Indigenous occupants of the claim area (and surrounding country) continued to exercise exclusive possession even after European settlement, showing determined resistance to their country's occupation—at [130]; and
- the existence of archaeological record that establishes 'abundant evidence of Aboriginal occupation' within Gudjala traditional lands—at [134];

This, and other cited material within the report, lead [Author of Anthropological Report 2 - name deleted] to conclude that 'Aborigines who are likely to have been the predecessors of the Gudjala claimant group occupied, used and defended their territories... [at sovereignty]'—at [135]. Much of the information contained within the report relates to the period at or shortly after contact, but I understand [Author of Anthropological Report 2 - name deleted] to be opining that the situation

at contact is synonymous to that at sovereignty. This understanding has been reached on the bases that [Author of Anthropological Report 2 - name deleted] has placed this material under the heading '[t]he laws and customs of the claimant group's predecessors at sovereignty'.

The following information from the [Author of Anthropological Report 2 - name deleted] report is also relevant to the factual basis for the assertion in subparagraph (a) of s. 190B(5):

- Contemporary claimant group members are identified by reference to a set of surnames capturing all the cognatic descendants of four named apical ancestors. The four apical ancestors are 'owners of the country within the claim area'—at [11] and [12]. Some of their history within the claim area can be traced from birth to death. The relationship between the ancestors and the current surname identities of families within the claim group also forms part of the factual basis (including the [Clan Group 2 – name deleted], [Clan Group 3 - name deleted] and [Clan Group 4 - name deleted] families) —at [10] to [26]. Using software entitled 'The Master Genealogist Version 7,' genealogies of the families have been produced in the form of descendant charts and attached to the report as Appendix B.
- The continued occupation of the claim area in the post-contact period, by predecessors and contemporary members, has been facilitated through alliances with particular stations within the claim area. Historical record and contemporary accounts of the ongoing association with stations and surrounding areas are detailed within the report—at [362] and [406] to [468].
- The 'central focus of people's memories of living and working on the stations is their kin groupings, and the elder people, who constituted the authoritative core of their social world' and points to their 'enduring connections to country'—at [416]. This appears to be at the core of the factual basis provided in support of s. 190B(5)(a).

Claimant accounts of their own association with the application area also form part of the factual basis, some of which are detailed in the [Author of Anthropological Report 2 - name deleted] report, including:

- [interview with [Clan Group 5 - name deleted], 7 April 2009] 'My father's mother is a tribal woman from Maryvale, [ancestor 4 - name deleted]. I've seen Grandfather [Clan Group 6 - name deleted] come out with the [Clan Group 7 - name deleted]. We lived in slab huts...My uncle [ancestor 5 - name deleted], my father's brother, was there at Maryvale, and [ancestor 6 - name deleted] was there...' [It should also be noted that [Author of Anthropological Report 2 - name deleted] opines that [ancestor 4 - name deleted] (an identified apical ancestor) was born at Maryvale Station no later than the 1860s and that her children were also born there]—at [424].
- [interview with [Clan Group 5 - name deleted], 7 April 2009] 'We knew that was our traditional country growing up in Maryvale'—at [424].
- [interview with [Clan Group 8 - name deleted], 6 April 2009] 'We were shown cave paintings, and tribal dance grounds around the stations on Allensleigh and Maryvale and Wandovale, Pentland. I worked on them all...Another fellow is [Clan Group 5 - name deleted], my first cousin, born at Maryvale, belonged there, lived and worked it'—at [124].
- [interview with [Clan Group 9 - name deleted], 28 April 2009] '[ancestor 3 - name deleted] is from Toomba'— at [432]. [Author of Anthropological Report 2 - name deleted] places

[ancestor 3 - name deleted]'s birth date sometime in the early to mid 1860's in the Bluff Downs, Maryvale, Toomba area, with records showing her sons being born at Bluff Downs Station in 1889 and 1891—at [13] to [16].

- [interview with [Clan Group 10 - name deleted], 30 April 2009] 'I was born in Charters Towers, raised on Gainsford Station...I take my daughter out to Gainsford whenever I can. I protect my country by not telling people about sites I know about around Gainsford...[ancestor 7 - name deleted] showed us bora ring at Gainsford ... '—at [440].
- [interview with [Clan Group 11 - name deleted], 6 April 2009] ' I was born in Maryvale on 3/8/31. Grew up there. Mum and Dad were living there...First job at Allendale (near Homestead), then Bluff Station ... Stayed there till went back to Allendale'—at [442].
- [interview with [Clan Group 12 - name deleted], 24 February 2009] 'Featherby Wall, old story Place. At certain times of the year you can see old people with firesticks when we were small. Big water hold but the waters gone now, another waterhole further on where Dad took us hunting for turtle and eels. My granny [ancestor 8 - name deleted] walked out along the Development Road, catching snakes to eat, rock-python and porcupine'—at [283].

Other material

Both affidavits of [Applicant 3 - name deleted] sworn 24 January 2006 and 11 September 2006 detail his own association with the area along with that of his family, including predecessors. This association is relevant to that of the [Clan Group 2 - name deleted] family and the apical ancestor, [ancestor 3 - name deleted]. The affidavit of [Clan Group 1 - name deleted] sworn 25 January 2006 also provides a factual basis for the association of her family ([Clan Group 3 - name deleted]) and predecessors, including her great grandmother, [ancestor 4 - name deleted].

Within the [Author of Anthropological Report 1 - name deleted] report, the association of each of the identified surname groupings is detailed, namely [Clan Group 2 - name deleted], [Clan Group 3 - name deleted] and [Clan Group 4 - name deleted] [pp. 3-5]. [Author of Anthropological Report 1 - name deleted] asserts that the material pertaining to the group supports the conclusion that current claimants are members of the Gudjala group through their descent from the named ancestors. Further, [Author of Anthropological Report 1 - name deleted] opines that both contemporary members and their predecessors maintained 'an unbroken chain of occupation of the overall claim area' [p. 5]. Those assertions and opinions, in my view, have considerable force, and must be accepted as fact.

I have also considered the decision of Dowsett J in *Gudjala [2009]* on this aspect of the test (in particular his findings and conclusions at [79] to [80]). His Honour was satisfied of the factual basis provided, including [Author of Anthropological Report 1 - name deleted]'s assertion that there was a continuous chain of association— at [80].

Consideration

The report of [Author of Anthropological Report 2 - name deleted], coupled with the affidavit material and report of [Author of Anthropological Report 1 - name deleted] contain information that is part of the factual basis in support of the assertion at s. 190B(5)(a), which in my view provide a sufficient factual basis in support for the assertion that the native title claim group

have, and their predecessors had, an association with the area. I outline pertinent points from that material below.

Firstly, the factual basis is stated to be that the native title claim group, the Gudjala people, are the descendants of the named apical ancestors who were the traditional owners of the claim area at the time of first settlement—[Author of Anthropological Report 2 - name deleted] report at [11]. Each of the identified apical ancestors has an association with the application area— [Author of Anthropological Report 2 - name deleted] report at [8] to [23] and [Author of Anthropological Report 1 - name deleted] report at pp 3 to 5. There is also a factual basis relevant to the native title claim group's continuing association with the area—[Author of Anthropological Report 2 - name deleted] report at [408] to [468].

Thus, within the applicant's factual basis, there is a clear identification of the native title claim group and their association with the area the subject of this application. Importantly, in my view, [Author of Anthropological Report 2 - name deleted] offers an opinion on the native title claim group and their association with the area dating back to sovereignty, which for the purpose of the test at s. 190B(5), I may treat as a 'recitation of fact'—*Gudjala FC* at [94].

Secondly, a factual basis is provided to support the assertion that the Gudjala people are part of a pre-sovereignty society, whose members (including the native title claim group) and their predecessors 'have continuously exercised their rights of possession, occupation, use and enjoyment of their traditional country since before the assertion of British sovereignty', and that this was despite such factors as forced dislocations and conflict within the area—[Author of Anthropological Report 2 - name deleted] report at [32] and [38].

Also, a factual basis is provided for how this continuity of association with the area has been maintained by contemporary members and their predecessors. Whilst suggesting that working life on stations is a feature of the claimant's association with the area, the assertion is that '[t]he central focus of people's memories of living and working on the stations is their kin groupings, and the elder people who constituted the core of their social world.' A factual basis is provided to support this assertion—[Author of Anthropological Report 2 - name deleted] report at [38] to [41].

Further, the Gudjala people's claimed association to the area and factual basis is not limited to their physical presence on parts of the application area continuously/from time to time. I accept that such an assertion can be made[3]. Furthermore, the applicant has provided a factual basis in support. There is, for instance, material which points to an enduring spiritual association, such as stories and accounts of teachings of significant places and sites within the area that have been passed down through the generations. I accept this as part of the factual basis which supports the assertion that the claimant's have, and their predecessors had, an association with the application area.

My decision

The information and material contains a factual basis which is sufficient to support the assertion that the claim group as a whole is presently associated with the area; that the four apical

[3] I understand the decision of French J in *Martin v Native Title Registrar* [2001] FCA 16, to be authority for the principle that association should not be 'so narrowly construed' so as to limit its meaning to presence of a physical kind only, and that I am to be informed on the nature of the claimant's association with the application area on the basis of the information provided— at [26]

ancestors were associated with the area since first settlement (inviting the inference that the association of the Gudjala People dates back to sovereignty, and I have made that inference); and that association has been continuously maintained since that time by the native title claim group.

I am satisfied that there is a sufficient factual basis to support the assertion in s. 190B(5)(a).

Section 190B(5)(b) - that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interest

The Law

In *Gudjala [2007]*, Dowsett J recognised the importance of understanding the meaning attributed to 'native title' pursuant to s. 223 of the Act, in order to examine the factual basis provided in support of the assertion at s. 190B(5)(b) (and similarly at s. 190B(5)(c)). That meaning, with its focus upon rights and interest in relation to land and waters and the current possession of such rights and interests 'under traditional laws and customs by claimants who, pursuant to such laws and customs presently have a connection with the land or waters in question,' provides guidance to the Registrar or her delegate when examining the factual basis in support of this assertion — *Gudjala [2007]* at [26], where Dowsett J outlined his understanding of the principles drawn from *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (*Yorta Yorta*). Again, this aspect of the decision of Dowsett J, as to requirements to support this assertion, was not criticised by the Full Court: see *Gudjala FC* at [90] to [96].

His Honour explored, in detail, the significance attributed to 'traditional' by the High Court in *Yorta Yorta*, and stated that:

> The word "traditional" describes a means of transmission of laws or customs. A traditional laws or customs is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. In the context of the Act the word "tradition" conveys an understanding of the age of the traditions, namely that their origins lie in the normative rules of Aboriginal and Torres Strait Islander societies which existed before the assertion of British sovereignty. Only these normative rules are traditional laws and customs.
>
> The normative system under which the relevant rights and interests are possessed must have enjoyed a continuous existence and vitality since the assertion of sovereignty. If the system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist.
>
> Laws and customs arise out of, and go to define, a particular society, that is a body of persons united in, and by, its acknowledgement and observance of a body of laws and customs —at [26].

This analysis, which was continued in *Gudjala [2009]*, led his Honour to form the following views in relation to the test at s. 190B(5)(b):

- Identification of an indigenous society at sovereignty is the starting point, as it 'is impossible to identify a system of laws and customs as such without identifying the society which recognizes and adheres to those laws and customs'—*Gudjala [2007]* at [66] and *Gudjala [2009]* at [36].

- There must be some link 'between the claim group and claim area,' including the identification of a link between the apical ancestors and the relevant society [clearly specific to the way the claim group has been described in this matter], although it is not necessary that it be shown that the ancestors were members of the relevant society—*Gudjala [2007]* at [66] and *Gudjala [2009]* at [40].
- For laws and customs to be traditional 'they must have their source in a pre-sovereignty society and have been observed since that time by a continuing society'—*Gudjala [2007]* at [63] and *Gudjala [2009]* at [37].
- Such laws and customs that exist now may not be identical to those that existed prior to sovereignty but must 'have their roots in the pre-sovereignty laws and customs'—*Gudjala [2009]* at [22].

Thus, the inquiry into such a factual basis must begin with the identification of the relevant indigenous society at the time of sovereignty or, at the very least, the time of contact. Once identified, it follows that the factual basis must reveal the existence of laws and customs with a normative content that are associated with that society. That is, it is necessary within the factual basis to demonstrate the 'relationship between the laws and customs now acknowledged and observed in a relevant indigenous society, and those which were acknowledged and observed before sovereignty'—*Gudjala [2007]* at [26], [66] and [81].

Pre-Sovereignty Society

The [Author of Anthropological Report 2 - name deleted] report

The report explores and offers a number of conclusions and opinions in regard to the society of which the Gudjala people were a part at the time of contact, inviting the inference that the situation in the pre-sovereign period was commensurate. I outline these below.

Under the section heading 'description of the claim area and the claimant group,' the report states that:

> The claimant group is constituted through principles of perpetual filiation (including through socially acknowledged adoption) to a small number of ancestors who were themselves owners of the country within the claim area. These predecessors were amongst the traditional owners of the claim area at the time of first settlement of the claim region...—at [11].
>
> The claimant group members are identified in the contemporary period by a local 'shorthand' which denotes a set of surnames which encompass the cognatic descendants of four principal apical ancestors...- at [13].

That in itself says little about any pre-sovereignty society, however [Author of Anthropological Report 2 - name deleted] goes on to provide a factual basis for the existence of a society at contact of which it is implicit that the predecessors of the group were a part. Again, much of the material in the report appears to focus on the situation at contact (around the 1850s or 1860s), inviting the inference that the circumstances at this time were the same as at sovereignty. In fact, in my view, [Author of Anthropological Report 2 - name deleted] makes this inference explicit in that he places this material under the banner of '[t]he Laws and customs of the claimant group's predecessors at sovereignty'—at [30] to [228].

As to the factual basis for this society, the report says:

- The Gudjala people, while a distinct group, were (as at contact) and are, part of a larger regional society, which included and continues to include their close neighbouring groups. That is, 'Gudjala people are members of what [is termed] "a single regional Aboriginal jural public, and the several beneficial titles to particular lands and waters are not constituted in isolation from that wider jural public"'. The 'wider jural public, which upholds the region's laws and customs, is more extensive than any single language labelled group and /or its lower-level divisions'—at [38],[39],[40], [189], [190], [191], [228].
- There has not been any 'enduring consensus on a common name for the grouping now known as Gudjala', however there are historical records referencing probable and likely variations of the group name, such as Koochulburra and Gudjal—at [76] to [126] where [Author of Anthropological Report 2 - name deleted] details historic records of various groups in the area and maps of the region.
- The historical record is such that it indicates 'that local country groups in this region had complex patterns of alliance and interaction with neighbouring groups...' However, 'recruitment to country occurred at the local country group level rather than at the language-labelled level'. While language was not a political unit, it did provide 'a diffuse backgrounded form of identity for members of local groups and language ownership identity had some salience to territoriality...'—at [75].
- The evidence is sufficient to infer 'the geographical extent of Gudjala country at first settlement despite the changes in language group nomenclature ... '—at [225], and further, the historical record is supportive of the present claim area comprising 'country identified by senior people born before the turn of the twentieth century with the label Gudjala or a cognate variant thereof'—at [126].

That the native title claim group, now known as the Gudjala people, comprised a component of this regional society, and that they have done so since a time before first settlement, is my understanding of the factual basis that is detailed within the [Author of Anthropological Report 2 - name deleted] report.

Consideration of the applicant's factual basis on Pre-Sovereignty Society

Before outlining my reasons, I think it appropriate to consider the conclusions of Dowsett J on this particular issue in *Gudjala [2009]* (noting that similar conclusions were formed in *Gudjala [2007]*). His Honour was dissatisfied with the lack of a factual basis (or even a claim) supportive of the inferences that the named apical ancestors, identified as Gudjala (or that others identified them as such), had some link with any pre-sovereignty society or were members of the pre-sovereignty society. His Honour did not intend to impose an onerous burden upon the applicant but was faced with 'various, largely disconnected, and very general, assertions with a view to identifying available inferences as to the existence of a pre-sovereignty society relevant to the present claim group'—at [61] to [63]. With that in mind, it is appropriate to largely view the conclusions of Dowsett J, on this point, in the context of the want of material that was before his Honour.

His Honour also expressed concern in regard to the applicant's assertion that the predecessors of the group at or about the time of sovereignty 'described themselves as Gudjala' without any factual basis provided for such an assertion, and coupled with the fact that no attempt was made

to reveal the meaning of the word 'when applied to those persons who occupied the claim area' at contact. Further, his Honour was concerned that there was 'no explanation of what was meant by that description in the pre-sovereignty society'. His Honour does go on to accept, however, that people calling themselves Gudjala were located within the claim area around the time of contact, but held that this 'says nothing about the claim group'—at [53] to [54] and [68].

In that context, I understand the assertion implicit in the new material provided by the applicant in the [Author of Anthropological Report 2 - name deleted] report to be that the Gudjala people comprised a subset of the regional society (that is, the 'regional Aboriginal jural public') at the time of contact and that they continue to do so today. In my view, [Author of Anthropological Report 2 - name deleted] offers a clear opinion as to the Gudjala people, including their predecessors, comprising a component of this 'regional Aboriginal jural public' at the time of contact and the extent of Gudjala country as encompassed within this region-wide society—at [8] to [24] and [125] to [126]. Again, for the purpose of the test at s. 190B(5)(b), I must treat this opinion as a 'recitation of fact'—*Gudjala FC* at [94].

It is not for me, as a delegate of the Registrar, to analyse and dissect the issue of whether there has been any enduring agreement as to the common name for the grouping of people now known as Gudjala, or whether they, in fact, described themselves before or at sovereignty as Gudjala. I would suggest that it is quite rare (although not unheard of) to find any historical record of particular individuals (such as named apical ancestors or others) identifying themselves as such at the time of sovereignty. That may or may not raise concern for the Court at the time of considering the application for determination.

For my part, I am only required to look for material upon which I can be satisfied that there is a sufficient factual basis, supportive of the assertion 'that there was, in 1850-1860 [noting that this is specific to the facts in this instance], an indigenous society in the claim area observing identifiable laws and customs'—*Gudjala FC* at [96]: see also *Gudjala [2007]* at [66] and *Gudjala [2009]* at [36]. To the extent that I must be satisfied of a factual basis showing the link between the apical ancestors and the relevant pre-sovereignty society, I explain in my reasons below why I am satisfied of this. As to the name Gudjala, and the level to which it is necessary that details of its origins form part of the factual basis, there is, in my view, material within the [Author of Anthropological Report 2 - name deleted] report providing a factual basis as to how that name (or a cognate variant thereof) fits within the context of the region-wide society and how it relates to the current claimant's and their predecessors—at [58] to [126].

In my view the factual basis that is provided on the pre-sovereignty society, contained within the [Author of Anthropological Report 2 - name deleted] report, is such that it permits a number of inferences, including:

- At contact, the ethnographic evidence indicates that 'Gudjala people are members of... "a single regional Aboriginal jural public"—at [38]. This invites the inference that the situation in the period between sovereignty and contact was the same. I feel that inference is open to me. Again, because of the way in which he presents the material, it is my understanding that [Author of Anthropological Report 2 - name deleted] holds the opinion that the situation at contact is synonymous to that at sovereignty.
- Region-wide laws and customs of the native title claim group's predecessors at contact are indicative of an extensive and complex system of interaction between groups—[Author of

Anthropological Report 2 - name deleted] report at [30] to [225]. Given the extensiveness and detail with which [Author of Anthropological Report 2 - name deleted] outlines the laws and customs as they existed at sovereignty, this invites the inference that the situation at sovereignty was the same. I feel that inference is open to me.

- The native title claim group is traced to 'a small number of ancestors [identifying [ancestor 3 - name deleted], [ancestor 4 - name deleted], [ancestor 1 - name deleted] and [ancestor 2 - name deleted]] who were themselves 'owners of the country within the claim area' and that they 'were amongst the traditional owners of the claim area at the time of first settlement of the claim region by Europeans,'—at [11]. This, in my view, invites the inference that they were members of the relevant society. I am comfortable making such an inference.

Traditional Laws and Customs

The [Author of Anthropological Report 2 - name deleted] report, the material within the application (including the two affidavits and [Author of Anthropological Report 1 - name deleted] report) and the additional affidavit of [Applicant 3 - name deleted], sworn 11 September 2006, provide further support for the assertion at s. 190B(5)(b), giving details of the link between the current laws and customs and the traditional laws and customs of the relevant pre-sovereignty society discussed above. Further, in my view, that material provides a factual basis as to how those traditional laws of the pre-sovereignty society have been continually acknowledged and observed by the native title claim group.

Membership to the Gudjala people (Local Country Groupings)

It is asserted that, at sovereignty, it is likely 'that rights and interests in land were distributed through a group-centred network which recognised a range of legitimate pathways for acquiring rights in land, including through filiation through the mothers, mother's mothers and father's mothers line'—[Author of Anthropological Report 2 - name deleted] report at [168] and [328].

Modes of recruitment included a range of alternatives in 'recognising legitimate country connections' but with the probability of patrifilial connections being the preferred mode of connection. The alternatives would have included birth connections through the mother's father and mother's mother and also through marriage. Other associations are recognised, such as through 'one's own and one's parent's biographies'—[Author of Anthropological Report 2 - name deleted] report at [169] and [170].

In the contemporary context, there has been some change, with the yielding of the 'patrifilial bias' but with the retention of 'the traditional element of perpetual filiation' for recruitment to local groups, which are 'realised on-the-ground as "families of polity"'—[Author of Anthropological Report 2 - name deleted] report at [328]. This continuous filiation is stated to be evidenced in the genealogies of the claimant families provided with the report (Appendix B to the [Author of Anthropological Report 2 - name deleted] report). Also, the description of the claim group in Schedule A is such that membership is to persons descended from one of the four named apical ancestors, with the recognition that those members are connected to the application area through 'physical, spiritual and religious association and genealogical descent and processes of succession'.

[Author of Anthropological Report 1 - name deleted], in his report, says of the contemporary context that ancestry continues to provide the most important reference for membership to the group and may involve 'establishing to the satisfaction of senior members of the community that one's earliest known ancestor was from the area.' [p. 8].

[Applicant 3 - name deleted], in his affidavit sworn 11 September 2006, details how his rights to country have been derived through his ancestry, including his great grandmother [ancestor 3 - name deleted], his grandfather [ancestor 9 - name deleted] and his father [ancestor 10 - name deleted]. He also discusses other ways of acquiring rights, including through marriage and birth.

[ancestor 11 - name deleted] [a claimant born in 1922- see descendant chart of [ancestor 4 - name deleted], Appendix B] spoke to [Author of Anthropological Report 2 - name deleted] about how his grandmother taught him about the family's traditional country—at [345].

The factual basis as to the assertion that members of the native title claim group are connected to the application area through 'physical, spiritual and religious' means is also explored throughout the [Author of Anthropological Report 2 - name deleted] report and other material. For instance, [Author of Anthropological Report 1 - name deleted] opines that:

> The belief that the contemporary rights are ultimately underpinned by both spiritual/religious factors and rights of prior possession, coupled with the rule of descent, helps the community to maintain its connections with the past and its coherence as a community [p. 12].

[Author of Anthropological Report 2 - name deleted] describes a 'traditional mode of recruitment' for the region (and for Gudjala people) that recognised a range of 'legitimate pathways for acquiring rights in land...'—at [168], and I accept that the factual basis is sufficient to support the assertion that the current approach to membership of the group is consistent with that traditional mode, even given that patrifiliation may have yielded somewhat.

It appears that ancestry was, at sovereignty, and has continued to be, the most significant means of recruitment to the native title claim group, but that there are other pathways to acquiring rights in land such as acquiring some rights through marriage and adoption (and that such pathways are not inconsistent with traditional means of recruitment). It may be, given the description of the native title claim group in Schedule A, that these 'other pathways' could only result in those individuals acquiring secondary rights. As to what rights are ultimately acquired, and by whom, is a matter for the Court.

Territoriality and the right to speak for country

It is asserted that territoriality was an important feature of the society at sovereignty. However, this is to be viewed in the context of 'complex patterns of alliance and interaction with neighbouring groups' within that regional society. This meant that there could be movement between the areas of close neighbouring groups but with the understanding and respect for the fact that particular tracts of country belonged to certain groups, such as Gudjala—[Author of Anthropological Report 2 - name deleted] report at [75] and [58] to [126].

The historical record provides evidence to support the conclusion that 'Aborigines who are likely to have been the predecessors of the Gudjala claimant group occupied, used and defended their territories from both indigenous and non-indigenous intruders'—[Author of Anthropological Report 2 - name deleted] report at [76] to [126] and [135].

This is also explored in the [Author of Anthropological Report 1 - name deleted] report. Drawing from the historical record, [Author of Anthropological Report 1 - name deleted] opines that some principles of law are 'immediately apparent', including that of territoriality, in terms of people belonging to particular places [p. 6].

In the contemporary context, groups in the region, such as Gudjala, exercise rights and interests in specific tracts of land, but still do so as a result of the authority of the 'broader jural community'—[Author of Anthropological Report 2 - name deleted] report at [232]. The affiliation and alliance within the region appears to remain a feature of this contemporary society, with [Author of Anthropological Report 2 - name deleted] quoting extracts from interviews with members of the claimant group, such as:

> Gudjala tribe ran up to Clarke River, Christmas creek, we one tribe with Gugu Badhun, Gudjal and the mob at Mt. Morgan – Wulguru. We take in the Star River, this side of Harvey Range, Reid River – the boundary is on the mountains [Cultural Story 1 – text deleted]. [Clan Group 13 - name deleted] told me the [Dreaming Beings 1 - name deleted] [Cultural Story 2 – text deleted][interview with [Applicant 3 - name deleted], Mackay, 28/6/09]— at [235].

The laws and customs pertaining to territoriality within the region and the emphatic assertion that certain country is that belonging to Gudjala, as distinct to land belonging to other groups such as Gugu Badhun, is also reflected in claimant accounts, demonstrating that this is a long standing view of the law within the region that regulates claims to country. For instance:

> Gudjal runs between Cape and Suttor Rivers, up to the Clarke, I heard about that from my grandmother [ancestor 12 - name deleted], she told us about that. She said that's the traditional country for our family' [extract of interview with [Clan Group 5 - name deleted], 7 April 2009]—at [345].
>
> My country, I can talk past Greenvale to Clarke River in North, then to Cape River in South West to Towers Creek, Clarke Creek, Mingela Range in East, to Mount Cooper and Mount Connell' [extract of interview with [Clan Group 8 - name deleted], 6 April 2009]— at [281].
>
> [W]e lived on the land, my grandfather came from there...Featherby Wall is in Gudjala country. I've been there. I speak for my family heritage of the country, other people say "You don't speak for my country." I've had a few arguments in the past. You got to have blood and country '[extract of interview with [Clan Group 14 - name deleted], 6 April 2009]— at [295].

Furthermore, 'the claimants and their neighbours tolerate only a limited degree of infringement' of boundaries, with the prospect of confrontations when the wrong people speak for country—at [295].

While the assertion of language group 'boundedness' is more prominent in the contemporary context [referring to some claimant's statements on this matter], it is asserted that this is not necessarily a move away from traditional laws and customs, but rather 'drawing into the social foreground something possessed as a more backgrounded identity in earlier times'. As indicated, recruitment to country at sovereignty was at the local country group level rather than at the language level, but with language identity having 'some salience to territoriality.' This appears to remain a feature of the society in the present context—[Author of Anthropological Report 2 - name deleted] report at [75] and [326].

[Applicant 3 - name deleted], in his affidavit sworn 11 September 2006, identifies himself as belonging to the 'Gurrdjal language group', although he can only speak about half of that language. He also states that the boundaries of Gudjala country are well known, and that such knowledge has been imparted from the elders of the group over time—at [1.2] and [2.7].

The material is not suggestive of many contemporary members of the group maintaining the knowledge of the language spoken by their predecessors. However, it seems evident from the material that language affiliations and identities, of particular groups within the region, remain an important feature of the society, and has done so since contact.

There is, in any event, no requirement for current laws and customs to be identical to those acquired prior to sovereignty. They only need have 'their roots in the pre-sovereignty laws and customs'—*Gudjala [2009]* at [22].

I accept that the factual basis is sufficient to support the assertion that laws and customs pertaining to the territory of specific local country groups with mixed language identities and affiliations were important in establishing the country of particular groups within the regional society, and that they have continued to be so.

Authority vested in Elders

In his report, when detailing the traditional laws and customs of the predecessors, [Author of Anthropological Report 1 - name deleted] refers to the notes of Roth, W.E (1905) and his reference to 'the "general government of the community" lying in the hands of "an assembly of elders"'. [Author of Anthropological Report 1 - name deleted] concludes (in relation to the Gudjala People) that this is revealing of 'a body responsible for decision making'[p. 8].

In the contemporary context, it is claimed that Gudjala people 'constantly refer to the authority which is vested in knowledgeable elders, particularly when it comes to discussions about land...' —[Author of Anthropological Report 2 - name deleted] report at [96]. Throughout the [Author of Anthropological Report 2 - name deleted] report there are also accounts of the teachings of elders and references to the 'old people' and the laws and customs they have imparted, such as:

- [interview with [Applicant 3 - name deleted], 28 June 2009] ' He [Ancestor 7 – name deleted] told us, "Oh you can't marry that girl, she's your blood," and [ancestor 13 - name deleted] gave us advice about those things [reference to his father's brother and sister, [ancestor 7 - name deleted] born 1923 and [ancestor 13 - name deleted] born 1922]—at [268];
- [interview with [Clan Group 15 - name deleted], 8 April 2009] 'The old people, [Clan Group 6 - name deleted]s, lived at Corinda...and they used to tell me about the country and life on the stations. The oldest sibling has to tend the family and talk for country'—at [282];
- [interview with [Clan Group 8 - name deleted], 6 April 2009] 'This story I heard from old people. Old man and young one came there to Fletcher to fish to take back to their family. The old fella said "We only need enough for our family"...I tell my young ones you only need enough for a feed'—[277];
- [interview with [Clan Group 8 - name deleted], 6 April 2009] ' Old people told us that was where our boundary was, across Clarke River...'—at [281]; ' I think they always need to

> consult elders about decisions for country. Elders are not just from age you should have knowledge from being in country...' —at [295].

[ancestor 7 - name deleted] also speaks about the authority vested in elders and asserts that 'the ruling personalities are the Elders' (Affidavit sworn 11 September 2006, p. 10). Similarly, in her affidavit sworn 25 January 2006, [Clan Group 1 - name deleted] states that '[w]hen matters which affect my Gudjala community happen I expect to be consulted, together with other senior community members, about the problem, so that we can decide what to do'—at [8].

The spiritual and cultural responsibilities and obligations of the group

[Author of Anthropological Report 2 - name deleted], in his report, asserts a ceremonial and spiritual society, of which the Gudjala people are a part, that has continued into the present and which can reflect responsibilities and obligations in relation to the land and people.

Interview accounts from contemporary claimants as well as the affidavit material provided with the application also refer to this. For instance:

- [interview with [Clan Group 5 - name deleted], 2 May 2009] [Cultural Story 3 – text deleted]. My grandfather, [ancestor 14 - name deleted] [born 1866 and was the great grandfather of [Clan Group 5 - name deleted] – see descendant chart – Appendix B to [Author of Anthropological Report 2 - name deleted] report] and [Ancestor 15 – name deleted] were always telling me about it'—at [311];
- [interview with [Clan Group 12 - name deleted], 25 February 2009] 'Don't go up there [Sacred Place 1 – name deleted][Cultural Story 4 – text deleted]. Well, he just looks after the traditional land and stuff'—at [311];
- [interview with [Clan Group 8 - name deleted], 6 April 2009] 'You have to talk to them. They're the ancestors. It's a feeling you get from their presence. If you in the wrong country you have to move'—at [312];
- [interview with [Clan Group 10 - name deleted], 30 April 2009] '[ancestor 7 - name deleted] showed us a bora ring at [Sacred Place 2 – name deleted], where they used to do the ceremony'—at [359];
- [interview with [Clan Group 16 - name deleted], 6 April 2009] 'We took the kinds to do corroboree, we got a dance troop going with [Clan Group 14 - name deleted]'—at [359]; and
- [interview with [Clan Group 17 - name deleted], 25 April 2009] 'I take my kids out bush to Yarrabah. I dance traditional dances'—at [359].

The [Dreaming Beings 1 - name deleted] is an important figure in the regional society, and [Author of Anthropological Report 2 - name deleted] observes that:

> The power of the [Dreaming Beings 1 - name deleted] is believed to have laid the foundation of social laws and customs so that sorcerers [who] were able to access its magical powers could exact retribution of law-breaking behaviours—[Author of Anthropological Report 2 - name deleted] report at [50].

Stories about the [Dreaming Beings 1 - name deleted] and its importance to the society are recounted by Gudjala people indicating that 'it was a powerful being attributed with both

creative and destructive energies which could be used to reproduce the normative force of traditional law and custom'—[Author of Anthropological Report 2 - name deleted] report at [57]. Examples of its continuing importance to the Gudjala people are also detailed in the [Author of Anthropological Report 2 - name deleted] report: see sections 4.1, 4.3 and 4.7.

The historical record of the regional society of which the Gudjala people were a part, points to 'a lively ceremonial world'. The stories that have been transmitted to current members of the group from previous generations relate to traditional places of significance and these sites and stories have been protected in the contemporary context. These 'stories which are told by contemporary Gudjala people about their experiences of natural and supernatural events on country have continued to be a focus of belonging to country'. Ceremonies, meetings and cultural activities continue to be conducted on country—[Author of Anthropological Report 2 - name deleted] report at [189] and [348] to [353].

Consideration

It may be that in many instances, the nature of anthropological material and the opinions offered are such that they could be best described as 'argumentative inferences,' as they were in *Sampi*— at [803]. Ultimately, it is for the Court alone, at the time of hearing the application, to draw its conclusions on the evidence submitted in support of the claim and to make the link between any methodologies employed by the expert and the apparent factual matters— *Gumana v Northern Territory of Austrlia (with Corrigendum dated 22 February 2005)* [2005] FCA 50 (*Gumana*) at [65].

The way in which I am to treat the material in support of the factual basis has been foreshadowed in my reasons above. I am to assume that the facts asserted are true— *Doepel* at [17], and agreed and adopted by the Full Court in *Gudjala FC*—at [82] to [85]. Further, it is my view that the decisions in *Doepel* and *Gudjala FC* provide clear guidance on how such information is to be treated for the purpose of s. 190B(5). My role is not to test the efficacy of the material upon which the above opinions and assertions are based but rather to accept such as a 'recitation of facts'— *Gudjala FC* at [83] and [94].

My decision

It is open to me to form the view that the link between the native title claim group and the relevant pre-sovereignty society has been demonstrated in the applicant's factual basis. Primarily, in my view, that link is shown by detailing, within the factual basis, the existence of a regionally active society (at or around the time of contact) of which, [Author of Anthropological Report 2 - name deleted] opines, the Gudjala people are members and derive their laws and customs from— [Author of Anthropological Report 2 - name deleted] report at [30] to [47].

Importantly, the [Author of Anthropological Report 2 - name deleted] report provided in support of the application, in my view, appears to address in a more fulsome and detailed manner the factual basis relevant to each of the assertions. It supplements what was before Dowsett J in *Gudjala [2007]* and *Gudjala [2009]*, and is such that it now enables a 'genuine assessment' of the applicant's factual basis—*Gudjala FC* at [92].

The material and information presented on behalf of the applicant, in my view, equates to a sufficient factual basis, supportive of the assertion that there was a pre-sovereignty society relevant to the present claim group now known as the Gudjala people, from which the traditional laws and customs, giving rise to the claim to native title rights and interests, have been derived

(noting that this, in my view, appears consonant with the approach taken by Dowsett J in *Gudjala [2007]* and *Gudjala [2009]*—at [66] and [33] respectively).

In conclusion, my decision is that there is a sufficient factual basis supportive of the assertion at s. 190B(5)(b).

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

This part of the test is concerned with whether the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the native title rights and interests claimed. In my view, this assertion relates to the continued holding of native title through the continued observance of the traditional laws and customs of the group.

In essence, this element of the test equates with what the majority in *Yorta Yorta,* in constructing the definition of native title, identified as the second element in their understanding of the word 'traditional'. It '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'—at [47].

In addressing this aspect of the test in *Gudjala [2009]*, Dowsett J considered that:

> Clear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs may justify an inference of continuity'—at [33].

I note the following from the factual basis provided to support the assertion in s. 190B(5)(c):

- At contact, the Gudjala people were members of a 'regional Aboriginal jural public, from which they derive their laws and customs'—[Author of Anthropological Report 2 - name deleted] report at [30] to [225]. In my view, the applicant's factual basis provides clear details of a society at contact and its laws and customs: see [Author of Anthropological Report 2 - name deleted] report, [Author of Anthropological Report 1 - name deleted] report, affidavits of [Applicant 3 - name deleted] and Schedule F of the application.
- The descendants of the ancestors (who were traditional owners of the claim area) 'have continued to live and raise their families within the claim area, have transmitted knowledge of the laws and customs of their society and reproduced the enduring relationships between the families comprising this sub-set of the regional society'—[Author of Anthropological Report 2 - name deleted] report at [11]. The [Author of Anthropological Report 2 - name deleted] report attaches genealogies dating back to the named apical ancestors at Appendix B . This part of the material provides a factual basis as to the genealogical links between the apical ancestors [who, according to [Author of Anthropological Report 2 - name deleted] are members of the pre-sovereignty society] and the claim group.
- The 'Gudjala native title claim group and their predecessors have continuously exercised their rights of possession, occupation, use and enjoyment of their traditional country since the assertion of British sovereignty'—[Author of Anthropological Report 2 - name deleted] report at [337].

- The factual basis contains material and information on the laws and customs of the claimant group's predecessors at sovereignty and the traditional laws and customs of contemporary Gudjala people—[Author of Anthropological Report 2 - name deleted] report at [30] to [336],[Author of Anthropological Report 1 - name deleted] report at [pp. 7-13], affidavits of [Applicant 3 - name deleted] and [Clan Group 1 - name deleted]. In my view, there appears to be 'an apparent similarity' of the laws and customs outlined—*Gudjala [2009]* at [33].
- The [Author of Anthropological Report 2 - name deleted] report contains material and information, including contemporary oral accounts, on how the traditional laws and customs have been passed down through the generations of the society which existed at sovereignty and which continues to exist—at [30] to [359].
- The claim group's 'ongoing observance of traditional laws and customs is consistent with the maintenance of traditional rights and interests in the land subject to the claim'—[Author of Anthropological Report 1 - name deleted] report at [p. 15].
- The [Author of Anthropological Report 2 - name deleted] report contains material and information on the rights and interests in Gudjala country stemming from the traditional laws and customs—at [337] to [359].

Taking account of the above and the other material/information in the application and additional report of [Author of Anthropological Report 2 - name deleted], I am satisfied that there is a sufficient factual basis to support the assertion in s. 190B(5)(c).

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.

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

The nature of the task at s. 190B(6)

The pertinent point in considering the application against the requirements of this section is that the test is prima facie. Thus, 'if on its face a claim is arguable**,** whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'—*Doepel* at [135].

The test is said to involve some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed'—*Doepel* at [126], [127] and [132].

Further, in *Doepel,* Mansfield J noted that this section is one that permits consideration of material that is beyond the parameters of the application and requires the Registrar to:

> [C]onsider whether 'prima facie' some at least of the native title rights and interests claimed in the application can be established. By clear inference, the claim may be accepted for

registration even if only some of the native title rights and interests claimed get over the prima facie proof hurdle—at [16].

Native Title rights and interests

In undertaking the task at s. 190B(6), I must have regard to the relevant law as to what is a native title right and interest, specifically the definition of native title rights and interests contained in s. 223(1) of the Act. That is, I must examine each individual right and interest claimed in the application to determine if I consider, prima facie, that they:

- exist under traditional law and custom in relation to any of the land or waters in the application area;
- are native title rights and interests in relation to land or waters: see chapeau to s. 223(1); and
- have not been extinguished over the whole of the application area.

The 'critical threshold question' for recognition of a native title right or interest under the Act 'is whether it is a right or interest 'in relation to land or waters'—*Western Australia v Ward* [2002] HCA 28 (*Ward HC*), Kirby J at [577]). Remembering '[t]hat the words 'in relation to 'are of wide import'—(*Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group* [2005] FCAFC 135 (*Alyawarr FC*)).

In the interests of brevity, I do not intend to examine this 'threshold question' separately in respect to each native title right and interest claimed. Having examined each of the native title rights and interests set out in the application, it is my view that, prima facie, each is a right or interest 'in relation to land or waters.'

As to the other requirements for native title rights and interests, this was put succinctly by the majority in *Yorta Yorta* (referring primarily to s. 223(1)(c) but alluding to the requirements of s. 223(1)(a)):

> Native title ***owes its existence and incidents to traditional laws and customs*** [emphasis added], not the common law. The role of the common law is limited to the recognition and protection of native title. That recognition and protection ***depends on native title not having been extinguished*** [emphasis added]and its not having incidents that are repugnant to the common laws... requires examination of whether the common law is inconsistent with the continued existence of the rights and interests that owe their origin to Aboriginal law or custom—at [110].

It is also my view that the way in which the applicant has framed the rights and interests claimed (Schedule E) in relation to the application area (Schedule B) sufficiently addresses any issue of extinguishment, for the purpose of the test at s. 190B(6). Thus, while I address this issue briefly in my reasons in regard to the applicant's claim for exclusive rights and interests, I do not go any further in examining the question of extinguishment.

The native title rights and interests claimed by the applicant have been reproduced in my reasons at s. 190B(4). I now consider each of those rights and interests as claimed. I note that in some instances I have grouped certain rights and interests together.

Exclusive rights and interests

1) Land and waters where there has been no prior extinguishment of Native Title or where section 238 (the non-extinguishment principle) applies:

The native title rights and interests claimed are the right to possession, occupation, use and enjoyment of the claim area as against the whole world, pursuant to the traditional laws and customs of the claim group but subject to the valid laws of the Commonwealth of Australia and the State of Queensland.

(The application does not include a claim for exclusive possession over previous non-exclusive possession act areas as defined under section 23F of the Native Title Act 1993 save where the Native Title Act 1993 and/or the common law allows such a claim to be part of the Native Title Determination application).

[See also Schedule B, which identifies areas not covered by the application and Schedule P, which states that the applicant does not claim exclusive possession of all or part of an offshore place].

The law

In *Western Australia v Ward* [2002] HCA 28, the majority considered that '[t]he expression "possession, occupation, use and enjoyment ... to the exclusion of all others" is a composite expression directed to describing a particular measure of ***control over access to land***' [emphasis added]. Further, that expression (as an aggregate) conveys 'the assertion of rights of control over the land', which necessarily flow 'from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country'—at [89] and [93].

In *Griffiths v Northern Territory of Australia* [2007] FCAFC 178 (*Griffiths FC*), the Full Court explored the relevant requirements to proving that such exclusive rights are vested in a native title claim group, stating:

> [T]he question whether the native title right of a given native title claim group include the right to exclude others from the land the subject of their application does not depend upon any formal classification of such rights as usfructuary or proprietary. ***It depends rather on the consideration of what the evidence discloses about their content under traditional law and custom*** [emphasis added]—at [71].

And further,

> It is not necessary to a finding of exclusivity in possession, use and occupation, that the native title claim group should assert a right to bar entry to their country on the basis that it is "their country". If control of access to country flows from spiritual necessity because of the harm that "the country" will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive... The question of exclusivity depends upon the ability of the appellants effectively to exclude from their country people not from their community ... Nor is exclusivity negatived by a general practice of permitting access to properly introduced outsiders—at [127].

My decision

A review of the material outlined above, at s. 190B(5), indicates to me that, prima facie, this exclusive right claimed by the native title claim group is shown to exist under traditional law and custom over those areas where they have not been extinguished. I refer to the following material within the applicant's factual basis that, in my view, prima facie, supports the existence of the right to possession, occupation, use and enjoyment of the claim area as against the whole world:

- the Gudjala people are members of a regional Aboriginal jural public which includes their close neighbouring groups (particularly the Gugu Badhun, Warungu and Wulguru). This

is the relevant society—[Author of Anthropological Report 2 - name deleted] report at [30] to [46].

- it is this regional Aboriginal jural public from which the laws and customs of the Gudjala group are derived. There is a factual basis as to the active participation of the Gudjala group within this regional society—[Author of Anthropological Report 2 - name deleted] report at [30] to [225].
- the recognition of each group's rights in land 'is ultimately legitimated by the laws and customs shared by the broader regional society...' Language affiliations and territoriality are an important feature of this society, however movement between the territories of neighbouring groups is also noted—[Author of Anthropological Report 2 - name deleted] report at [58] to [75] and [230] to [237].
- the 'predecessors of the Gudjala native title claim group occupied, used and defended their territories from both indigenous and non-indigenous intruders.' The archaeological record, suggests that those within this claim region at sovereignty 'possessed laws and customs under which they occupied, used, enjoyed and spoke for country within the claim area ...'—[Author of Anthropological Report 2 - name deleted] report at [127] to [135].
- the Gudjala people and their neighbours have only a limited tolerance for infringement of boundaries, with the potential for verbal and physical confrontation when the wrong person speaks for the wrong country—[Author of Anthropological Report 2 - name deleted] report at [295].
- while trespassing on the land of a neighbouring group may not be discovered and/or punished by the land-holding group, 'punishment may ensue from supernatural agencies', with 'spirit induced malaise' being widely recognised amongst Gudjala people for speaking 'out of place' in relation to country that is not theirs—[Author of Anthropological Report 2 - name deleted] report at [295] to [297].

The claim to this exclusive right and interest is also supported by contemporary accounts, which appear intermittently within the [Author of Anthropological Report 2 - name deleted] report, including:

- [interview with [Clan Group 14 - name deleted], 6 April 2009] 'I speak for my family heritage of the country, other people say, "You don't speak for my country." I've had a few arguments in the past... If they go out there walking about themselves, who knows what could happen, they just get sick. Leg might give out for them. Just give 'em a warning. This is not their land. They've gotta get permission first to go there. Or get someone from here to take 'em there...'—[Author of Anthropological Report 2 - name deleted] report at [295] and [297].
- [interview with [Clan Group 12 - name deleted], 5 April 2009] 'Even historic folk, we call it getting sick now, from trying to claim our area...Well if we're going to run this person come with us, we sing out first...And we're bringing the person into our country'—[Author of Anthropological Report 2 - name deleted] report at [297].

It is claimed that, within the Gudjala native title claim group, the right to speak for country is ordered within the group, namely that smaller kin groupings may have the right to speak for

particular tracts of country, although communal title is still vested in the whole group: see affidavit of [Applicant 3 - name deleted], sworn 11 September 2006 at [4.4] and [Author of Anthropological Report 2 - name deleted] report at [294].

The nature of the society propounded by [Author of Anthropological Report 2 - name deleted], in my view, presents a somewhat intricate scenario. It is such that interaction between the various neighbouring groups is a prominent feature of that society, including some freedom of movement between the territories. For instance, the historical record cited by [Author of Anthropological Report 2 - name deleted] notes a certain degree of movement between the different linguistic or tribal areas, which apparently has continued to the present—at [58] to [65].

It is, however, as stated by the Full Court in *Griffiths FC ,* important to consider the way in which the traditional laws and customs 'have been framed by reference to relations with Indigenous people' and that when speaking of 'control of access' this is in clearly a reference to 'strangers'—at [127]. In my view, the information provided in the applicant's factual basis suggests that the laws and customs of the regional society of which the Gudjala People are a part, have been framed in a way that recognises the close relations between neighbouring groups, while still acknowledging the prominence of the law of territoriality for that society and for the separate land-holding groups, such as Gudjala.

In light of the factual basis, I consider that, on its face, this claim is one that is arguable.

Further, it is my view, that the way in which the applicant has framed this exclusive right and the way in which the applicant has framed the description of the application area (Schedule B of the application) takes account of the requirement that such exclusive native title rights and interests can only be recognised over areas where there has been no previous extinguishment of native title or where extinguishment is to be disregarded as a result of the Act.

Given that the application does not exclude any exclusive right to free flowing or free standing water, it is important to point out that such a right has been held to be inconsistent with common law principles and cannot be recognised: see for instance the Full Court's decision in *Attorney General of the Northern Territory v Ward* [2003] FCAFC 283 at [31].

Outcome: prima facie established

Non-exclusive rights and interests

2) All remaining land and waters within the claim area the Native Title rights and interests claimed are not to the exclusion of all others and are the rights to use and enjoy the claim area in accordance with the traditional laws acknowledged and customs observed by the Gudjala for the purposes of:

i) accessing land and waters

ii) entering and remaining on the land being claimed

The native title claim group's right to access, enter and remain on the land and waters within the application area is well documented in the material. That material suggests that these rights exist under the traditional laws and customs of the group.

In his report, [Author of Anthropological Report 2 - name deleted] details historical record in relation to the use and occupation of country within the claim area, together with evidence pertaining to occupation of stations within the claim area. This is coupled with material on the laws and customs relevant to such use and occupation, such as local country groupings and group membership, dispute settlement and spiritual obligations in relation to the land—at [136] to [225] and [406] to [468].

In his affidavit of 11 September 2006, [Applicant 3 - name deleted] says that '[a]s a Gurrdjal [referring to his language group], I do not have to ask permission of any person to be or walk on Gurrdjal Country even for burning on Country'—at [3.2].

[Clan Group 14 - name deleted], in his interview with [Author of Anthropological Report 2 - name deleted] on 6 April 2009, states that he has a right to speak for his country and 'to hunt and fish and get bush foods, to camp in the country anywhere, no government is stopping us in our traditional lands and no one can stop us, pastoralists or whatever, we can walk about there'—[Author of Anthropological Report 2 - name deleted] report at [347].

I consider, prima facie, that these rights can be established.

Outcome: prima facie established

iii) hunting

iv) fishing

v) gathering and using the products of the claim area such [as] food, medicinal plants, timber, bark, ochres and earths, stone and resin, minerals, and using natural water resources of the area

The native title claim group's right to hunt, fish and to use the natural resources on the land and waters within the application area is evidenced in the material. That material suggests that these rights exist under the traditional laws and customs of the group.

[Author of Anthropological Report 2 - name deleted] opines that '[h]unting, preparing and consuming animals, plants and other materials taken from the claim area continues to be a marker of the claimant group's identity as traditional owners of the region'—[Author of Anthropological Report 2 - name deleted] report at [346].

The [Author of Anthropological Report 2 - name deleted] report details historical records of these practices amongst the claimant's predecessors, including the use of specialised tools for fishing in waterholes observed inside the claim area in the mid 1800's. According to [Author of Anthropological Report 2 - name deleted], rules regarding such practices as fishing and hunting and what is termed 'demand sharing' among kin are believed to have been derived from 'an ancestral temp-plate'—at [219] to [220] and [278].

Further, [Author of Anthropological Report 2 - name deleted] opines that the ethno-historical record points to the claimant's predecessors having possessed laws and customs authorising rights in relation to collection and consumption of natural resources. That record also points to the actual collection and use of such resources occurring amongst inhabitants of the area in the 1800's. An important feature of such practices and the laws and customs is said to be the presence of walking tracks made by the ancestors—at [213] to [218].

[Author of Anthropological Report 2 - name deleted] states that, 'the pleasure of travelling to and "checking up on country" are believed to keep the sentient landscape alive and responsive to the needs of those who properly belong there. This sentience is at least partly derived from the marks left by ancestors' prior presence...'—at [286].

There are also contemporary claimant accounts, which evidence the existence of such rights under the traditional laws and customs of the group, including:

- [interview with [Clan Group 8 - name deleted], 6 April 2009] 'This story I heard from old people. Old man and young one came there to Fletcher to fish to take back to their family. The old fella said "we only need enough for our family"'—at [277].
- [interview with [Clan Group 14 - name deleted], 6 April 2009] 'We hunt and fish and everything. We do all that you know...Plenty of bush plants. Little bush bananas there, berries, and whatever you need'—at [346].
- [interview with [Clan Group 18 - name deleted], 27 April 2009] [Cultural Story 4 – text deleted]—at [346].
- [interview with [Clan Group 19 - name deleted], 26 April 2009] 'We had possum, porcupine, kangaroo, turkey, fish and emu when we were kids. [ancestor 16 - name deleted] (Mum's brother) did all the cooking, he was the main one taught us about it...'—at [346].
- [interview with [Clan Group 10 - name deleted], 30 April 2009] 'The old people showed us fishing traps along the Fletcher on [Sacred Place 2 – name deleted]...We'd go to Red Falls, all the basalt country, it has springs through it and water all year round'—at [432].

[Applicant 3 - name deleted], in his affidavit of 24 January 2006, says that [ancestor 17 - name deleted] taught him how to fish near Gainsford, in the claim area. She would tell him 'not to take home all of the fish we caught but to leave some for the *[*Dreaming Beings 3 – name deleted*]* as an offering.' He was taught about many other natural resources in the claim area and how to find and cultivate them. He has also taught his nephews about such practices—at [11] to [21]. There is also material in the affidavit of [Applicant 3 - name deleted], sworn 11 September 2006, that provides support for above native title rights and interests, including details of hunting and fishing practices, the use of bush medicines and the gathering and use of various resources by the claim group in the application area—at [3.3] to [3.9].

Schedule Q of the application is to the effect that the applicant does not make any claim to any resources owned by the Crown, including minerals, petroleum or gas.

I consider, prima facie, that these rights can be established.

Outcome: prima facie established

vi) camping and erecting shelters

In opining that the predecessors of the native title claim group occupied and used the application area, [Author of Anthropological Report 2 - name deleted] points to the historical and archaeological record, showing frequency of the presence of camp-sites noted in the area and infrequent records of cited rockshelters, sacred trees, wells and burial sites—at [127] to [135].

Claimant accounts of this right being exercised in more contemporary times are also set out in the [Author of Anthropological Report 2 - name deleted] report, including:

- [interview with [Clan Group 8 - name deleted], 6 April 2009] 'We can camp anywhere in our country, you know. I mean, no government is stopping us from camping in our country... If we want to go out walkabout, we can go out walkabout'—at [342].
- [interview with [Applicant 3 - name deleted], 28 June 2009] 'We got with [ancestor 18 - name deleted] at Flat Rock (on the Braughton) and we'd go camping at Flat Rock for a week'—at [346].
- [interview with [Clan Group 20 - name deleted], 3 May 2009] 'We always go to Fletcher camping, we just came back after 6 weeks there. All mum's side of the family came up, they camped on the other side...'—at [441].

I consider, prima facie, that this right can be established.

Outcome: prima facie established

vii) engaging in cultural activities

viii) conducting ceremonies and holding meetings

ix) teaching the physical and spiritual attributes of locations and sites[4]

[Author of Anthropological Report 2 - name deleted] relies on a range of historical data that he opines points to the participation, at sovereignty, of the regionally active population, including the Gudjala people, in initiation ceremonies, ceremonial dispute resolution, art and bodily adornment. He concludes that the data is indicative of 'a lively ceremonial world which was shared across the broader cultural region encompassing the current claim area'—at [174] to [225].

Referring to the teaching of the physical and spiritual attributes of locations and sites, [Author of Anthropological Report 2 - name deleted] cites the transmission of stories 'to those now living from previous generations of Gudjala people (often referred to simply as "old people").' Such stories have continued to be transmitted across generations and there is 'a strong emphasis upon a narrator being properly "in place"'—at [348] to [353].

[Applicant 3 - name deleted] in his affidavit of 11 September 2006, states the following:

[Cultural Story 6 – text deleted]

> I am aware of the existence and sites of law grounds throughout the Country—at [6.7].
>
> Among young people ceremonies were and are passed on by paintings, orally and by dances—at [6.8].

In her affidavit of 25 January 2006, [Clan Group 1 - name deleted]says that as a senior woman in the Gudjala community she helps to teach younger people about their ancestors, laws and customs—at [7].

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[4] This right has been recognised by the Court as a non-exclusive right in a number of matters: see for instance *Griffiths v Northern Territory of Australia* [2006] FCA 1155 and *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakay Claim group* [2005] FCAFC 135.

I consider, prima facie, that these rights can be established.

Outcome: prima facie established.

x) participating in cultural practices relating to births, marriages and deaths on the claim area

There is material within the [Author of Anthropological Report 2 - name deleted] report indicating that the right to participate in cultural practices relating to births, marriages and deaths exists under the traditional laws and customs of the native title claim group.

In the historical context, [Author of Anthropological Report 2 - name deleted] identifies a 'four section marriage class system' as being relevant to the society of which the Gudjala are a part. Citing Gaggin (cited in Howitt 1904:498-499; Kennedy 1948:1) [Author of Anthropological Report 2 - name deleted] recounts that:

[Cultural Story 7 – text deleted]

[Author of Anthropological Report 2 - name deleted] opines that this, and other material cited, provides evidence of a normative system of laws and customs within the region that relate to marriage and mortuary rites—at [156]:see also [Author of Anthropological Report 2 - name deleted] report at [136] to [157] and [199] to [209].

Contemporary accounts detail how such laws and customs have been carried on by the native title claim group. For instance, claimants continue to visit places which were set aside for marriage promises. Such sites are believed to possess 'an enduring power and possible danger for strangers'. Furthermore, the focus of senior people's concerns about kinship practices relates to the law that marriage should be avoided between people who are 'too closely related'—[Author of Anthropological Report 2 - name deleted] report [262] to [272].

As with their ancestors' mourning practices, today's claimants' practices involve 'an entire social group' and periods of mourning extend until the 'family is satisfied'. Further, cultural norms, such as avoidance of speaking the names of deceased persons, persist in the current context—[Author of Anthropological Report 2 - name deleted] report at [298] to [305].

In relation to the existence of a right to participate in cultural practices relating to births, there is, in my view, a dearth of material.

That said, and having examined the factual basis in its entirety, it is my understanding that this right relates to the participation of the native title claim group in 'cultural practices', which may include those connected to marriage, death or birth. I am of the view that the material suggests that this right exists under the traditional laws and customs of the native title claim group.

I consider, prima facie, that this right can be established.

Outcome: prima facie established

xi) making decisions, pursuant to Aboriginal law and custom about the use and enjoyment of the land by Aboriginal people

The native title claim group's right to make decisions, pursuant to Aboriginal law and custom about the use and enjoyment of the land by Aboriginal people is evidenced in the material. I consider, prima facie, that this is a right that exists under the traditional laws and customs of the native title claim group.

[Author of Anthropological Report 2 - name deleted], in his report details the role of elders as authoritative structures 'particularly in regard to their authority in assessing the connections to country associated with different family groups'—at [281]. He opines that 'local authority is vested in knowledgeable elders, particularly in any discussions about land and its resources'—at [25].

Claimant accounts also detail how this right has been exercised by the native title claim group, including:

- [interview with [Clan Group 16 - name deleted], 2 April 2009] 'Elders give the clearance. Different families talk for special areas'—at [281].
- [interview with [Clan Group 15 - name deleted], 8 April 2009] 'The old people, [Clan Group 6 - name deleted]s, lived at Corinda (near airport, just out of town) and they used to tell me about the country and life on the stations. The oldest sibling has to tend the family and talk for country'—at [282].

There is some divergence within the authorities as to whether this right as expressed is one that is capable of recognition as a non-exclusive right,[5] with the suggestion that such a right, as expressed, equates to a right 'to control access', and therein lies the inconsistency.

The apparent tension of the expression of such a right ['a right to make decisions about the use and enjoyment of the land'] as non-exclusive was noted in *Ward HC* in the joint judgment:

> It is necessary to recognise that the holder of a right, as against the whole world, to possession of land, may control access to it by others and, in general, decide how the land will be used. But ***without a right of possession of that kind, it may greatly be doubted that there is any right to control access to land or make binding decisions about the use to which it is put*** [emphasis added]. To use those expressions in such a case is apt to mislead—at [52].

It was, however, also pointed out in *Ward HC*, that the inquiry into the nature of the rights and interests and whether they are recognisable is one of fact—at [18]. In my view, this supports the approach that while some rights and interests may be expressed similarly, it is the factual inquiry which is revealing of the true nature of the right or interest and not the expression per se.

In any event, this right, as expressed, has been found to be capable of recognition as a non-exclusive right. Any question of law will ultimately be answered by the Court.

It is my view that while involving disputed questions of law, this claim, on its face, is arguable.

Outcome: prima facie established

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[5] See for instance *Ward v State of Western Australia* [2006] FCAFC 283 at [27], where the Full Court held that such a right as expressed correlated to 'control of access', and that this was inconsistent with such a non-exclusive right. This was followed expressly in *Jango v Northern Territory* [2006] FCA 318. Other decisions, however, have recognised this right as expressed: see *De Rose v State of South Australia (No 2)* [2005] FCAFC 110. A number of consent determinations have also recognised this right, including *Mundraby v Queensland* [2006] FCA 436 and *Yankunytjatjara/Antakirinja Native Title Claim Group v The State of South Australia* [2006] FCA 1142.

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.

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

This section imposes 'some measure of substantive (as distinct from procedural) quality control upon the application'. It requires that the evidentiary material be capable of satisfying the Registrar or delegate of a particular fact(s), specifically that at least one member of the claim group 'has or had a traditional physical connection' with any part of the claim area—*Doepel* at [18]. Although, the focus must necessarily continue to be one that is confined, as:

> It is not the same focus as that of the Court when it comes to hear and determine the application for determination of native title rights and interests. The focus is upon the relationship of at least one member of the native title claim group with some part of the claim area—*Doepel* at [18].

I also hold the understanding that the term 'traditional,' as used in this context, should be interpreted in accordance with the approach taken in *Yorta Yorta—Gudjala [2007]* at [89]). In interpreting connection in the 'traditional' sense as required by s. 223 of the Act, the members of the joint judgment in *Yorta Yorta* felt that:

> [T]he connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs ... "traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty—at [86].

With the above in mind, I am satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application.

In my view, within the anthropological reports of [Author of Anthropological Report 2 - name deleted] and [Author of Anthropological Report 1 - name deleted] and the affidavit material of [Applicant 3 - name deleted] and [Clan Group 1 - name deleted], there are numerous and specific references to current and previous members of the native title claim group which provide evidence of the requisite traditional physical connection by members of the native title claim group. For instance, the anthropological report of [Author of Anthropological Report 2 - name deleted] provides claimant accounts of members of the group accessing the application area, pursuant to their traditional laws and customs, including by hunting, fishing, camping, visiting significant sites, conducting ceremonies and meetings.

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

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

Section 61A provides:

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

(2) If :

(a) a previous exclusive possession act (see s. 23B) was done, 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;

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

(3) If:

(a) a previous non-exclusive possession act (see s. 23F) was done, 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;

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

(4) However, subsection(2) and (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

The application **satisfies** the condition of s. 190B(8). I explain this in the reasons that follow by looking at each part of s. 61A against what is contained in the application and accompanying documents and in any other information before me as to whether the application should not have been made.

Reasons for s. 61A(1)

Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title.

In my view the application **does not** offend the provisions of s. 61A(1).

The Tribunal's geospatial Services prepared an overlap analysis on 30 March 2010 (2010 geospatial analysis). That analysis confirms no determinations per the National Native Title

Register fall within the external boundary of this application as at 30 March 2010. I agree with this assessment.

Reasons for s. 61A(2)

Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply.

In my view the application **does not** offend the provisions of s. 61A(2).

Schedule B of the application excludes from the claim area any part of the claim area that is covered by a valid previous exclusive possession act, as set out in Division 2B Part 2 of the Act, attributable to the Commonwealth or State.

This is stated to be subject to the provisions of ss. 47, 47A and 47B of the Act, which does not offend the provisions of s. 61A(2): see s. 61A(4) of the Act.

The above statements, as contained in the application, are sufficient to show that the application is not made over areas covered by a previous exclusive possession act, unless the circumstances in subparagraph (4) apply.

Reasons for s. 61A(3)

Section 61A(3) provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done, unless the circumstances described in s. 61A(4) apply.

In my view, the application **does not** offend the provisions of s. 61A(3).

Schedule B of the application sets out that the applicant does not claim exclusive possession over areas that have been subject to valid previous non-exclusive possession acts done by the Commonwealth or the State.

This is stated to be subject to the provisions of ss. 47, 47A and 47B of the Act, which does not offend the provisions of s. 61A(2): see s. 61A(4) of the Act.

The above statements, as contained in the application, are sufficient to show that the application is not made over areas where a previous non-exclusive possession act was done, unless the circumstances in subparagraph (4) apply.

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.

The application **satisfies** the condition of s. 190B(9), because it meets all of the three (3) subconditions, as set out in the reasons below.

Reasons for s. 190B(9)(a):

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

Schedule Q of the application contains the statement that the applicant does not make any claim to the ownership of minerals, petroleum or gas wholly owned by the Crown.

Reasons for s. 190B(9)(b)

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

Schedule P of the application contains the statement that the applicant does not claim exclusive possession of all or part of an offshore place.

Result for s. 190B(9)(c)

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

Schedule B of the application excludes from the application any area where native title rights have been extinguished except to the extent that ss. 47, 47A or 47B may apply.

Each of the affidavits accompanying the application, in accordance with s. 62(1)(a) contain the affirmation that the native title rights and interests claimed have not been extinguished in relation to any part of the area covered by the application.

[End of reasons]

Attachment A
Summary of registration test result

Application name	**Gudjala #2**
NNTT file no.	**QC06/8**
Federal Court of Australia file no.	**QUD147/06**
Date of registration test decision	**30 June 2010**

Section 190C conditions

Test condition	**Subcondition/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	Subcondition/requirement		Result
		s. 62(2)(h)	Met
s. 190C(3)			Met
s. 190C(4)			Overall result: Met
	s. 190C(4)(a)		Met
	s. 190C(4)(b)		Not Applicable

Section 190B conditions

Test condition	Subcondition/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	Subcondition/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**