National Native Title Tribunal

Registration test decision

Application name	Wadja People
Name of applicant	Philip Obah, Judith Tatow, Daisy Gibson, Lennard Watson, Harriet Vea Vea
State/territory/region	Queensland
NNTT file no.	QC2012/010
Federal Court of Australia file no.	QUD422/2012
Date application made	22 August 2012
Name of delegate	Susan Walsh

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 190C are met. I accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

Date of reasons: 19 December 2012

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Susan Walsh

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 12 October 2012 and made pursuant to s. 99 of the Act.

Reasons for decision

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Introduction

This document sets out my reasons, as a delegate of the Native Title Registrar (Registrar), for the decision to accept the Wadja People (Wadja) native title determination application (application) for registration pursuant to s. 190A of the Act.

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.

Application overview

The application was made on 22 August 2012 when it was filed in the Federal Court of Australia (Court). On that day, the Court gave a copy of the application to the Registrar pursuant to s. 63 of the Act. This has enlivened the Registrar's duty to consider the claim made in the application in accordance with s. 190A(1) (commonly called the 'registration test'). On 23 October 2012, the Court provided 'replacement' affidavits by the applicant pursuant to s. 62(1)(a). On 22 November 2012 the Court granted the applicant leave to uplift the original affidavits filed by the applicant and for the affidavits filed on 23 October 2012 to replace these affidavits. The effect of this is that the affidavits filed on 23 October 2012 and provided by the Court to the Registrar on that day are the affidavits accompanying the application for the purposes of s. 62(1)(a).

The applicant is represented by Queensland South Native Title Services Limited (QSNTS), who is the body funded under s. 203FE(1) to perform the functions of a recognised representative A/TSI body for the area covered by the application. QSNTS have also certified the application pursuant to s. 203BE of the Act.

Registration test overview

The statutory scheme for applying the registration test is found in ss. 190A to 190D. The combined effect of ss. 190A(6) and (6B)[1] is that:

- I must accept the claim for registration if it satisfies all of the registration test conditions outlined in ss. 190B and 190C; and
- I must not accept the application for registration if the claim does not satisfy any one or more of the conditions in ss. 190B and 190C.

Section 190B sets out conditions that test particular merits of the claim made in the application and s. 190C sets out conditions about 'procedural and other matters'. The procedural condition is found in s. 190C(2) and requires me to be satisfied that the application contains certain specified details and other information and is accompanied by any prescribed documents (outlined in ss. 61 and 62). Some of these details are relevant to my consideration of the merit conditions in s. 190B. I propose therefore to consider the s. 190C(2) procedural condition first, in order to assess whether the application contains the requisite details etc. before turning to questions regarding the other matters in s. 190C and the merits of the claim described in the application in s. 190B.

[1] I note here that the consideration of the claim in the application is not governed by either of ss. 190A(1A) or (6A) as this is not an amended application.

Information considered

General principles

The ambit of the task when applying the provisions of ss. 190B and 190C was considered by Mansfield J in *Northern Territory of Australia v Doepel* (2003) 133 FCR 112; (2003) 203 ALR 385; [2003] FCA 1384 (*NT v Doepel*). I believe that the following extracts from that decision highlight the importance of focussing upon the particular conditions of ss. 190B or 190C in determining what it is appropriate to consider in relation to a particular condition or conditions:

> The Territory's contentions ... focus upon the substantive requirements for an application for determination of native title under the NT Act. The requirements it principally refers to are those in ss 61(1), 61A and 251B of the NT Act. Its detailed submissions looked extensively to the material available to the Registrar under s 190A(3) to support the claim that the Registrar erred in a reviewable way in deciding to accept the application for registration—at [13].
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> In my judgment, it is important first to focus upon the conditions imposed by ss 190B and 190C, and to determine what they impose in relation to the substantive provisions to which the Territory referred—at [14].
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> It is convenient to set out ss 190B and 190C in full. The consideration of them throws some light upon what the Registrar is required to be satisfied about in relation to their separate requirements ...—at [15].
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> . . .
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> It is trite to observe that the nature of the Tribunal's task is defined by those provisions. Its task is clearly not one of finding in all respects the real facts on the balance of probabilities, or on some other basis. Its role is not to supplant the role of the Court when adjudicating upon the application for determination of native title, or generally to undertake a preliminary hearing of the application. Section 190C, dealing with procedural and other matters, largely but not exclusively directs attention to the terms of the application itself. Section 190C(2) is confined to ensuring the application, and accompanying affidavits or other materials, contains what is required by ss 61 and 62. The matter raised by s 190C(4)(a) may also be met on the face of the application, perhaps supported by the Registrar's information about the relevant representative bodies. If s 190C(4)(b) applies, s 190C(5) imposes requirements which must appear from the application itself. Section 190C(3) on the other hand may involve the Registrar addressing information otherwise available: see e.g. s 190A(3)(b). Section 190B also has requirements which do not appear to go beyond consideration of the terms of the application: subs 190B(2), (3) and (4). Section 190B(5), (6) and (7) however clearly calls for consideration of material which may go beyond the terms of the application, and for that purpose the information sources specified in s 190A(3) may be relevant. Even so, it is noteworthy that s 190B(6) requires the Registrar to consider 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. Indeed it may be that the Registrar, upon being satisfied that some of the native title rights and interests claimed can, prima facie, be established, might not apply that evidentiary test to each of the claimed native title rights and interests—at [16].

> Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the `factual basis on which it is asserted' that the claimed native title rights and interests exist `is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts—at [17].
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> Section 190B(7) imposes a different task upon the Registrar. It does require the Registrar to be satisfied of a particular fact or particular facts. It therefore requires evidentiary material to be presented to the Registrar. The focus is, however, a confined one. 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. It can be seen, as with s 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration—at [18].
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> Consequently, it is clear that ss 190B and 190C impose a range of different tasks upon the Registrar in determining whether to accept for registration an application for determination of native title rights and interests. When considering whether the Registrar has fallen into reviewable error under s 5 of the ADJR Act, it will be necessary to identify the particular task of the Registrar which is under scrutiny. Not every one of those tasks requires the Registrar to have logically probative evidence about the facts to which the particular part of the application relates. The contentions of the Territory in relation to the alleged failure of the Registrar to have logically probative evidence in support of certain conclusions, or to have failed to have had regard to relevant material, or to have regard to irrelevant material, in reaching certain conclusions must be considered specifically in relation to the particular requirements of ss 190B and 190C—at [19].

I note that a Full Court of the Federal Court (French, Moore & Lindgren JJ) cited with approval Mansfield J's characterisation of the Registrar's general functions under s 190A at [16] to [18] of *NT v Doepel*: see *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317; [2008] FCAFC 157 *Gudjala (2008)* at [82] to [85]. I note also that at [90] to [96] of *Gudjala (2008)*, the Full Court said this in relation to the correct approach at s. 190B(5):

> A convenient starting point, in considering the correctness of his Honour's approach, is to consider the interaction between s 62 and s 190A in the terms they were in at the time the application was lodged. The former provision prescribes what an applicant must do to commence an application. The latter provision establishes a statutory regime under which the Registrar of the Tribunal assesses the application to determine whether it should be accepted. It is tolerably clear that what the assessment entails is informed by what is required of an applicant to commence an application. Indeed, there is no reason to doubt that this statutory scheme contemplates that it would be open to the Registrar to accept an application based on the application, including the accompanying affidavit, without having regard to other information of the type referred to in s 190A(3). Accordingly, the statutory scheme appears to proceed on the basis that the application and accompanying affidavit, if they, in combination, address fully and comprehensively all the matters specified in s 62, might provide sufficient

information to enable the Registrar to be satisfied about all matters referred to in s 190B. This suggests that the quality and nature of the information necessary to satisfy the Registrar will be of the same general quality and nature as the information required to be included in the application and accompanying affidavit. Of course, if an applicant fails to fully and comprehensively furnish the information required by s 62 then there is a risk that the Registrar will not accept the claim although that risk is ameliorated by the power of the Registrar to consider information additional to that contained in the application, including documents (other than the application) provided by an applicant: see s 190A(3)(a)—[90].

What then is the nature and quality of the information required by s 62? In substance, s 62(1) requires that the accompanying affidavit must contain evidence that the applicant believes the claimed rights have not been extinguished, believes none of the claimed area is covered by an entry in the Register, believes all the statements made in the application are true and that the applicant is authorised to make the application. The application must contain the details specified in s 62(2) and may contain details of the matters referred to in s 62(1)(c). There is an obvious link between the requirement that the evidence of the applicant include a statement that the applicant believes that all the statements in the application are true and the requirement that the application contain the details specified in s 62(2) together with the identification of the details in that subsection—at [91].

Of central importance in this appeal are the details specified by s 62(2)(e), namely details which constitute a general description of the factual basis on which it is asserted that the native title rights and interests claimed existed and, in particular, the matters referred to in ss 62(2)(e) (i), (ii) and (iii). Those details are in aid of the description, with some particularity, required by s 62(2)(d) of the asserted native title rights and interests. The fact that the detail specified by s 62(2)(e) is described as "a general description of the factual basis" is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim—at [92].

Turning to the specifics of this case, we think there are observations of the primary judge in his reasons which suggest that his Honour approached the material before the Registrar on the basis that it should be evaluated as if it was evidence furnished in support of the claim. If, in truth, this was the approach his Honour adopted, then it involved error. But there is another problem with the approach taken by his Honour. It leads us to the conclusion that the appeal should be allowed. As noted earlier, his Honour was critical of, and in many respects did not accept, the opinions expressed by Mr Hagen. For example, his Honour said "Mr Hagan's [sic] evidence provides opinions and conclusions rather than any alleged factual basis for such opinions and conclusions or for the claim" (at [52])—at [93].

> Mr Hagen'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 in relation to the various matters referred to in s 190B(5) ...—at [94].
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> ...
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> ... Mr Hagen's report did not fall for consideration by reference to questions of admissibility that would arise on a trial of the application—at [95].
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> The general approach the primary Judge took in relation to the evidence of Mr Hagen affected his approach in assessing the matters required to be considered by s 190B(5). For example, his Honour said (at [70]) that on the material presently available he could find no factual basis supportive of an inference that there was, in 1850-1860, an indigenous society in the area, observing identifiable laws and customs. However Mr Hagen's report, which formed part of the application (and in respect of which there were affidavits from members of the claim group saying the statements in the application were true), contained several statements which, together, would have provided material upon which a decision maker could be satisfied that there was, in 1850-1860, an indigenous society in the claim area observing identifiable laws and customs. It may be accepted that Mr Hagen's report does not deal in direct and unequivocal terms with this question and others that s 190B requires must be addressed. But it is not true that his report provides no factual basis in the way described by his Honour. Had his Honour given appropriate weight to Mr Hagen's report, that report together with other material could well have sustained a conclusion that the application should be accepted. We accept that in relation to some of the asserted native title rights and interests there was a dearth of material that such rights and interests had been and continue to be observed, but that would not have been fatal to the acceptance of the claim—at [96] (Underlining added).

In my view, these passages from *Gudjala (2008)* and also from [82] to [85] of that decision establish that I must accept as true what I am told about the applicant's asserted factual basis. This, in my view, constrains what I may consider when testing the application against the condition of s. 190B(5). It is also my view that the above comments by the Full Court are relevant more generally to the nature of the task for the other conditions in ss. 190B and 190C, subject to the comments by Mansfield J at [16] to [18] of *NT v Doepel* in relation to what a particular condition may require.

Having regard to these passages from *NT v Doepel* and *Gudjala (2008)*, it is my view that close attention needs to be paid to the provisions of ss. 190B and190C when considering a claim for registration pursuant to s. 190A.

Section 190A(3)

Further, in my view, s. 190A(3) is of central importance to the statutory scheme as it sets out the information that I must have regard to, and provides that there may be other information to which I may have regard, if I consider it appropriate.

Section 190A(3) provides:

> In considering a claim under this section, the Registrar must have regard to:
> (a) information contained in the application and in any other documents provided by the applicant; and
> (b) any information obtained by the Registrar as a result of any searches conducted by the Registrar of registers of interests in relation to land or waters maintained by the Commonwealth, a State or a Territory; and

(c) to the extent that it is reasonably practicable to do so in the circumstances—any information supplied by the Commonwealth, a State or a Territory, that, in the Registrar's opinion, is relevant to whether any one or more of the conditions set out in section 190B or 190C are satisfied in relation to the claim;

and may have regard to such other information as he or she considers appropriate.

I note here that I do not have any information of a kind described in paragraphs 190A(3)(b) and 190A(3)(c).

Information in the application and other documents provided by the applicant

Pursuant to paragraph 190A(3)(a), I have considered the information in the application, including that found in the attachment documents filed in the Court with that application[2] and the accompanying affidavits by the applicant and filed in the Court pursuant to s. 62(1)(a). I have also considered the information in any other documents provided by the applicant, as required by s. 190A(3)(a). The other documents provided by the applicant comprise a series of documents identified in a letter from QSNTS dated 25 October 2012 and an email dated 31 October 2012 including an annotated version of the joint Schedules F and M found in the application, followed by a series of documents to support the factual basis provided by the applicant for the assertion that the claimed native title rights and interests exist and for the three particular assertions in s. 190B(5) and by three affidavits and part of a witness statement. (A complete list of the documents provided by the applicant is identified in my reasons below at s. 190B(5).)

Other information to which I consider it appropriate to have regard

The Registrar may go beyond what is in the application in relation to certain of the conditions of ss. 190B and 190C and 'for that purpose, the information sources in s. 190A(3) may be relevant'.[3] The only other information that is before me in this category is a report by the Registrar's Geo-spatial Specialist dated 5 September 2012 (Geospatial report) in relation to the existence or otherwise over the application area of any previously registered native title claims, approved determinations of native title or future act notices (relevant, respectively, to the conditions of ss. 190C(3) and 190B(8) and, if relevant, the employment of best endeavours to finish this decision under s. 190A(2)).

I note that the Geospatial report reveals the existence of the QC2012/010—Gaangalu Nation—QUD400/2012 native title determination application (Gaangalu application), which partly overlaps the northern reaches of the Wadja application. It is necessary for me to consider the implications for the Wadja application in relation to the condition of s. 190C(3) and I discuss this below.

However, it is my view that it is not appropriate to have regard to any information from the Gaangulu application in a more general sense, having regard to the limited ambit of the Registrar's task when considering the conditions of ss. 190B and 190C, as discussed above by Mansfield J in *NT v Doepel*. There are also the comments of the Full Court in *Gudjala (2008)* which I have found relevant when considering the ambit to what it may be appropriate to have regard.

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[2] Where I have considered an attachment document from the application, this is discussed in the reasons that follow.

[3] *NT v Doepel* at [16] discussing that ss. 190B(5), (6), (7) and 190C(3) and (4) may call for consideration of information beyond the terms of the application.

The Registrar was approached by the solicitor for the competing and overlapping Gaangalu Nation applicant, who sought to have a submission considered. This approach was not solicited by either myself, the Registrar or any member of the staff of the Tribunal. I note also that I was not made aware of the contents of that submission. My first port of call is to decide whether I must have regard to information from the Gaangalu Nation applicant under s. 190A(3). I am of the view that information from a competing claimant such as the Gaangalu Nation applicant is not something that I must have regard to under subparagraphs 190A(3)(a) to (c). The next step is to decide whether it is appropriate to have regard to information from such a source under the concluding words of s. 190A(3).

I have decided that it is not appropriate to have regard to any information from such a source, having regard to the limited ambit of the Registrar's task when considering the conditions of ss. 190B and 190C, as discussed above by Mansfield J in *NT v Doepel*. I gave instructions to the Tribunal case manager to return the submission unopened, which has been done.

Procedural fairness

The High Court recently affirmed a long line of authority that the question of whether procedural fairness is owed in relation to the making of an administrative decision must first be considered with reference to the relevant statutory scheme under which that decision is made, and is not governed by questions in relation to whether or not a person is aggrieved by the decision.[4] In the context of s. 190A, these principles have been affirmed in the following decisions:

- *Western Australia v Native Title Registrar and Belotti* (1999) 95 FCR 93; [1999] FCA 1591 at [29], [31]–[38] (*WA v Registrar*) (Carr J);
- *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 at [15]–[16] and [21] (*Gudjala 2007)*) (Dowsett J);[5]*Hazelbane v Doepel* (2008) 167 FCR 325; [2008] FCA 290 (*Hazelbane*) at [21], [25]–[26] (Mansfield J).

In the particular circumstances of this case, where my decision is to accept the claim in the application for registration, it is my view that the only person to whom procedural fairness is owed is the State of Queensland (see *WA v Registrar*). Subject to what is said in s. 190A(3)(c) about it being reasonably practicable to do so in the circumstances, it is my view that this requires that the State of Queensland (State) is extended an opportunity to have a submission considered and to comment on any additional information that is before me. The State was afforded this as follows:

- by letters dated 24 and 30 August 2012, when the Registrar's case manager provided the State's officers with a copy of the application pursuant to s. 66(2) and offered an opportunity to make submissions by 11 October 2012;
- by letter dated 23 October 2012, when the Registrar's case manager provided the State with a copy of the additional affidavits filed by the applicant pursuant to s. 62(1)(a), which the Registrar received from the Court on 23 October 2012 and which accompany the application for the purposes of s. 62(1)(a);
- by letter dated 8 November 2012, when the Registrar's case manager provided the State with a copy of the applicant's additional information received from QSNTS on 25 and 30 October

[4] *Plaintiff S10-2011 v Minister for Immigration and Citizenship* [2012] HCA 31.
[5] This aspect of his Honour's decision was not considered on appeal.

2012, with an opportunity to comment by 16 November 2012. By e-mail dated 13 November 2012, a senior research officer, claims resolution, employed by the Aboriginal and Torres Strait Islander Land Services informed the Registrar's case manager that the State would not be commenting in relation to the additional material.

As noted above, the solicitors for the Gaangalu Nation applicant attempted to provide me with a submission. Having regard to the decision of Mansfield J in *Hazelbane*, it is my view that, although a competing registered native title claimant may be aggrieved by a decision to register an overlapping claim, the statutory scheme which governs the registration test has excluded any entitlement to have a submission considered whilst the claim is being considered for registration, absent a legitimate expectation being created to the contrary.

According to Mansfield J at [18], this is because ss. 66(3) and 66(6) 'positively' directs the Registrar not to notify a range of persons about the claimant application, including overlapping registered native title claimants or others whose interests may be affected by a determination in relation to the application (if considered appropriate), until after the Registrar has decided under s. 190A whether or not to accept the claim made in the application for registration. His Honour later stated that:

- [I]n my view s 66(6)(a) makes it plain that in the normal course a competing registered native title claimant is not entitled to be given the opportunity to be heard when the Registrar is considering whether to accept for registration a native title determination application over the same area of land. The mere fact of having standing to challenge the Registrar's decision does not mean that the … applicants [for an overlapping claim] were entitled to the opportunity to make submissions to the Registrar and to present material to … [the Registrar] when … [the Registrar] was considering such a decision—at [26].

It is also relevant, in my view, that s. 190A(3) does not mandate consideration of information from a competing, overlapping claimant (whether registered or not). I note this because it was a material factor in the decision by Carr J in *WA v Registrar* that the State was owed procedural fairness. Paragraph 190A(3)(c) states that the Registrar must, 'to the extent that it is reasonably practicable to do so in the circumstances', have regard to 'any information supplied by the Commonwealth, a State or a Territory, that, in the Registrar's opinion, is relevant to whether any one or more of the conditions set out in section 190B or 190C are satisfied in relation to the claim'. However, the requirement to have regard to any such information is conditional, i.e. it must be 'reasonably practicable [to do so] in the circumstances'. The fact that a claim is affected by a s. 29 notice may mean it is not reasonably practicable to do so. Further, I must only have regard to information that, in my opinion, is relevant to the conditions of the test.

It was also relevant to his Honour that the Registrar had invited a submission from the State of Western Australia when giving it a copy of the application under s. 66(2)—at [37].

Although unsolicited, I was concerned to allay any expectation that I would consider information from the Gaangalu Nation applicant. Accordingly, I did not consider or read the document emailed to the Registrar's case manager and the case manager returned this information to the lawyer for the Gaangalu Nation applicant, along with a letter advising that I would not be considering the submission.

My decision

For the reasons that follow, I have decided that the claim in the application must be accepted for registration because it satisfies all of the conditions of ss. 190B and 190C.

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 refer to the following instructive comments by Mansfield J in *NT v Doepel* as to the ambit of the task at s. 190C(2):

> ... Section 190C(2) is confined to ensuring the application, and accompanying affidavits or other materials, contains what is required by ss 61 and 62 ...—at [16].
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> ... Section 190C(2) directs attention to the contents of the application and the supporting affidavits. It seeks to ensure that the application contains `all details' required by s 61. There is obviously good reason why that should be so. If the application did not contain the required information, for example as to the composition of the native title claim group, the subsequent determination of the application would be difficult ...—at [35].
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> ... s 190C(2), relevantly to the present argument, does not involve the Registrar going beyond the application, and in particular does not require the Registrar to undertake some form of merit assessment of the material to determine whether he is satisfied that the native title claim group as described is in reality the correct native title claim group ...—at [37].
>
> It may be observed that the above approach would enable a claim to be registered, notwithstanding that there was another native title determination application by a different native title claim group over the same claim area, or overlapping the claim area or part of it. Section 190C(3) would seem to acknowledge that should be the case, provided two native title claim groups themselves contained no overlap of membership. That would reflect the fact, as Blackburn J said in *Milirrpum v Nabalco Ltd* (1971) 17 FLR 141 at 178-179, that the boundaries of claim areas of native title claim groups are not precise and they may overlap. See also per Lee J in *Ward v State of Western Australia* (1998) 159 ALR 483 at 544—at [38].
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> Counsel referred also to *Quall v NTR* and to *Holborow v State of Western Australia* [2002] FCA 1428 (*Holborow*) as touching upon the present issue. *Quall v NTR* involved a challenge to the Registrar's refusal to accept for registration an application for determination of native title, inter alia, under s 190D(2) of the NT Act. Under such a review, as I noted earlier in these reasons, the Court is required to determine issues of fact: *WA v Strickland* at p 49 [65]. The argument that the Registrar was not entitled to go beyond the material in the application to adjudicate upon its registrability was rejected in the light of s 190A(3). In *Quall v NTR* the applicant for review argued that the Registrar had reached a wrong factual conclusion that the

> native title claim group identified in the application was in fact the relevant native title claim group, and not simply part of it: see at [26]. It was not argued that, for the purposes of s 190C(2), the Registrar could not have had regard to material outside the application itself. My observations at [23] and [26] about the Registrar being entitled to have regard to material extraneous to the application for the purposes of addressing the requirement of s 190C(2) must be seen in that context. With the benefit of the helpful contentions of counsel in this matter, I hold the view that, for the purposes of the requirements of s 190C(2), the Registrar may not go beyond the information in the application itself. I note that the registration in that case was also refused by reason of the requirements of s 190B(3) not being met—at [39] (Underlining added).

Having regard to *NT v Doepel,* it is my view that I must confine my consideration to the information within the application in considering whether the requirements of s. 190C(2) have been met. Further, I have considered what the Full Court said at [82] to [85] and [90] to [96] of *Gudjala (2008)* (set out above) that the Registrar must treat what is said in the application as true. I feel that these comments are also relevant to the Registrar's task at s. 190C(2), particularly in light of Mansfield J's comments (also set out above) that the Registrar is constrained to a consideration of what is in the application, must not consider material from extraneous sources at s. 190C(2) and must not undertake any kind of merit assessment of the material for the purposes of s. 190C(2).

With these principles in mind, I turn to the particular parts of ss. 61 and 62 which require the application to contain certain details/information or be accompanied by any 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).

NT v Doepel is authority that I am not required to look beyond the application, nor am I entitled to undertake a merit assessment to determine if I am satisfied whether the native title claim group described in the application before me is the correct native title claim group—at [35] to [37], [39] and [47]. That said, in seeking to verify that an application contains all the details and information required by ss. 61 and 62, I do ensure that a claim 'on its face, is brought on behalf of all members of the native title claim group' as that term is defined in s. 61(1)—*NT v Doepel* at [35] to [37].

Schedule A of the application contains the following description of the persons in the native title claim group:

> The native title claim group is comprised of all the persons descended from the following Wadja ancestors:
> - Myra Freeman
> - Harriet Dutton
> - Sarah Dodd
> - Lilla Livingstone

There is nothing on the face of the application to indicate that the described native title claim group is part only of, or does not include all, of the persons in the 'native title claim group', as

defined in s. 61(1). It follows in my view that the application contains the details required by s. 61(1) in relation to s. 190C(2).

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). These details are provided on the first and final pages of the application.

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

An application that persons in a 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). These details are found in Schedule A and I undertake an assessment of the sufficiency of the description in my reasons below for the related merit condition of s. 190B(3).

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

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

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

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

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

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

Note: Section 251B states what it means for the applicant to be ***authorised*** by all the persons in the native title claim group.

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

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

There are five persons comprising the applicant. Each of these persons made an affidavit which was filed with the application on 22 August 2012; however, I formed a preliminary view that the affidavits did not contain the statement required by subparagraph 62(1)(a)(iv), which the Registrar's case manager conveyed to QSNTS by letter dated 2 October 2012. On 23 October 2012, the Court provided the Registrar with copies of affidavits filed in the Court by the applicant to replace the original affidavits and also provided the Registrar with a copy of the orders made relevant to this on 22 November 2012. These affidavits were filed on 23 October 2012. In my view, these affidavits, although filed after the application, can nonetheless be said to accompany the application for the purposes of s. 62(1)(a), particularly as they have been accepted by the Court as replacing the original affidavits and have been referred by the Court to the Registrar under s. 63.

Each of the affidavits filed on 23 October 2012 has been competently made by the five persons comprising the applicant and contain the statements required by the five parts of s. 62(1)(a).

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), being 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), being a description of the area covered in Attachment B (external boundaries) and Schedule B (areas within external boundaries not covered by the application). I undertake an assessment of the sufficiency of the description in my reasons below for the related merit condition of s. 190B(2).

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

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

The application **contains** all details and other information required by s. 62(2)(b), being a map showing the boundaries of the area in Attachment C of the application.

Searches: s. 62(2)(c)

> The application must contain the details and results of all searches carried out by or on behalf of the native title claim group 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). Schedule D states that to the best of their knowledge no searches of the relevant kind have been carried out.

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) being a description of the claimed native title rights and interests in Schedule E which is not merely a statement to the effect that the claimed native title are all native title rights and interests that may exist or have not been extinguished at law. I undertake an assessment of the sufficiency of the description in my reasons below for the related merit condition of s. 190B(4). Whether or not some of the claimed rights and interests are prima facie established is the task of the merit condition at s. 190B(6).

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) being a general description of the factual basis in Schedule F which refers to a joint Attachment F and M, also

found within the application. I undertake an assessment of the sufficiency of the description in my reasons below for the related merit condition of s. 190B(5).

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** the details and other information required by s. 62(2)(f) being a list of current activities carrried out by the native title claim group in Schedule G.

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). The applicant states in schedule H that the Gaangalu application filed on 20 August 2012 is an overlapping application.

Section 24MD(6B)(c) notices: s. 62(2)(ga)

> The application must contain details of any notification under s. 24MD(6B)(c) of which the applicant is aware, that have been given and that relate to the whole or part of the area covered by the application.

The application **contains** all details and other information required by s. 62(2)(ga). Schedule HA states that the applicant is not aware of any notification.

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 states that the applicant is not aware of any notification.

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 requirement that the Registrar is satisfied in the terms set out in s. 190C(3) is only triggered if the previous application meets all of the criteria set out in subparagraphs (a), (b) and (c): *Western Australia v Strickland* (2000) FCR 33; [2000] FCA 652 at [9].

The Wadja application is the 'current application' and it was 'made' for the purposes of s. 190C(3) when it was filed in the Federal Court on 22 August 2012.

I refer to the comments of Mansfield J at [16] of *NT v Doepel* that s. 190C(3) 'may involve the Registrar addressing information otherwise available.' I have considered an analysis of the application area by the Registrar's Geo-spatial Specialist against the Register of Native Title Claims to identify whether or not there are any previously registered applications affecting that area at the time the current application was made on 22 August 2012.

The Geospatial report shows that there is one overlapping application, namely the Gaangalu application. Although the Gaangalu application is an overlapping application and there is information in Schedule O of the current application indicating there may be members in common, it is not a previously registered overlapping application in the sense required by paragraphs 190C(3)(b) and (c), because it was not on the Register of Native Title Claims when the current application was made on 22 August 2012. Accordingly, I do not have to consider whether or not there are common members between the two claim groups under s. 190C(3). To conclude, there are no previously registered overlapping applications and the requirements of s. 190C(3) are thus met.

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.

Note: The word ***authorise*** is defined in section 251B.

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

For the reasons that follow, I am satisfied that the application has been certified under Part 11 by the only representative body that could certify the application, namely, QSNTS.

Attachment R of the application contains the signed certification of the application by **[Person 1 – Name Deleted]**, the Chief Executive Officer of the QSNTS, dated 21 August 2012. Mr **[Person 1 – Name Deleted]** states at the outset that QSNTS is a body funded under s. 203FE(1) to perform the functions of a recognised representative A/TSI body and he has been delegated by QSNTS the function to certify the application. The Geospatial report shows that the area of land and waters covered by the application falls entirely inside the QSNTS representative body region.

In light of the express statement to this effect by Mr **[Person 1 – Name Deleted]** and my own knowledge that QSNTS is in receipt of funding to perfom the certification functions in a region known generally as the QSNTS region, I am satisfied that QSNTS is empowered to undertaken

the certification function in that region. The information in the Geospatial report satisfies me that QSNTS is the only representative body that could certify the application under Part 11.

For the certification to satisfy the requirements of s. 190C(4)(a) it must comply with the provisions of s. 203BE(4)(a) to (c). I am satisfied that the certification in Attachment R does so comply, for the reasons that follow.

Section 203BE(4)(a)

It is my view that the certification complies with s. 203BE(4)(a) as it makes the statements required by that section—QSNTS states its opinion at [2] and [3] respectively that all persons in the native title claim group have authorised the applicant to make the application and deal with all matters in relation to it and that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

Section 203BE(4)(b)

It is my view that the certification complies with s. 203BE(4)(b) as it briefly sets out the reasons for being of that opinion. The setting out of the reasons in the certification refer to the holding of an authorisation meeting on 5 August 2012 and provides details of the print and other media advertising campaign and giving of notice of the meeting by mail and phone calls to known members of the native title claim group so as to provide notice of the intention to authorise this native title determination application. There is information that the meeting was well attended and that attendance records were kept and other QSNTS meeting procedures were followed.

In my view s. 190C(4)(a) does not require me to 'look behind' these reasons or to question the merits of the representative body's certification— *NT v Doepel* at [78], [80] and [81] and *Wakaman People 2 v Native Title Registrar and Authorised Delegate* (2006) 155 FCR 107; [2006] FCA 1198 at [31] and [32].

Section 203BE(4)(c)

Section 203BE(4)(c) requires the QSNTS to, 'where applicable, briefly set out what the representative body has done to meet the requirements of s. 203BE(3)' which in turn requires it to make all reasonable efforts to reach agreement between any overlapping claimant groups and to minimise the number of overlapping applications (including proposed applications) of which the QSNTS is aware. Section 203BE(3) states that a failure to make these efforts does not invalidate any certification of the application by the representative body.

Paragraph 5 of the certificate states that the QSNTS is aware of a proposed native title claim on behalf of the Gaangalu Nation and briefly sets out what the representative body has done to meet the requirements of s. 203BE(3), which has 'included senior QSNTS staff meeting with the Gaangalu Nation's legal representatives and anthropological consultants' which was 'convened with a view to reconciling differences in research outcomes with a view to minimising possible areas of dispute.' The certificate states that 'during this meeting all reasonable efforts were made by QSNTS staff but unfortunately a resolution encompassing ... [the] dispute could not be reached.'

I am of the view that the certification complies with the requirements of s. 203BE(4)(c), having regard to the statements therein about what has been done to achieve agreement and minimise overlapping applications.

Summary of decision

It follows that I am satisfied that the application has been certified pursuant to Part 11 because the certification by QSNTS complies with the relevant provisions of Part 11 at s. 203BE(4).

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).

Mansfield J said at [16] of *NT v Doepel* that consideration of this condition does not require the Registrar to go beyond the terms of the application itself.

Section 190B(2) requires that the information in the application describing the area of land and waters covered by the application must be sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters. For the Registrar to be satisfied that this can be said, the written description and the map should be sufficiently consistent with each other.

The written description of the areas covered is found in Attachment B which uses a metes and bounds description that references topographic features, cadastral parcels, adjoining native title determination application boundaries, subparagraphs basin catchment areas and coordinate points, referenced to GDA94 in decimal degrees. The map showing these external boundaries is within Attachment C and it contains the following features:

- the boundary application area depicted as a dark blue outline;
- relevant native title determination application boundaries are shown with a dashed red outline and labelled;
- relevant cadastral are shown and labelled;
- a monochrome 1:250k topographic background;
- scale-bar, north-point and notes relating to the source, currency and datum of data used to prepare the map.

Paragraph [6] of Schedule B states that in the event of any discrepancy between the map and written description, the latter shall prevail.

It is my view that the information within the application about the external boundaries is comprehensive, logically consistent and sufficient to identify the area covered by the application on the earth's surface.

The areas not covered by the application are described in Schedule B, which generally excludes categories of land and waters, having regard to the provisions of s. 23B of the Act. It is my view that this offers a sufficiently certain and objective mechanism to identify areas which are not covered by the application, having regard to the statement by the applicant in Schedule D that no

searches of non-native title rights and interests have been undertaken (see *Daniel for the Ngaluma People v Western Australia* [1999] FCA 686 at [29] to [38]).

In conclusion, I am satisfied that the information and map required by paragraphs 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular areas of the 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).

I refer to my reasons above at s. 190C(2) in relation to s. 61(1) which transcribes the description of the native title claim group from Schedule A of the application and shows that the group is not named but described by reference to their descent from four named apical ancestors. It is thus necessary for me to consider whether the application meets the requirements of s. 190B(3)(b).

The decision of Mansfield J at [16] and [51] of *NT v Doepel* is authority that consideration of this condition does not require the Registrar to go beyond the terms of the application itself. Further, it is not a relevant consideration that the application correctly describes the native title claim group.[6] On this point also, I am of the view that that s. 190B(3)(b) only requires that the members of the claim group be identified or described sufficiently, not that there be a 'cogent explanation of the basis upon which they qualify for such identification— see [33] of *Gudjala (2007).*

In my view, descent from named ancestors is an acceptable mechanism and provides the requisite clarity required by s. 190B(3)—see *WA v Native Title Registrar* at [63] to [69]. It follows that I am satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

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).

My view is that for a description to meet the requirements of s. 190B(4), it must describe what is claimed in a clear and easily understood manner—see *NT v Doepel* at [91] to [92], [95], [98] to [101] and [123].

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[6] See *NT v Doepel* [32] to [51].

Mansfield J said at [16] of *NT v Doepel* that consideration of this condition does not require the Registrar to go beyond the terms of the application itself.

The application provides a description of the claimed native title rights and interests in Schedule E in the following terms:

1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s238, and/or ss47, 47A or 47B apply), the Wadja people claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to their traditional laws and customs.
2. Over areas where a claim to exclusive possession cannot be recognised, the Wadja People claim the following rights and interests:
   a) the right to access the application area;
   b) the right to camp on the application area;
   c) the right to erect shelters on the application area;
   d) the right to live on the application area;
   e) the right to move about the application area;
   f) the right to exist and be present on the application area;
   g) the right to hold meetings on the application area;
   h) the right to hunt on the application area;
   i) the right to fish on the application area; the right to take and use the natural water resources of the application area, including the beds and banks of watercourses;
   j) the right to take, use, share or exchange the natural resources on the application area;
   k) the right to gather the natural products of the application area (including food, medicinal plants, timber, stone, ochre and resin) according to traditional laws and customs;
   l) the right to light campfires for cooking, heating and lighting purposes on the application area; domestic purposes including cooking but not for the purposes of hunting or clearing vegetation
   m) the right to teach about the physical and spiritual attributes of the application area;
   n) the right to conduct ceremony on the application area;
   o) the right to participate in cultural activities on the application area;
   p) the right to maintain places of importance under traditional laws, customs and practices in the application area;
   q) the right to protect places of importance under traditional laws, customs and practices in the application area;
   r) the right to conduct burials on the application area;
   s) the right to be accompanied onto the application area by non-claim members required under traditional laws and customs for the performance of ceremonies or cultural activities and to assist in observing and recording traditional activities in the application area;
   t) the right to transmit the cultural heritage of the native title claim group including knowledge of particular sites; and
   u) the right to cultivate and harvest native flora according to traditional laws and customs.

2. The native title rights and interests are subject to:
   (a) the valid laws of the State of Queensland and the Commonwealth of Australia;
   (b) the rights conferred under those laws.

3. The native title rights and interests do not include ownership of any minerals, petroleum or gas that are wholly owned by the Crown.

I find this description clear and understandable and it follows, in my view, that the description is sufficient to allow the native title rights and interests claimed to be readily identified for the purposes of s. 190B(4).

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

The application **satisfies** the condition of s. 190B(5).

General principles

The Registrar's task at s. 190B(5) was analysed by Mansfield J in *NT v Doepel*, who said the following:

> Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the `factual basis on which it is asserted' that the claimed native title rights and interests exist `is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts (Underlining added).

This was approved by the Full Court in *Gudjala (2008)*—at [83] to [85], who also had this to say about the requirements of s. 62(2)(e) (which calls for the applicant to provide a general description of the factual basis within the application form) and how this feeds into what will amount to a sufficient factual basis under s. 190B(5):

> The fact that the detail specified by s 62(2)(e) is described as "a general description of the factual basis" is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality.

> But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim—at [92]. (Underlining added)

The Full Court indicated at [93] of *Gudjala (2008)* that it would be wrong for the Registrar to approach the material provided in relation to the factual basis 'on the basis that it should be evaluated as if it was evidence furnished in support of the claim'.

Following *NT v Doepel* and *Gudjala (2008)*, I therefore do not evaluate the applicant's asserted factual basis as if it were evidence furnished in support of the claim, nor do I criticise or refuse to accept what is stated in the application and other material that is before me in relation to the factual basis, apart from its sufficiency to fully and comprehensively address the relevant matters in s. 190B(5). My assessment of the material is limited to whether the asserted facts can support the claimed conclusions set out in s. 190B(5).

I am of the view that in the face of the significant comments by the Court referred to above as to the limits of the s. 190B(5) consideration, that disputed facts are not my province. It is not for me to supplant the Court's role in determining the identity of the rightful holders of native title. What is required is that I consider the quality of the applicant's asserted factual basis for the claimed rights and interests; but only in the sense of ensuring that, if they are ultimately found by a Court to be established, they can support the existence of the claimed native title. The role is to determine whether the asserted facts can support the claimed conclusions; it is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts.

The Full Court in *Gudjala (2008)* considers the analysis by Dowsett J in *Gudjala (2007)* of the elements a sufficient factual basis must address to meet the requirements of s. 190B(5).[7] There is nothing to indicate that the Full Court considered Dowsett J to have erred in his analysis of the particular assertions in s. 190B(5). It appears that Dowsett J, although mindful of the Full Court's direction on how to treat the factual basis materials, applied the same principles to his analysis when he again considered the application for registration in *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572[8] at [18] to [77] (*Gudjala (2009)*).

In my view, the approach by Dowsett J in *Gudjala (2009)* in relation to each of the particular assertions did not differ markedly to the approach which he took in *Gudjala (2007)*, with the possible exception of a less stringent approach to the first assertion in s. 190B(5)(a), found to be met on the material before his Honour when considering the application a second time—*Gudjala (2009)* at [79] and [80].

I note that in *Gudjala (2007)* Dowsett J said that '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)'—at [39]. However, it is my view that these comments need to be considered in the overall context of what else has been said on the nature of the Registrar's task and the requirements of s. 190B(5):

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[7] At [68] to [72], [77] and [90] to [96].
[8] *Gudjala (2009)*.

- the applicant is not required 'to provide anything more than a general description of the factual basis'—*Gudjala (2008)* at [92];
- the nature of the material provided need not be of the type that would prove the asserted facts —*Gudjala (2008)* at [92];
- the Registrar's function under s 190A is to determine whether the requirements of ss. 190B and 190C are satisfied according to their terms, rather than generally to consider the accuracy of the information in the application—*NT v Doepel* at [47];
- the Registrar is to assume that the facts asserted are true, and to consider only whether they are capable of supporting the claimed rights and interests—*NT v Doepel* at [17].

Mansfield J said at [132] of *NT v Doepel* that the Registrar did not err in his consideration of the application against the condition of s. 190B(5) by focussing on the factual basis provided for the particular assertions within paragraphs 190B(5)(a) to 190B(5)(c) because:

> If any of the particular requirements were not met, then the general requirement would not be met.

Having regard to this, I too focus on the particular requirements of s. 190B(5).

Information considered

The principal source of information about the asserted factual basis within the application is found in Schedule F, by way of a document attached to the application and labelled 'Attachment F and M – Wadja native title claim application' [Attachment F]. The five persons comprising the applicant have each sworn or affirmed in their affidavits accompanying the application pursuant to s. 62(1)(a) that they believe all of the statements in the application are true.

I have also received additional information from QSNTS dated 25 October 2012 on behalf of the applicant, comprising:

- A copy of Attachment F and M from the application, with referencing and footnoting added
- Extracts from the following source materials:
  - EM Curr—*The Australian Race Book 3*—pages 58–59
  - Bennett 1918—*The Vocabulary of the Mt Spencer Blacks*—pp 175–176
  - Capel 1963—*Linguistic survey of Australia*—Area E—page 16
  - Oates and Oates 1970—*A Revised Linguistic survey of Australia*—pages 157–158
  - Leichardt 1847—Journal Chapters 1–4 *Overland Journey from Moreton Bay to Port Essendon*—pages 50–71
  - Tindale N 1940—*Results of the Harvard Adelaide Universities Anthropological Expedition 1938–1939*—page 172
  - Tindale N 1974—*Aboriginal Tribes of Australia: their Terrain, Environmental Controls, distribution, Limits and Proper Names*—page 186
  - *Norman Tindale Genealogies*, 1938, Woorabinda, Sheets 85 and 9
- Affidavits by **[Claimant 1 – Name Deleted]** (11/02/12), **[Claimant 2 – Name Deleted]** (01/05/12), **[Claimant 3 – Name Deleted]** (12/12/11), **[Claimant 4 – Name Deleted]** (08/02/12), **[Claimant 5 – Name Deleted]** (01/12/11), **[Claimant 6 – Name Deleted]** (09/11/11), **[Claimant 7 – Name Deleted]** (01/10/11), **[Claimant 8 – Name Deleted]** (30/10/12), **[Claimant 9 – Name Deleted]** (30/10/12) and **[Claimant 10 – Name Deleted]** (20/10/12)
- Extract of witness statement of **[Person 3 – Name Deleted]** filed in the Court on 30/01/12

Association with the area—s. 190B(5)(a)

For the reasons that follow, I am **satisfied** that the factual basis on which it is asserted that the native title claim group have, and the predecessors of those persons had, an association with the area, is sufficient to support that assertion.

General principles

I understand from comments by Dowsett J in *Gudjala (2007)* that a sufficient factual basis for this assertion needs to address:

- that the claim group as a whole presently has an association with the area, although it is not a requirement that all members must have such an association at all times;
- that there has been an association between the predecessors of the whole group over the period since sovereignty—at [52].

This analysis of what the factual basis materials must support in relation to the assertion in s. 190B(5)(a) was not criticised by the Full Court in *Gudjala (2008)*—see [69] and also at [96].

Consideration

The native title claim group are known as the Wadja People and they are described in Schedule A as the descendants of four apical ancestors, Myra Freeman, Sarah Dodd, Lilla Livingston and Harriet Dodd. The application contains a map of the area covered by the application which includes a topographic overlay that names many of the places with which the native title claim group and their predecessors have and had an association.

Attachment F says that Wadja country is bounded by the Bigge, Expedition and Dawson Ranges, being natural geographic features which also inform the social, cultural and spiritual association maintained by the Wadja People to their country—at [1]. [I can see from the map of the application area in Attachment C that the external boundary coincides with these three mountain ranges.] The external boundary is said to be supported by the testimony of Wadja People, as well as by sources in the ethno-historical literature—at [2].

In relation to the position at sovereignty, Attachment F states:

- the explorer Leichardt did not arrive in the region until 1845–1846 and it was another 10 years until sustained settlemenjt of the region—at [4];
- at sovereignty [1788] there were Aboriginal people associated with the land of the claim area, some of whose descendants identify as Wadja People and who have taught their children to do the same—at [5];
- there is ethnographic literature on this area that confirms the existence of a land-owning group in the region that coincides with the area covered by the application, see Tindale in 1940 and again in 1970—at [6].

Extracts from the ethno-historical literature have been provided as additional information to suport the assertions about the extent of the country that belonged to the Wadja People before the arrival of the settlers:

- Leichardt 1847, *Overland Journey from Moreton Bay to Port Essendon*, pp 50–70, discusses the region in which the application lies [Expedition Range and Bigges Mountain on the western

and southern boundaries respectively] and refers to the presence of Aboriginal occupation there.

- E.M. Curr 1887, *The Australian Race*, Vol 1, pp 58–59 includes an entry for the eastern slopes of Expedition Range [the western boundary of the application area] and the lower Dawson, Upper Fitzroy, Mackenzie and Isaacs Rivers [to the north of the application area] and many of their tributaries by Peter McIntosh which says 'the *Kaangoo-loo* are a tribe, or rather a confederation of several tribes – the *Karranbal*, the *Maudalgo*, the *Malkali*, and others inhabiting this area. [Tindale, *Results of the Harvard Adelaide Universities Anthropological Expedition 1938–1939* (1940), questioned whether an alternative name for Wadja could be the *Maudalgo* referred to by McIntosh in Curr]
- Bennett 1918, *The Vocabulary of the Mt Spencer Blacks*, pp 175–176 refers to the 'last of the Lower Dee blacks' who 'came from the Mt Spencer area, which lies about 50 miles south-west of Rockhampton' [to the west of the application area].
- Capell 1963, *Linguistic Survey of Australia*, Area E, p 16 identifies that the Wadja were located on the '[s]treams on east side of Expedition Range; south to Bigge Range; east nearly to Dawson River' are '[r]eported as closely related to Gangulu'.
- Oates and Oates 1970, *A Revised Linguistic Survey of Australia,* pp 157–158 identifies that the Wadja were located on '[e]ast side of Expedition Range; south to Bigge Range; east nearly to Dawson River' and 'possibly a subgroup of Kangulu', along with Gangulu, Kaangooloo and others, referring to McIntosh and Ors in Curr's *Australian Race*.
- Tindale 1974, *Results of the Harvard Adelaide Universities Anthropological Expedition 1938–1939*, p 172, identifies them as from the streams on east side of Expedition Range, South to Bigge Range, east nearly to Dawson River, closely related to Kangulu and questions whether an alternative name for Wadja could be the *Maudalgo* referred to by McIntosh in Curr's *Australian Race*.
- Tindale 1974, *Aboriginal Tribes of Australia: their Terrain, Environmental Controls, distribution, Limits and Proper Names*, p 186 reiterates his 1939 entry and says also that they are the original inhabitants of Woorabinda [in the north of the application area] and '[n]ative tradition is that they were formerly two separate small tribes, Wadja and Wainjigo [who] lived together for "a long time" until their separate identities were submerged.'

I note in relation to these sources, that they document a boundary for the Wadja's traditional country [i.e. the Expedition, Bigge and Dawson Ranges/River] which coincides with the mapping provided to show that boundary and the extent of the area covered by the application.

In relation to the association over time by the native title claim group with the application area, the claim group comprise the descendants of four apical ancestors [Myra Freeman, Sarah Dodd, Lilla Livingstone and Harriet Dutton] who were connected to the area around the time of sustained settlement of the region and whose descendants also have an association as a result of their ancestral links with the area, the details of which are found in [8] to [17] of Attachment F, which I now outline.

The first Wadja ancestor, **[Apical Ancestor 1 – Name Deleted]**, was born in the 1870s and lived on or near the claim application area all of her life, for example at Planet Downs, Bauhinia and Fairfield Station. She married Karingbal man, **[Person 2 – Name Deleted]** [the Karingbal are neighbours to the south and west of the Wadja People]. **[Apical Ancestor 1 – Name Deleted]**'s

children were born at stations on, or to the immediate west of the claim application area, as she and **[Person 2 – Name Deleted]** moved around working there. **[Apical Ancestor 1 – Name Deleted]** died in the 1930s and is buried at Fairfield Station in the claim area, along with her daughter **[Claimant 12 – Name Deleted]**—at [8] to [9] of Attachment F.

It is said that a significant portion of **[Apical Ancestor 1 – Name Deleted]**'s descendants live on or near the claim area at Woorabinda [in the north of the application area], Blackwater [a town which lies outside the northern boundary of the application area] and Rockhampton [a relatively large regional centre, on the coast, north-east of the application area] and this is elaborated upon in the affidavits of her descendants, namely, **[Claimant 6 – Name Deleted]** [9/11/11], **[Claimant 1 – Name Deleted]** [11/2/12], **[Claimant 7 – Name Deleted]** [1/10/12], **[Claimant 5 – Name Deleted]** [1/12/11] and **[Claimant 3 – Name Deleted]** [12/12/11].

The second Wadja ancestor, **[Apical Ancestor 2– Name Deleted]**, was born circa 1858 on the banks of the Mimosa Creek [proximate to the north-eastern boundary of the claim area]. **[Apical Ancestor 2– Name Deleted]** lived and worked at Redcliff Station [also proximate to the north-eastern boundary] until exempted from the provisions of the *Aboriginal Protection and Restriction on the Sale of Opium Act 1897* [*Protection Act*] in 1904 and moving to Rockhampton. She is believed to have been nearly 100 years old when she died and is remembered by current claimants.

[Apical Ancestor 2– Name Deleted] had four children and also raised her grandson, **[Claimant 13 – Name Deleted]** [child of **[Claimant 14 – Name Deleted]**] who is the father of the claimants **[Claimant 15 – Name Deleted]** and **[Claimant 2 – Name Deleted]**. **[Claimant 13 – Name Deleted]** worked on properties throughout the claim area. There is an affidavit by **[Claimant 2 – Name Deleted]** which attests to her family's association with the application area dating back to **[Apical Ancestor 2– Name Deleted]**.

The third Wadja ancestor, **[Apical Ancestor 3 – Name Deleted]**, is known by her family to have associated with **[Apical Ancestor 2– Name Deleted]** at Redcliff Station on the claim area in the latter half of the 19th century. She was exempted from the *Protection Act* before her daughter **[Claimant 16 – Name Deleted]** was born in 1908. **[Apical Ancestor 3 – Name Deleted]**'s daughter **[Claimant 16 – Name Deleted]** and her husband **[Claimant 17 – Name Deleted]** had seven children who were all born at stations in the claim area where she worked. **[Claimant 16 – Name Deleted]**'s son, claimant **[Claimant 8 – Name Deleted]**, began working with his father on stations in the claim area when he was 12 years old, and was the recipient of much of his parents' knowledge of Wadja country.

The fourth Wadja ancestor, **[Apical Ancestor 4 – Name Deleted]**, is recorded as being born at Duaringa in 1845 to **[Claimant 18 – Name Deleted]** [see Tindale Woorabinda Genealogy, Sheet 85]. **[Apical Ancestor 4 – Name Deleted]** married **[Claimant 19 – Name Deleted]** in 1874 at Bauhinia Downs Station [in the south west of the application area]. They had seven children, five of whom were born at Bauhinia Downs, and all were born between 1800 and 1900. **[Apical Ancestor 4 – Name Deleted]** was recorded by Tindale as belonging to the 'Wainjigo' tribal group, which he elsewhere records as 'Wadjaingo tribe E[ast] of Rolleston, same as Wadja and Wainjigo'. The relevant notes taken by Tindale are referenced and a copy provided with the applicant's additional information [see Tindale' Genealogies, 1938, Woorabinda, sheets 9 and 85]. The descendants of **[Apical Ancestor 4 – Name Deleted]**'s daughter, **[Claimant 20 – Name Deleted]**,

are acknowledged by the claim group as having rights and interests in the application area which descend from **[Apical Ancestor 4 – Name Deleted]** and her daughter.

I have considered what is said about the association of the native title claim group with the application area within the affidavits provided by **[Claimant 1 – Name Deleted]** [11/2/12], **[Claimant 2 – Name Deleted]** [1/5/12], **[Claimant 3 – Name Deleted]** [12/12/11], **[Claimant 4 – Name Deleted]** [8/2/12], **[Claimant 5 – Name Deleted]** [1/12/11], **[Claimant 6 – Name Deleted]** [9/11/11] and **[Claimant 7 – Name Deleted]** [1/10/11] [these were provided to me as additional information by QSNTS on 25 October 2012].

[Claimant 1 – Name Deleted] [11/2/12]

[Claimant 1 – Name Deleted]'s great-grandmother is **[Apical Ancestor 1 – Name Deleted]** and great-grandfather is the Karingbal man **[Person 2 – Name Deleted]**. **[Claimant 1 – Name Deleted]** lived in Woorabinda most of her life with her large extended family, including her grandfather, **[Claimant 21 – Name Deleted]**, who was a son of **[Apical Ancestor 1 – Name Deleted]**. She spent a lot of time with Grandfather **[Claimant 21 – Name Deleted]**, as did the **[Family 1 – Name Deleted]**, **[Family 2 – Name Deleted]** and **[Family 3 – Name Deleted]**. **[Claimant 1 – Name Deleted]** states at [7] that Grandfather **[Claimant 21 – Name Deleted]** 'liked to keep all his grandchildren in the one place'. Grandfather **[Claimant 21 – Name Deleted]** worked for a long time as a tracker around Rewan [proximate to Rolleston, to the west of the application area] and came to Woorabinda with his family when young and some of **[Claimant 1 – Name Deleted]**'s aunties and uncles [Grandfather **[Claimant 21 – Name Deleted]**'s children] were born at stations between Springsure [to the west of the application area] and Woorabinda. **[Claimant 1 – Name Deleted]** spent a lot of time with her Aunts **[Claimant 14 – Name Deleted]** and **[Claimant 22 – Name Deleted]** and Uncle **[Claimant 23 – Name Deleted]** [her father's siblings].

They used to take **[Claimant 1 – Name Deleted]** and other kids out into the bush near Woorabinda and teach about the country. Wadja country stops at the Shotover Ranges [past the western boundary and above Expedition Ranges]. **[Claimant 1 – Name Deleted]** always knew that her father and Grandfather **[Claimant 21 – Name Deleted]** were Wadja and Karingbal, with the latter being next to Wadja on the western side, where her great grandfather, **[Person 2 – Name Deleted]**, came from. **[Claimant 1 – Name Deleted]** lived at Woorabinda when her children were young. **[Claimant 1 – Name Deleted]** was taught to collect resources from the bush, including gumbi gumbi, a healing ointment and to only take what they needed when hunting bush tucker.

[Claimant 1 – Name Deleted] and her siblings learnt about Wadja country from her Grandfather **[Claimant 21 – Name Deleted]** and from her aunts and uncle. When she went out bush with family, she was taught to call out to the old people and tell them who they are. She camped out there with her family. Her Uncle **[Claimant 23 – Name Deleted]** walked everywhere, including all the way to Duringa. **[Claimant 1 – Name Deleted]** discusses special places that she doesn't want others to know about, her concern being that they will use this information for another group's claim. She discusses a birthing place and a photo of it is found in her affidavit and a birthing tree, also photographed and found in her affidavit. There were places she wasn't allowed to go. The Wadja families include the **[Family 4 – Name Deleted]**, **[Family 1 – Name Deleted]**, **[Family 3 – Name Deleted]** and **[Family 5 – Name Deleted]** and she has also heard of the **[Family 6 – Name Deleted]** and **[Family 7 – Name Deleted]**, although they have moved away.

[Claimant 2 – Name Deleted] [1/5/12]

[Claimant 2 – Name Deleted] was born in Baralaba and is a Wadja woman through her father and an Iman woman via her mother. She has been given the responsibility to speak for her family by her Wadja father [**[Claimant 13 – Name Deleted]**, who was raised by his maternal grandmother, **[Apical Ancestor 2– Name Deleted]**]. **[Apical Ancestor 2– Name Deleted]** was born around 1858 on the banks of Mimosa Creek, near where Redcliff station now lies and before the establishment of Woorabinda. **[Apical Ancestor 2– Name Deleted]** told this to **[Claimant 13 – Name Deleted]**, who told **[Claimant 2 – Name Deleted]** that she used to say this was where she was born, like all her mob. **[Claimant 2 – Name Deleted]** believes this to mean that **[Apical Ancestor 2– Name Deleted]**'s mob was from Wadja country.

[Apical Ancestor 2– Name Deleted] was 96 years old when she died in 1954. She did not grow up on the mission because of her white father and exemption under the old Protection Act. **[Apical Ancestor 2– Name Deleted]** worked as a domestic on Redcliff station. Her three children were removed to a mission near Ipswich. **[Apical Ancestor 2– Name Deleted]** eventually moved away from her country and lived a lot of her life in Rockhampton, where she raised **[Claimant 2 – Name Deleted]**'s father and his two brothers. **[Claimant 2 – Name Deleted]**'s father and older sister **[Claimant 14 – Name Deleted]** remember that **[Apical Ancestor 2– Name Deleted]** kept in touch with her Wadja family, and people from her country would visit her, including the **[Family 10 – Name Deleted]** and **[Family 8 – Name Deleted]** families and **[Claimant 24 – Name Deleted]**'s family. **[Claimant 2 – Name Deleted]**'s older sister remembers a traditional funeral was held when **[Apical Ancestor 2– Name Deleted]** passed away.

[Claimant 2 – Name Deleted] grew up in Rockhampton with other Aboriginal families around her. Her uncles, including **[Claimant 25 – Name Deleted]**, know a lot about the people of the region and he told her that her people were Wadja. **[Claimant 2 – Name Deleted]** was told as a child that Wadja country included Woorabinda and that the boundaries were Expedition Ranges to the west, Dawson Ranges to the east and Bigge Range to the south. Their southern neighbours are Iman [to whom **[Claimant 2 – Name Deleted]** has links on her mother's side].

[Claimant 2 – Name Deleted] claims that her understanding is that the Gangulu are from around Mount Morgan [north-east of the application area] and although their country may come close to the Dawson Ranges, it does not cross over into Wadja country. The other Wadja families she sees the most are the **[Family 4 – Name Deleted]**, **[Family 2 – Name Deleted]**, **[Family 1 – Name Deleted]** and **[Family 5 – Name Deleted]** who are all connected to the Wadja ancestor, **[Apical Ancestor 1 – Name Deleted]**. She also sees the **[Family 8 – Name Deleted]** and the **[Family 7 – Name Deleted]**. She is very close to the **[Family 8 – Name Deleted]**, who trace their Wadja connections to **[Apical Ancestor 3 – Name Deleted]**, whose father was a white man. **[Claimant 2 – Name Deleted]**'s dad grew up with the **[Family 8 – Name Deleted]**, who came often to stay with **[Apical Ancestor 2– Name Deleted]**. [I have inferred that the reference to **[Apical Ancestor 3 – Name Deleted]** is to either apical ancestor 3, **[Apical Ancestor 3 – Name Deleted]**, or to a descendant of that ancestor].

[Claimant 3 – Name Deleted] [12/12/11]

[Claimant 3 – Name Deleted]'s great grandmother was **[Apical Ancestor 1 – Name Deleted]**. Her father was a Wadja man and his mother, **[Claimant 12 – Name Deleted]**, was born at Rewan Station and was a child of **[Apical Ancestor 1– Name Deleted]** and **[Person 2 – Name Deleted]**.

[Claimant 3 – Name Deleted] grew up in Woorabinda and lives there now. She is grateful for the bush tucker her family was able to get to supplement the mission rations. Her grandmother's brother, Grandfather **[Claimant 21 – Name Deleted]**, kept the Wadja families together at Woorabinda. Her parents, aunties, uncles and grandfather took them to places along Mimosa Creek, such as the crossing and Niagra Falls [south of Woorabinda].

Grandfather **[Claimant 21 – Name Deleted]** taught them a lot about Wadja culture, especially the boys. He would dance for them. He was clearly a strong influence on **[Claimant 3 – Name Deleted]** and her family. She learnt the name Wadja for her family's country in the late 1980s but it seems that this gave a name for the connection to coutnry they have always claimed through Grandfather **[Claimant 21 – Name Deleted]** and her grandmother, Nanna **[Claimant 12 – Name Deleted]**. When she goes on country she sings out to let the old people know who she is, that Nanna **[Claimant 12 – Name Deleted]** is her grandmother and why she is there.

Wadja country includes Woorabinda, Niagra Falls, the Mimosa Creek, Fairfield station and Bauhinia Downs and the Expedition, Dawson and Bigge Ranges are a boundary for the Wadja People; **[Claimant 3 – Name Deleted]** says that they never went further than those Ranges.

[Claimant 3 – Name Deleted] says that Wadja is separate from Ghangulu; they were always told this; they were only ever told about the country that her family had a connection to and held knowledge for. **[Claimant 3 – Name Deleted]** was told by her family that Ghangulu country starts over the Dawson Range; this is not Wadja country and she would need permission to go over there hunting or fishing. **[Claimant 3 – Name Deleted]** was told that the Ghangulu were their neighbours over the Dawson Ranges [east], the Kanalou their neighbours over the Expedition Ranges [west] and Garingbal towards Rolleston [south-west]. Wadja country does not cross the Bigge Range [south]. Foleyvale is Yetimarli country.

[Claimant 4 – Name Deleted] [8/2/12]

[Claimant 4 – Name Deleted] was born in Mount Morgan and is a Wadja man through his father, grandfather, great grandfather [Grandfather **[Claimant 21 – Name Deleted]**] and great great grandmother, **[Apical Ancestor 1 – Name Deleted]**. He is also Karingbal as **[Apical Ancestor 1– Name Deleted]**'s husband, **[Person 2 – Name Deleted]** is his great great grandfather. **[Claimant 4 – Name Deleted]**'s mum was a child of **[Claimant 21 – Name Deleted]** [referred to in some of the affidavits as Grandfather **[Claimant 21 – Name Deleted]**]. **[Claimant 4 – Name Deleted]** grew up in Woorabinda and lived there most of his life with his family always around. His dad would visit and his aunties and uncles. Most of his relatives live or lived around Rockhampton and Woorabinda so he sees them regularly. He learnt a lot about his country from his mother [a child of Grandfather **[Claimant 21 – Name Deleted]**] and he was taught that Wadja country is between the Dawson River and the Shotover ranges.

[Claimant 4 – Name Deleted] is used to walking long distances because his Mum would take him for walks all around their country. He walked long distances to get to Woorabinda. He knows the location of special sites but doesn't want them disclosed and used for a Gangulu claim. His affidavit provides details of these special places. He was told that Gangulu are the neighbours of the Wadja and it is wrong that their claim encroaches on Wadja country.

His Mum taught him about the bush, which she learnt from her father, old **[Claimant 21 – Name Deleted]**. She gave him tips for hunting and collecting food from the bush. He was taught to hunt for only what you need and not to eat his totem.

[Claimant 5 – Name Deleted] [1/12/11]

[Claimant 5 – Name Deleted] is a Wadja man via his father [**[Claimant 26 – Name Deleted]**], whose father [**[Claimant 27 – Name Deleted]**] was the son of Nanna **[Claimant 12 – Name Deleted]**, a Wadja woman [**[Claimant 12 – Name Deleted]** was a child of **[Apical Ancestor 1 – Name Deleted]**]. Granddad **[Claimant 27 – Name Deleted]**'s cousin brothers were Granddad **[Claimant 23 – Name Deleted]**, Granddad **[Claimant 28 – Name Deleted]** and Granddad **[Claimant 29 – Name Deleted]**. **[Claimant 5 – Name Deleted]** was born at Woorabinda and spent some time on Palm Island when young. He lived with his parents in Woorabinda until he left school at 16 and he then went to work on a farm near Woorabinda. He would go out hunting with is granddads, following the Mimosa Creek towards the bridge.

He is Wadja because his dad and granddad were Wadja and they used to talk about their country. They didn't say 'Wadja'; they just said it was their country. **[Claimant 5 – Name Deleted]** nonetheless undestands that this is their country because they have a connection to and knowledge for Wadja country. His elders told him that he was Wadja and that they were separate from the other groups, such as Ghangulu and Garingbal. He knows Wadja country to go down to Bauhinia Downs and Fairfield station; this is what his granddads told him. The Mimos, Zamia, Blackboy, Lilly, Davey Junction and Conciliation Creeks run through Wadja country. His Uncle **[Claimant 6 – Name Deleted]** told him about the ranges that run on Wadja country, including the Dawson. He was told that Woorabinda is Wadja country. He walked around 8 mile, Niagra Falls and Mimosa Creek with this granddads he knows these places and still visits them today, when the creeks are running.

[Claimant 6 – Name Deleted] [9/11/11]

[Claimant 6 – Name Deleted] was born on Palm Island and lives in Townsville but gets back to Woorabinda to visit his family and fulfil the role the ancestors gave him. His Wadja identity stems from his mother, who was born on Fairfield Station [in the south-west of the application area], where she grew up, as well as Woorabinda. **[Claimant 6 – Name Deleted]**'s mother was a child of **[Claimant 30 – Name Deleted]**, who also worked on Fairfield station and **[Claimant 30 – Name Deleted]** was a Wadja woman through her mother, **[Apical Ancestor 1 – Name Deleted]**. Under Wadja custom, **[Claimant 6 – Name Deleted]** calls **[Apical Ancestor 1– Name Deleted]**'s other four children, grandmother and grandfather. He is very close to the large extended family descended from **[Apical Ancestor 1– Name Deleted]** who he regards as brothers/sisters, not as cousins. These relations are described extensively in his affidavit. He felt a strong pull to his Wadja connections. He remembers when his mother first took him to Woorabinda to see his country and spend time with his family. His mother always used to tell him where he was from and that he was a Wadja man and where his country was. Growing up on Palm Island, he spent a lot of time with the **[Family 11 – Name Deleted]** brothers, who are Wadja men through their grandmother **[Claimant 20 – Name Deleted]** and their great grandparents **[Claimant 19 – Name Deleted]** and **[Apical Ancestor 4– Name Deleted]** and their great great grandmother, **[Claimant 18 – Name Deleted]**. [**[Apical Ancestor 4 – Name Deleted]** is Wadja apical ancestor 4]. The **[Family 11 – Name Deleted]** brothers were part of the community of elders that taught them how

to behave and treat each other with respect and when **[Claimant 6 – Name Deleted]** was a bit older he started speaking with them more about Wadja and Wadja country.

In about 1996, **[Claimant 6 – Name Deleted]** started spending a lot of time in Woorabinda with his Karingbul grandfather, who always lived in Woorabinda and another man, who became his mentors. Although not Wadja, they are recognised as knowledgeable men that understood Wadja laws and customs. He recounts an experience in the bush where he communed with his ancestors and followed them to a special place where he sat and listened to them sing. His mentors explained that he was chosen to have a senior role with the Wadja and from that day on they began teaching him to perform his customary roles, responsibilities and obligations for Wadja country. **[Claimant 6 – Name Deleted]** recounts stories important to the Wadja and to other neighbouring groups, the Iman, Gangulu, Kanalou and Karingbul. He provides photos of some special places on Wadja country connected to these dreaming stories.

[Claimant 7 – Name Deleted] [1/10/11]

[Claimant 7 – Name Deleted] is a descendant of **[Apical Ancestor 1 – Name Deleted]**, who is her great-great grandmother and she traces her Wadja connections through the female line. She was born at Woorabinda. Although **[Claimant 7 – Name Deleted]** did not know her grandmother who died before she was born, she spent a lot of time around her grandmother's brother, **[Claimant 21 – Name Deleted]**, who is referred to in some of the other affidavits as Grandfather **[Claimant 21 – Name Deleted]**. **[Claimant 7 – Name Deleted]** called him grandfather and sometimes by his Aboriginal name, **[Claimant 21 – Name Deleted]** and he was around a lot when she was growing up. **[Claimant 7 – Name Deleted]** would go out bush with her mum and aunts; they would camp out there and they knew the country 'like the back of their hands'. The aunts and old people would talk about the places they went sometimes calling out to the land, finding sticks to dig up uams and showing them how to collect other food. They would sing out to their country. They would go to places like Niagra Falls, 8 Mile Creek and the Davy Creek Junction; all Wadja country.

There were a lot of 'outside families' living at Woorabinda and **[Claimant 7 – Name Deleted]**'s mum did not like associating with them. When they went camping and hunting they always stayed between the Expedition Ranges and the Dawson River; this is Wadja country and they were told that they owned this country. There are troubles with the Gangulu, some of whom don't recognise this as their country, although some do. Some Iman families from south of the Bigge Range acknowledge the Wadja People.

[Claimant 7 – Name Deleted]'s mum and aunties showed them to collect bush food; to hunt. She knows the stories of her country and tells some of them.

[Claimant 8 – Name Deleted] [30/10/12]

[Claimant 8 – Name Deleted] is a descendant of **[Apical Ancestor 3 – Name Deleted]**, through his mother **[Claimant 16 – Name Deleted]**, who was **[Apical Ancestor 3 – Name Deleted]**'s daughter. His father is a Wiri man. **[Claimant 8 – Name Deleted]** started working on cattle stations all around Wadja country when he was 12 years old. His mother would tell him about his Wadja identity when she and his siblings came to visit. They would go out hunting and he would learn a lot about his Wadja country this way. His mother always spoke about Redcliff Station [in the east of the application area]. This was her people's country. His family knew **[Apical**

Ancestor 2– Name Deleted] and called her Aunty. They also knew **[Claimant 13 – Name Deleted]**; they knew that they were from the same mob.

[Claimant 9 – Name Deleted] [30/10/12]

[Claimant 9 – Name Deleted] is a descendant of **[Apical Ancestor 4 – Name Deleted]**. She remembers travelling to Woorabinda to visit relatives, including the **[Family 2 – Name Deleted]** and **[Family 1 – Name Deleted]** families. She was told that they were Wadja people, as was her family.

[Claimant 10 – Name Deleted] [20/10/12]

[Claimant 10 – Name Deleted] was born at Woorabinda in 1932 through descent from **[Apical Ancestor 4 – Name Deleted]**, who is her maternal great-grandmother. **[Claimant 10 – Name Deleted]** is the mother of **[Claimant 9 – Name Deleted]**. Her grandmother, **[Claimant 20 – Name Deleted]** used to talk about Wadja. **[Claimant 10 – Name Deleted]**'s great Uncle Charlie **[Family 9 – Name Deleted]** taught her and her cousin about traditional dancing and they would participate in the dancing at Woorabinda. **[Apical Ancestor 4 – Name Deleted]** lived to a great old age and lived in a tent by herself. She could speak language. **[Claimant 10 – Name Deleted]** always thought of Woorabinda as her country; this is what granny **[Claimant 20 – Name Deleted]** told them. She remembers other Wadja poeple, **[Claimant 21 – Name Deleted]**. **[Claimant 10 – Name Deleted]** knows lots of stories about the spirits on the land and the harm they can do; she remembers hearing all of those stories when younger. She has passed on this knowledge to **[Claimant 9 – Name Deleted]** and is happy that she is now taking on some of the responsibilities in speaking up for country.

I have also been provided with extracts from a witness statement by the Karingbal man, **[Person 3 – Name Deleted]** who speaks of the boundary between the Karingbal and theWadja being the Expedition Range.

It is my view, particularly having regard to the affidavits and the extracts from the ethno-historical record, outlined above, that the factual basis is sufficient to support an assertion that the native title claim group have, and their predecessors had, an association with the application area. This association stems from the fact that within the living memory of the native title claim group, they have always understood that they are the descendants of the Aboriginal persons whose country encompassed the land and waters that is bounded by the Expedition, Bigge and Dawson Mountain ranges. In my view, there are sufficient references within the material to all four ancestral lines who, it is said, were also born on and lived on places within this country, at the time of or shortly after the settlers arrived. In the generations since, the information referred to above, in my view, supports the existence over time of a concrete and enduring association with the application area, particularly at Woorabinda and east to the boundary with the Dawson Ranges [Mimosa, Redcliffe] and at Planet Downs, Bauhinia Downs and Fairfield [in the south east]. I say concrete and enduring because it seems to me that the factual basis provided in the affidavits is that the members of the claim group trace their association back to the ancestors who were alive in the mid 19th century. There is evidence that members of the native title claim group have maintained this association. There are examples of being born, growing up and living in places proximate to their country or being able to visit their country and Wadja relatives. There is also evidence of an inter-generational transmission of important knowledge in relation to country and the using of it to sustain traditional laws and customs, such as being taken out on country,

learning its stories, hunting and gathering its bush resources and understanding its limits. In relation to the boundaries of Wadja country there is some support in the ethnographic record outlined above to establish that it did not extend beyond the Expedition Range in the west, the Bigge Range in the south and the Dawson in the east.

There is no doubt that this is the subject of some disputation, particularly between the Wadja claimants and Gangulu claimants; however I am mindful that it is not my role to compare what is said in other applications when considering the factual basis. As I have said, I am required to accept as true what is relied on for the factual basis and competing information from other applications is not a part of this consideration.

To conclude, I am satisfied that the factual basis provided is sufficient to support an assertion that the native title claim group have, and their predecessors had, an association with the area covered by the application. In this regard, I am mindful that all that is required is a sufficient factual basis, not that the applicant provide evidence of the quality which will be required to prove their substantive claim to hold native title in relation to the application area. It would not be appropriate in my view to cast an overly forensic approach to the material I have considered. Suffice to say it is in my view more than a general set of assertions about association and is sufficiently detailed, both in relation to the identity of the pre-sovereign normative system [identified in numerous ethno-historic sources from the late 19th century as a group called Wadja or other variants of that name] from which the claim group descend, and in relation to the generations of the native title claim group in the period since settlement of the region in the mid 19th century until the present time.

Traditional laws and customs—s. 190B(5)(b)

For the reasons that follow, I am **satisfied** that the factual basis on which it is asserted that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests, is sufficient to support that assertion.

General principles

The language of the assertion in s. 190B(5)(b) nearly mirrors that found in s. 223(1)(a), which is part of the definition for the term 'native title rights and interests'. In my view, the factual basis here must address the assertion that the claimed native title rights and interests find their source in 'traditional' laws and customs. My usage of inverted commas around the word 'traditional' highlights that its meaning in s. 223(1)(a) is central to an understanding of whether native title rights and interests exist in relation to an area of land or waters. I understand that the legislature intends that the expression 'traditional' in relation to the meaning of native title rights and interests is used uniformly throughout the Act; hence what the High Court and other courts have decided in relation to this should inform my consideration of the sufficiency of the asserted factual basis for this particular assertion.

Accordingly, as was discussed by Dowsett J in *Gudjala (2007)* at [26], the factual basis provided by an applicant must pay attention to the High Court's decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; (2002) 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*) and in Full Court decisions since as to what is meant by rights and interests in relation to land and waters being possessed under 'traditional' laws and customs. This aspect of Dowsett J's

decision was not criticised by the Full Court in *Gudjala (2008)* who noted that one question, amongst others, which needs to be addressed is whether 'there was, in 1850–1860, an indigenous society in the area, observing identifiable laws and customs'—at [96].

The following is a brief synopsis of my understanding of the case law which has developed around the requirement in s. 223(1)(a) that native title rights and interests in relation to land and waters must be possessed under 'traditional' laws and customs:

- for laws and customs to be 'traditional', they must derive from a body of norms or normative system that existed before sovereignty and which has had a substantially continuous existence and vitality since sovereignty;
- a society is a body of people united in their acknowledgement and observance of laws and customs with normative content;
- the acknowledgement and observance of the laws and customs of the pre-sovereignty normative system must have continued 'substantially uninterrupted' in each generation from sovereignty until the present time;
- it is this continuity in the acknowledgement/observance of traditional laws and customs, rather than continuity of a society, which must inform the inquiry as to whether the native title is possessed under 'traditional' laws and customs;
- change or adaptation of traditional law and custom may be acceptable; however, the trial court needs to carefully consider whether it points to a cessation or substantial interruption of the normative system, such that the laws and customs currently acknowledged and observed are no longer traditional; i.e. they are not the laws and customs of the normative system at sovereignty.[9]

Having regard to the case law, it is my view that a sufficient factual basis for the assertion in s. 190B(5)(b) needs to address that the relevant traditional laws and customs have their origin in a pre-sovereignty normative system with a substantially continuous existence and vitality since sovereignty. I refer to comments by Dowsett J in *Gudjala (2007)* that the factual basis materials for this assertion must address:

- that the laws and customs currently observed have their source in a pre–sovereignty society and have been observed since that time by a continuing society—at [63];
- that there existed at the time of European settlement a society of people living according to a system of identifiable laws and customs, having a normative content—at [65] and see also at [66] and [81];
- the link between the claim group described in the application and the area covered by the application, which, in the case of a claim group defined using an apical ancestry model, may involve 'identifying some link between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage', although the apical ancestors need not themselves have comprised a society—at [66].

This aspect of Dowsett J's decision was not criticised by the Full Court in *Gudjala (2008)*—at [71], [72] and [96].

[9] The special meaning of the word 'traditional' in s. 223(1) was first considered by the High Court in *Yorta Yorta*. What is required under s. 223(1) has been considered in numerous decisions since, including the Full Court decisions of *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442; [2005] FCAFC 135 (*Alyawarr FC*) and *Bodney v Bennell* (2008) 167 FCR 84; [2008] FCAFC 63 (*Bennell FC*). This synopsis is drawn from *Yorta Yorta*, *Alyawarr FC* and *Bennell FC*.

I refer also to these additional comments by Dowsett J in the later *Gudjala (2009)* decision about s. 190B(5)(b):

- a sufficient factual basis must address the following elements:
  - a system of laws and customs which recognizes that the relevant claim group has a connection with the land or waters in question;
  - that such laws and/or customs have been passed down continuously through a society which existed prior to sovereignty and continues to exist; and
  - that although such current laws and customs may not be identical to those which obtained prior to sovereignty, they have their roots in the pre-sovereignty laws and customs—at [22];
- 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'—at [36];
- there must be some link between the claim group and the claim area, including the identification of a link between the apical ancestors (if used to define the claim group) and the relevant society from which the claim group asserts that it has derived its native title rights and interests—at [40].

I have also considered what was said by Dowsett J at [29] of *Gudjala (2009)* that the Registrar must 'be careful not to treat, as a description of that factual basis, a statement which is really only an alternative way of expressing the claim or some part thereof.' 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; 'there must at least be an outline of the facts upon which the applicant relies'.

It is my view that the starting point for an applicant seeking to address subparagraph 190B(5)(b) is to identify the relevant society operating in the region occupied by the application area at the time of sovereignty or, at the very least, the time of contact/settlement.[10] Once identified, the factual basis must address the existence of traditional laws and customs with a normative content that are derived from that society/normative system and which have had a substantively uninterrupted operation since sovereignty in relation to the area covered by the application.

Consideration

Attachment F provides the following general description for the factual basis in relation to the assertion of subparagraph (b):

> **Traditional Laws and Customs acknowledged and observed by the claim group**
>
> 18. The areas adjoining Wadja country are asserted as belonging to the Kanolu, Karingbal, and Gangalu and Iman country groups, amongst others. Sources in the Ethnographic literature attest to the fact that together these groups formed an interconnected cluster of distinct, named groups who interacted for cultural and social purposes, displaying common laws and customs and possessing a degree of social and political unity [sic] The Wadja claimants recognise that they share a common system of laws and customs with the neighbouring groups, but attest that

[10] As was discussed by the Full Court at [96] of *Gudjala (2009)*.

under that system of laws and customs only they enjoy rights and interests in the particular piece of land covered by the application.

19. According to the traditional law and custom of the Wadja people, rights to access and enjoy the use of the application area are inherited through descent from the apical ancestors named above as part of this application.

Spiritual Knowledge of the claim area

20. Rights to country are exercised within the context of a powerful and at times dangerous spirituality. The management of this requires adherence to customary rules that mandate certain behaviour within the application area and which governs the exercise of Native Title rights .
21. The Wadja claimants believe that their country is imbued with a potent spirituality, manifest both as place and spiritual phenomena. Familiarity with these forces is part of the repertoire of knowledge possessed by senior claimants. Claimants maintain knowledge of a number of creation narratives for the application area which form part of the body of their traditional law and custom.
22. In addition to these creation narratives, claimants also understand that their country, and specific places within it, is occupied by spirits of their ancestors and by other spiritual beings. It is an essential part of their law and custom to respect these spiritual forces and their sense of responsibility for the land is strengthened by a sense of responsibility to the creative and ancestral spirits. These beliefs inform and circumscribe the exercise of rights and interests by Wadja claimants within the application area.
23. According to testimony from Wadja claimants, management of the spirituality is accomplished by adherence to customary rules which include avoidance of places, a prohibition on the removal of objects from country and an ability to speak with the spirits of the country so that they might be mollified or placated.
24. Below are some examples of laws and customs acknowledged and observed by Wadja claimants. They include but are not limited to laws and customs relating to:
    a) Specific practice regarding birth of Wadja people
    b) Specific practices regarding totems
    c) Rights to speak for country
    d) Specific practices related to caring for country
    e) Specific practices regarding respect for Elders
    f) Specific practices regarding safe and dangerous places
    g) Specific practices related to managing the spirituality of the country
    h) Specific practices regarding addressing the spirits believed to reside in the application area
    i) Specific practices regarding removing objects from country
    j) Specific practices regarding marriage
    k) Specific practices regarding kinship relationships
    l) Membership of, and recruitment to the Native Title claim group

Right and Interests arising from Traditional Laws and Customs

25. Rights to Wadja country are, and were, exercised by members of the Wadja community comprised of persons descended from ancestors named as part of this application. Claimants and their forebears gained rights in land and membership of the community on the basis of descent from ancestors with such rights, and acknowledgment by the Wadja jural public.

26. People gain the authority to speak for country through the possession of geographical and cultural knowledge. Claimants use the phrase 'speaking for county', or a similar one, when discussing how people assert rights to country.
27. The Wadja claimants believe they are responsible for their country and assert the right and duty to take care of it. The right derives from their obligation under their law and custom to ensure the well-being of the land subject to this application.
28. Others who are not members of the Wadja community are, and were, required to seek permission prior to entering, gathering or hunting on the claim area. While Wadja claimants recognise that they are united with neighbouring groups within and by a shared body of law and custom, it is the rights and interests in the claim application area that distinguish the Wadja people from other groups who have rights and interests elsewhere and identify with different named groups.

The asserted factual basis is elaborated upon in the affidavits provided by **[Claimant 1 – Name Deleted]** [11/2/12], **[Claimant 2 – Name Deleted]** [1/5/12], **[Claimant 3 – Name Deleted]** [12/12/11], **[Claimant 4 – Name Deleted]** [8/2/12], **[Claimant 5 – Name Deleted]** [1/12/11], **[Claimant 6 – Name Deleted]** [9/11/11] and **[Claimant 7 – Name Deleted]** [1/10/11]. As some of the material is similar in content, I have referred to the following material only [I note that I have not included the names of people or other apparently confidential matters from the texts quoted below]:

[Claimant 1 – Name Deleted] [11/2/12]

[Claimant 1 – Name Deleted] learnt about the bounds of Wadja country from her father, her grandfather, Grandfather **[Claimant 21 – Name Deleted]**, a child of **[Apical Ancestor 1 – Name Deleted]** and Aunties **[Claimant 14 – Name Deleted]** and **[Claimant 22 – Name Deleted]** [her father's sisters] and Uncle **[Claimant 23 – Name Deleted]** [her father's brother]. Her brother has had a big role teaching all his nieces and nephews about being Wadja and Karingbal [through their ancestor **[Person 2 – Name Deleted]**, the Karingbal husband of **[Apical Ancestor 1 – Name Deleted]**]. The **[Family 4 – Name Deleted]** are the traditional owners for Wadja and Karingbal country. Wadja country stops at the Shotover Ranges [to the north of Expedition Range].

[Claimant 1 – Name Deleted] speaks about the following matters:

> *23. When we went out into the bush with our family, we were taught to call out to the old people and tell them who we are. We have to let them know we are family and what we are doing there, if we are collecting food or something else.*
> *24. We never take things off Wadja country. Bad things happen to people who do that. Those old people out there watch you and see what you are doing on their country.*
> *25. Me and my brothers and sisters learnt about Wadja country from my grandfather [and aunties and uncle]. [Uncle] used to walk everywhere. He used to walk all the way to Duringa. My Aunties and Grandfather used to take us kids camping on country. We didn't have tents – we just spread out a blanket and slept under the stars.*
> *26. My brother ... has passed his knowledge of country down to his nephews. He has taken my son ... out on country. He makes them walk, and he won't wait around for them. [My son] told me that when ... used to take the boys out hunting he told them they better keep up otherwise they would be left behind. [My brother and son] go out hunting on Wadja country regularly.*
> *27. I never heard the word Gangulu before native title started, but my brother said he heard of Kanolu and they were Comet, Blackwater people; Karingbul is over Rolleston and Rewan – I know this because I go Karingbul way through old **[Person 2 – Name Deleted]**.*

*28. There are places I know on Wadja country that only some of us **[Family 4 – Name Deleted]** know about. I don't want information about these places getting in the hands of other people that don't respect the **[Family 4 – Name Deleted]**. I don't want information about these places used for another group's claim.*

29. [Brother] took me and showed me this one place ...

30. I recently took [people] to a ... place in the scrub ... This is a [sacred] place. ... I don't think other people know about this ...

*32. When I was growing up we were told there were some places we couldn't go. None of us **[Family 4 – Name Deleted]** were allowed to go to ... We don't ... from that place either.*

37. My grandfather and Aunties taught me about things I can get from the bush. We use ... for healing all kinds of things.

38. We do smoking ceremonies too. One time ... did a smoking for the old people. This is when ... was very young. But all the old people started coughing and coughing. That old man was using the wrong plant. He was burning ... and that's not the right one. We didn't tell him though because he would have felt shame.

39. We learnt a lot from just sitting around listening to the old people yarn up about the past and the places and people they knew. They told us that we must look after the country and not be greedy taking more food than we need. If we did that, something would happen to make us remember that lesson and we would put some of those things back, and the old people would let us move on then. That happened to ... When he was ... young ... he and some friends went out hunting and they caught a lot of porcupine and a couple of roos. When they started heading home they couldn't find their way out of the scrub. They started to feel a bit anxious ... realised that they had been greedy and taken too much. The old people were reminding him of the rules. He let a few porcupines free and straight after that he remembered the way home.

40. My Uncle ... (... a Wadja man) told me a similar story. He hunted a lot more porcupines than he needed. On his way home the old ancestors started hassling and taunting him. He realised that he had taken too many porcupines so he let one go. Those old people wouldn't leave him alone so he let another one go. Those old people kept on bugging him so in the end he just thought it was safer to let all the porcupines go and return to town empty handed.

41. Our totem is the ... We don't eat that. I don't eat ... because I have seen them digging and going underground where we bury our old people, so we don't eat them at all.

42. I was told my totem is the ... Those ... don't like the light, but they always sit under the street light when they come to tell you news. There is an ... you can tell he is old from ..., which comes and sits in my backyard and watches over my family. I was walking down the street a couple of weeks ago and I saw this statue ... in a shop and I knew straight away that I had to buy that ... for my grandson. It looks after him.

*43. **[Claimant 6 – Name Deleted]** told us our totem is the ... I don't eat that now.*

44. Willy wagtail brings messages too. You know someone is coming to visit when you see him.

Marriage

45. My grandparents would tell all us kids who our family was. Our family was spread out near and far. At the time we hadn't met all the family they were telling us about. They wanted us to know who we were related to and how we were related in case we met distant relatives later on in life.

46. I do that to my kids too. I tell them who they are related to because there is no way I would allow my children to marry a cousin. No way would I allow that.

Respecting Elders

47. We were taught to be respectful of the old people. When I am with white people, I look them directly in the eye. I used to see my mother and aunties looking down and away when white people spoke to them, but I won't do that. I look them in the eye and I taught my kids and grandkids to do that too. It's different with Aboriginal people. For us, it is respectful to look away, not look directly at an older person in the eye, especially the old men. That's our way.

Spirits

48. The old people are always around us. I know when they are because I can feel them. It's a good feeling to know they are there looking after us. People in my family often see people who have died. One time when my kids were small I went to check they were all ok in bed, but I couldn't find ... He was nowhere to be found anywhere around the house. I went around to my parent's house, but he wasn't there and I started to get anxious. But then I thought I should check his room again, and there he was sitting on the bed! When I asked where he had been he said ... came and took him for a walk. I didn't remember that name until ..., who was really sleepy, said 'you remember him mum'. I wasn't thinking about him because he died a long time before, but he looked after ..., carried him when he got tired and brought him home safe.

49. ... is looked after by those old people. He has had lots of things happen to him, like the time ... but he never broke a bone. He's been in lots of dangerous situations but always comes out safe, that's why I know he is being looked after. ... that old man is looking after ***[Claimant 36 – Name Deleted]*** *too.*

50. ... see their old people too. His ... sees her grandfather and other old people that have passed away. She is never scared because we have told her that the old people are here to look out for her and her family.

51. There are those dgungidii too. Those little hairy men. They aren't bad, only cheeky. They play games with us, tricking us, but not in a bad way. It's mostly only children who see them. When we were kids, I remember ... went to the shop for some biscuits when he took us to the old outdoor cinema in Woorabinda. When he got to the shop he couldn't open the door. When he tried to go in, he got pushed back out again! Those dgungidii jumped him and unbuckled his belt and pulled it off. They run away with his belt and left ... with his trousers falling down.

52. When we were kids our parents would do a headcount as we ran out the door to play in the street. They would see us playing under the street light at dusk and would notice a lot more kids playing. It was those dgungidii having fun with us kids.

53. We were not to say the word dgungidii after dark because then they would come out and cause mischief. Those dgungidii hang out at Red Bank on Mimosa Creek close to the Woorabinda township.

54. Some ... things my old people taught me ... I have passed on to my children ...

[Claimant 2 – Name Deleted] [1/5/12]

Similar evidence is provided in the affidavit by **[Claimant 2 – Name Deleted]**, a descendant of **[Apical Ancestor 2– Name Deleted]**, who was born in about 1858 on the banks of the Mimosa River along with all of her mob. **[Claimant 2 – Name Deleted]** was told these things by her father, a grandchild of **[Apical Ancestor 2– Name Deleted]**'s who was brought up by her. **[Claimant 2 – Name Deleted]** discusses her relations with other Wadja families, including the descendants of **[Apical Ancestor 1 – Name Deleted]** and the **[Family 8 – Name Deleted]** and **[Family 7 – Name Deleted]**, who are descended from **[Apical Ancestor 3– Name Deleted]**. It is said in Attachment F that **[Apical Ancestor 3 – Name Deleted]** was known to have associated with **[Apical Ancestor 2– Name Deleted]** at Redcliff Station on the claim area in the latter half of the 19th century and her daughter **[Claimant 16 – Name Deleted]** was born in 1908. **[Claimant 16 – Name Deleted]** married **[Claimant 17 – Name Deleted]** and they had seven children, including **[Claimant 8 – Name Deleted]** who began working on stations in the claim area when he was 12 years old and received much information from his parents about Wadja country.

[Claimant 3 – Name Deleted] [12/12/11]

[Claimant 3 – Name Deleted] is a descendant of **[Apical Ancestor 1 – Name Deleted]** on her father's side. **[Apical Ancestor 1– Name Deleted]** was her great grandmother. I have included below some of the more salient aspects of her affidavit:

> *21. It wasn't until the late 1980's that I found out that the country my family claimed was called Wadja country. We are Wadja because we have a connection to Wadja country through my fathers' side. Our great grandmother,* ***[Apical Ancestor 1 – Name Deleted]****, was recorded as being Wadja. To be a Wadja person, you must show that you are descended from a Wadja ancestor.*
>
> *22. Wadja people feel like we are the forgotten tribe, but we are still here. We still keep in contact with each other and pass on Wadja culture to the younger generations. Many of us still live on and access Wadja country.*
>
> *23. As a Wadja woman, I have a responsibility to look after Wadja country. I also welcome visitors to Wadja country, and carry out this responsibility with the other old girls here at Woorabinda.*
>
> *24. Whenever I go out bush I sing out to let the old people know who I am, that Nanna* ***[Claimant 12 – Name Deleted]*** *is my grandmother and why I am there. I do this every time I visit places or go to get bush tucker or bush medicine. I have taught my children and grandchildren to do this when they go out hunting or looking for bush tucker or ... I told my kids to make sure that they sing out because if they don't, those old people (spirits) will follow them home when they leave.*
>
> *25. Wadja country includes Woorabinda, Niagra Falls, the Mimosa Creek, Fairfield station, and Bauhinia Downs. The Expedition, Dawson and Biggie Ranges are a boundary for Wadja country. We never went further than those Ranges.*
>
> *26. We don't have a connection to Ghangulu country. We only claim Wadja country. Wadja and Ghangulu are separate groups. We have always said that we were separate and never backed down about that. We were only told about the country that our family had a connection to and held knowledge for.*
>
> *27. We always had an association with Wadja country and felt a sense of belonging to this place. It wasn't just because we were born here. The places that we hunted, the creeks we swam in, the places we fished at, we always felt like we belonged.*
>
> *28. I was told by my family that Ghungulu country starts over the Dawson Range. That's not Wadja country over there. We would ask permission to go over there hunting or fishing, because that's someone else's country. I was told that our neighbours are Ghangulu over the Dawson Range, Kanalou over the Expedition Range and Garingbal towards Rolleston. We don't cross the Biggie Range. I was also told that Foleyvale is Yetimarli country. I would describe Wadja country to be a thumb shape.*
>
> *29. It's wrong to claim other people's country. Wadja people only claim Wadja country and we are the only ones who can talk for Wadja country. If others try to speak for Wadja country, we believe that something bad will happen to them because it's wrong.*
>
> *30. We put in a native title claim over Wadja country around 1996 because we wanted recognition as the traditional owners. We ended up coming together with the Kanalou people to bring a new claim and called it "West of the Dawson East of the Comet". It was our decision to do that.*
>
> *31. The Kanalou Elders always said that their country didn't come over the Expedition Range. We believe that something will happen to people claiming country that is not theirs. They recognise Wadja people.*
>
> *39. I have seen my Grand-dad* ***[Claimant 21 – Name Deleted]*** *after he passed away and I know that this means that someone in my family has passed away. I have seen him twice when I have been away from home, once in Brisbane and once in Darwin. Both times, I found out later that we had lost family. He doesn't come to me when I am at home, just when I am away.*
>
> *40. We were taught to respect our Elders. It was our Elders who made the decisions for us, and we always listened to them. Grand-dad* ***[Claimant 21 – Name Deleted]*** *was one of our Elders when we were younger and he taught his children to respect their Elders.*

41. You became an Elder because of your knowledge and not your age. Our Elders speak for Wadja people. The younger ones are taught to respect their Elders and learn from them. I have taught my children to respect their Elders.

42. My cousins are my brothers and sisters. My parents' brothers and sisters' (including their cousins) are all my aunties and uncles. My grandparents brothers and sisters are also my grandparents and I call them Nanna and Granddad.

43. From a young age we were told who our family were and what to call them. We are one big extended family and we all look after each other. We provide family with a place to stay when they need it and food when they don't have any. Our kids know who they are related to and who to call brother/ sister, aunty/ uncle or nanna/ grand-dad.

*44. I learned a lot of things from my dad, aunties, uncles, and Grand-dad Bulburra about Wadja culture. Grand-dad **[Claimant 21 – Name Deleted]**'s children used to take us kids out hunting and fishing a lot: Aunty **[Claimant 14 – Name Deleted]**, Aunty **[Claimant 22 – Name Deleted]** and Uncle **[Claimant 23 – Name Deleted]**. It is important for us to pass on our knowledge to the younger ones so that our culture isn't lost. It was mainly my mum, dad, aunties, uncles and grandparents who taught me things.*

45. We always knew that there were places for men and places for women, but we weren't taught about them. I just knew that I couldn't go to a bora ground because that is a men's place.

46. ... told me that there was a camping area near Rolleston where Wadja and Garingbal people would meet.

49. We lived off bush tucker when we were growing up: kangaroo, goanna, wallaby, birds, and porcupine. Sometimes we would cook our food out where we were in the ground on the hot coals and rocks, and sometimes bring them back to town because we had to be home before dark. We walked to the places on country and were told that the old people (spirits) would follow us in if we didn't get home before dark.

50. We chase the sand goanna and hit it with a stick. We only eat the sand goannas, the yellow ones, but not the black goannas. When one of us sees a sand goanna, we shout out, "goanna", and everyone will grab a stick and chase it. I haven't seen a goanna in a long time.

51. We still go hunting for kangaroo and whenever someone gets one, they share it with family. Someone might get a leg and another might get something else.

52. I know that the porcupine comes out in winter time and that is the time of the year that we go hunting for porcupine, from June to August. My brother usually goes out to get it. To get the quills off, you need to pour boiling water onto the porcupine and then scrape them off with a sharp knife. There is a part on its chest that you need to cut out, like two stones, because it is poisonous.

53. When I was younger we would go fishing along the Mimosa Creek and out at Niagra Falls. We would catch Black Brim, and Yellow Belly. We would also catch crayfish and collect mussels from the dams. We cooked what we caught on the hot coals.

54. We still go out fishing when we can get a car. We take the kids with us and go for the day. We go fishing in the Mimosa Creek and also at Niagra Falls when it is running. We also collect mussels in the dams around Woorabinda.

55. When we were younger, we were told where to find bush tucker. We collected gum from the wattle tree, possum seeds, bunya nuts, dumboons (witchetty grubs), bindooma's (small red berry), blackberries, small mangoes, the prickly pear and lime. Dumboons can be used to help babies who are teething. I love eating dumboons.

56. We go camping on Wadja places, and usually where there is water. I was told that the old people would camp with fires burning around them to keep the dingoes away. They would clear a big area and build fires around them.

57. I went out camping with some kids, 5 girls and 5 boys as part of a program. We were sitting around a fire talking and we had three tins to smoke everyone. It was a good feeling. The next day we

took the kids to a spring where the water never dries up. That's where you find that prickly pear on the vine. We also took the kids to the dam to collect muscles and cooked them on the hot coals.

58. We collect wood from the bush to make our fires when cooking food on country. We always make a fire when we are out on country to cook our food. Aunty ***[Claimant 14 – Name Deleted]*** *and Aunty* ***[Claimant 22 – Name Deleted]*** *showed me where to find bush tucker and I still collect bush tucker when I go out bush, including yams that we have to dig for.*

62. There is a Bora Ground just out of Woorabinda near the Mimosa Creek, where they held Corroborees and initiation ceremonies for the boys in the old days. I was told that women are not allowed to go to this place. Grand-dad ***[Claimant 21 – Name Deleted]*** *told the boys about this place, so they know more about it.*

63. I went out past the Bauhinia Downs area and I remember saying that I thought that this place was where Corroborees might have been held. I just got that feeling. Then we went to the Shotover Range and we got split up. Some of the ... family were there. I ended up standing on the road myself. That's when I saw this old man painted up and I thought he must have wanted me to go in there. I followed him and there were these painting on the rocks. The paintings were of hands, and one had an extra finger. The old man didn't show himself to the others, just me ... told me that the place I had a feeling about was where Corroborees were held and that there was a bora ring there. I was later told that this place was where Wadja and Garingbal people held Corroborees.

64. We still hold smoking ceremonies for visitors and when we take people out on country. It gives you a good feeling about being on Wadja country.

65. Wadja people have a responsibility to look after Wadja country. Certain Wadja people have special responsibility for certain places. They must check on those places and make sure they are not being disturbed by others.

66. This responsibility may only be for men in relation to some places like bora rings, and women in relation to other places. It is about looking after our country.

67. If someone disturbs an important place they might get sick or have some bad luck, such as a family member might pass away.

[Claimant 5 – Name Deleted] [1/12/11]

[Claimant 5 – Name Deleted] is a descendant of **[Apical Ancestor 1 – Name Deleted]**:

7. I was born at Woorabinda and spent some time on Palm Island when I was a young boy. I lived with my parents in Woorabinda where I attended school until I was 16. That's when I went to work on a farm near Woorabinda.

8. There were lots of rules when I was growing up, but it wasn't as bad as it used to be. You had to be home and indoors by sundown around 6pm and if you got caught on the street, you had to do 7 days in jail with the adults. Every morning they would march the kids who were in jail down to the school. I was caught being out after 6pm and did 7 days in jail.

9.I would go out hunting with my Granddads, but we would make sure we were back before dark. We would go out on weekends and school holidays. We just followed the Mimosa Creek down towards the Mimosa Bridge.

10. My father worked as a stockman and my mother did domestic work on the stations or farms. I was told that my dad and his parents were given rations when he was younger and they had to fight for a bit of food. That's why hunting was so important to them.

12. I am a Wadja man because my dad and Granddad were Wadja. They used to talk about their country, and say it was 'Kangaroo Sit Down' country. They didn't say Wadja, they just said it was their country. But we are Wadja people because we have a connection to and knowledge for Wadja country. My Elders told me that I was Wadja and that we are separate from the other groups, such as Ghangulu and Garingbal.

13. To claim Wadja you must show that you are descended from a Wadja ancestor. I am Wadja on my fathers' side.

14. Wadja people have a responsibility to look after Wadja country, and we were taught to sing out when we visited the country. I say who I am and that my Granddad's were ***[Claimant 29 – Name Deleted]****,* ***[Claimant 23 – Name Deleted]*** *and* ***[Claimant 30 – Name Deleted]****.*

15. I was told that it is disrespectful for other people to speak for Wadja country. Our Elders talk for Wadja country. My Elders are Aunties ***[Claimant 11 – Name Deleted]****,* ***[Claimant 32 – Name Deleted]*** *and* ***[Claimant 3 – Name Deleted]****, and Uncles* ***[Claimant 6 – Name Deleted]*** *and* ***[Claimant 33 – Name Deleted]****.*

16. When someone in our family passes away, people come to show their respects. We must go to funerals for our family. If it is another family, we have to at least send a representative from our family to go on our behalf.

17. My Granddad's took me to places that they said was their country. Most of the time we only went to places that we could walk to.

18. I know Wadja country to go down to Bauhinia Downs and Fairfield station from what my granddad's told me. The Mimosa, Zamia, Blackboy, Lilly, Davey Junction and Conciliation Creeks run through Wadja country. My Uncle ***[Claimant 6 – Name Deleted]*** *told me about the Ranges that run on Wadja country, including the Dawson Ranges. I was also told that Woorabinda is Wadja country.*

19. The main places I know about are the places that I walked to with my Granddads and other family members when I was younger. We always went to 8 Mile, Niagra Falls and Mimosa Creek for fishing. They are the places I still visit today, when the creeks are running.

20. Granddad ***[Claimant 23 – Name Deleted]*** *would speak in language when we visited places. He would make sure that the old people knew who we were and why we were there, for hunting and fishing.*

21. I remember hearing the old fella's speak in lingo but I didn't learn to speak myself. A lot of different tribes came to live at Woorabinda and the languages got mixed together. Some of my aunties speak some language.

29. My Granddads taught me things because I spent a lot of time with them and was always listening. They would take me hunting and fishing on Wadja country along the Mimosa Creek. Granddad ***[Claimant 23 – Name Deleted]*** *and Granddad* ***[Claimant 29 – Name Deleted]*** *showed me how to do the welcome dance for Wadja people. I would learn from watching them. I still know how to do this, but my knees are not the best anymore. The younger fella's can dance really well.*

30. My Elders used to tell us not to go down to the Red bank because the janjardi is there. It is a small man with long arms. They said that if he caught us, he would bash us up. Some people have seen the janjardi.

31. Granddad ***[Claimant 23 – Name Deleted]*** *showed me the Bora Ground outside of Woorabinda. He used to take me hunting through there. There are two big rings at the Bora Ground. Granddad* ***[Claimant 23 – Name Deleted]*** *told me that one was for the Corroborees and the other one was for initiations of the young boys. This place is a men's site and women are not allowed to go there. There were some young boys who made a camp at this place, and their mother got sick because of it.*

32. My Granddads taught me to hunt for traditional food on Wadja country. They told me that Kangaroo fat is good for your skin and you can use it as a sunscreen.

33. There is a place near Woorabinda called Blackboy where they used to bring foster children to stay. I have been to this place and there is a creek there. I think a family lives there now.

34. I spent a lot of time with my Granddad's out bush hunting for kangaroo, goanna, porcupine and birds. We would use a gun or axe to get kangaroos, and a stick to get goannas. We would cook the food out bush on the hot coals or bring it back into Woorabinda to share with family.

35. I go hunting at Niagra Falls where you can find small mango trees. There are some caves there. This place is nice when it is running with water.

36. The sand goannas used to be found along the sandy creek. We only eat the yellow goannas and not the black ones. I haven't seen a goanna in a while.

37. Porcupine comes out in winter time. They grow to be very big, and that's why we wait until winter time. That's when they have all the fat on them. Some people eat porcupine at other times of the year, but I don't.

38. My Granddad told me about the soapy leaf tree that can be used to catch fish. If you put the leaves into the creek, the fish will be stunned or paralysed.

39. We always go out fishing at places along the Mimosa Creek when the water is running. We catch Yellow Belly, Black Brim and Jew Fish. You can also get crayfish. We cook our catch on the hot coals of a fire. There is plenty of wood out on Wadja country. There are caves up the Mimosa Creek that I was told about.

40. There are lots of camping places out on Wadja country. I have been camping many times with my Granddad's, uncles and brothers. We go to places like Davey creek and Blackboy Creek for camping. When camping we take water from the creek for drinking, cooking and to wash with.

41. We can get ochre from 8 Mile for painting up. There is mainly the red and white colour's there.

42. We also collect mussels from the dams around Woorabinda and cook them on the hot coals.

43. There is bush food that can be found on Wadja country such as blackberries, witchetty grubs (dumboons), a prickly pear, small mangoes, binduma's (small red apple), and honey. There is honey up near the stockyard. We were told what trees were poisonous and to stay away from them. I eat witchetty grubs either raw or cooked.

44. My aunties and uncles told me about Gumbi Gumbi, which is our bush medicine. This can be found on Wadja country and can be used for sores, skin problems, coughs or colds, and other sicknesses. You have to boil it up in water, and either drink it or wash with it. It doesn't taste good, but it works.

45. Wadja people have a responsibility to protect and look after important places on Wadja country. These places include our Bora grounds, caves, old camping grounds, paintings, rock art, and other sites.

46. Our rock art is mainly of animal footprints, such as the kangaroo and emu. I know where there is rock art or paintings on Wadja country. I also go out looking for caves and paintings with my uncles so we know where they are and can check on them.

47. If you disturb our places, we believe that bad things will happen to you. Wadja men have a responsibility to maintain places like the bora ground and caves. We check on these places to make sure they haven't been disturbed.

48. It is the Elders who have most of the responsibility for important places, because they speak for Wadja country and have more knowledge about places.

[Claimant 6 – Name Deleted] [9/11/11]

[Claimant 6 – Name Deleted] is a descendant of **[Apical Ancestor 1 – Name Deleted]**. His mother **[Claimant 40 – Name Deleted]** was born on Fairfield station on Wadja country [in the south-west]. **[Claimant 40 – Name Deleted]**'s mother was **[Claimant 30 – Name Deleted]**, a daughter of **[Apical Ancestor 1 – Name Deleted]**. This is some of what he has said in his affidavit:

13. I was born on Palm Island and grew up there for most of my early childhood. We left Palm Island when I was about 7 and then moved to Townsville but I visited Palm Island often.

14. I remember the first time my mother took me to Woorabinda to see my country and spend time with my family. We caught a train from Townsville to Rockhampton. We didn't have trains on Palm Island so I was a bit afraid of getting on it. I would have been around 5 years old.

15. My mother always used to tell me where I was from when I was growing up. She used to say we were from down this way. She told me I was a Wadja man. She told me where my country is.

16. Growing up on Palm Island I spent a lot of time with ***[Claimant 34 – Name Deleted]*** *and* ***[Claimant 35 – Name Deleted]****.* ***[Claimant 34 – Name Deleted]*** *and* ***[Claimant 35 – Name Deleted]*** *are Wadja men through their grandmother* ***[Claimant 20 – Name Deleted]****, their great grandparents* ***[Claimant 19 – Name Deleted]*** *and* ***[Apical Ancestor 4– Name Deleted]*** *and their great great grandmother* ***[Claimant 18 – Name Deleted]****.* ***[Claimant 34 – Name Deleted]*** *and* ***[Claimant 35 – Name Deleted]*** *had a lot of daughters so they treated me and my brothers and some other kids on Palm as if we were their sons. They were part of the community of elders that taught us how to behave and treat each other with respect. They growled us when we needed to be growled at. When I was a bit older I started speaking with them more about being Wadja and Wadja country.*

17. After leaving school I have had various jobs assisting and representing my people through employment at government agencies. I have 25 years experience working within community development at a Federal, State and local level. After my heart attack I started my own business and I am now a consultant.

18. In around 1996 I started spending a lot more time in Woorabinda with my grandfather ***[Person 4 – Name Deleted]****, a Karingbul man. Granddad* ***[Person 4 – Name Deleted]****, who has always lived in Woorabinda, and* ***[Person 5 – Name Deleted]****, who I first met on Palm Island, became my mentors. Even though they are not Wadja, they are recognised as knowledgeable men that understand Wadja laws and customs.*

19. One night I dropped my sister ***[Claimant 37 – Name Deleted]*** *off at Duringa. On my way home my old ancestors were telling me to come out. They kept speaking to me all the way home. When I got to Woorabinda I went to my sister* ***[Claimant 38 – Name Deleted]*** *and asked her for a torch and matches. She didn't have any. I went to a few other houses and no one could help me. I ended up at my brother* ***[Claimant 39 – Name Deleted]****'s house and told him that the ancestors were calling us into the bush. He was too scared to come with me. I was scared too, but the ancestor's call was too strong so I set out in the pitch black darkness.*

20. I did not grow up around here so I didn't know where I was going. I finally asked the ancestors to help me. As soon as I asked a path through the scrub lit up. I followed it all the way to a special place where I sat and listed to my ancestors sing. I listened for a good while. When I felt it was time to leave, I asked them to show me the way home and they did.

21. A few days later I spoke to ***[Person 5 – Name Deleted]*** *and Granddad* ***[Person 4 – Name Deleted]*** *and told them what happened. They explained that I was chosen to have a senior role with the Wadja people, and that I was now a higher level than Granddad* ***[Person 4 – Name Deleted]*** *for traditional knowledge.* ***[Person 5 – Name Deleted]*** *was a higher level than me and Granddad* ***[Person 4 – Name Deleted]*** *so he could speak me through what I had experienced and did so for the next few years. From that day they began teaching me how to perform my customary roles, responsibilities and obligations for Wadja country. I have played an active role in how decisions are made about Wadja country ever since.*

Mr **[Claimant 6 – Name Deleted]** provides a lot of material in his affidavit which evinces a strong attachment to his Wadja identity, its countries, stories and special places. He tells of the Mundgatta which is the creation story for this country and is important also to the other groups in the area. He gives a lot of information about places on Wadja country and their stories. He says that it is a blood line connection which makes you a Wadja person but there is a strong spiritual connection to country as well. He discusses totems, marriage and kinship, elders, social organisation and the observance of traditional law and custom around these things. Importantly in relation to country he says:

57. The Wadja people acknowledge the over-arching system of laws that govern how land is held by different neighbouring groups in the region.

58. I know when I am crossing over from Wadja country into another person's country because you get a funny feeling. This feeling tells you when you're home and tells you when you're in someone else's home. The feeling gets stronger the further away you go from home. Because of the family connections I have with other groups in this region, I still get the feeling but it is not too strong. When I go to a place where I have no family connections that funny feeling is so strong. I know I have to tread lightly, I wouldn't disturb a thing.

59. Every time you pass through someone else's country you are supposed to send a message to let the traditional owners know. People don't do that much anymore and are breaking the law. We still acknowledge that the law exists and that we break it if we don't do the right thing.

60. If I went to someone else's country and claimed it as mine I would be punished physically and spiritually. It is the same when other people try and claim Wadja country as their own. I talk about this a bit later (see paragraphs 69 – 70).

Wadja Country

64. The Mundagatta made Wadja country and our boundaries. Wadja country is bounded by the Dawson ranges to the east, the Comet and Shot Over ranges to the west and the Bigge ranges to the south with the apex being Blackdown Tablelands.

65. Within Wadja country we have family estates. Around Bauhinia Downs and Fairfield station is the estate of ***[Apical Ancestor 1 – Name Deleted]****'s descendants. The south eastern part of Wadja country including Oombabeer Station and Redcliff station are associated with the* ***[Family 6 – Name Deleted]*** *and* ***[Family 8 – Name Deleted]****. Further north is associated with the* ***[Family 9 – Name Deleted]*** *family. All Wadja people have rights across Wadja country, we are all one mob but people are particularly associated with their family estates. This system is recognised by all Wadja people.*

66. Wadja people have the right to speak for their country and make decisions about their country. If someone was to build a dam on Mimosa creek, they would need to speak to Wadja people.

67. Wadja people can hunt and fish on Wadja country. Wadja people that have grown up on country are the best people to speak to about that. ***[Claimant 33 – Name Deleted]*** *and* ***[Claimant 15 – Name Deleted]*** *are older Wadja men that can tell you where to go and what to hunt for.* ***[Claimant 32 – Name Deleted]****'s sons* ***[Claimant 41 – Name Deleted]*** *and* ***[Claimant 42 – Name Deleted]*** *are two younger men that go out hunting quite often. They also know a lot about bush medicine and other useful plants and bush resources.*

68. Wadja people can make this country come alive. People from neighbouring groups can't do this. I recently travelled with ... and ... to Fairfield Station ... heard the old ancestors calling out, letting the others know that senior law people were on their way. When we got to Fairfield Station ... and I could hear an old man talking to us and ... could see him, but not hear him. These things only happen to Wadja people. I know this because when I told ... who was part of the march from Taroom about the things I see and hear, he confirmed that he doesn't see it because this is not his country.

69. I know this is our country. The things that make this Wadja country are expressed in the punishment of people doing the wrong things on Wadja country.

72. Even if our own Wadja people do the wrong thing on country they will get punished.

73. The over-arching system of laws gives us the rights we have in Wadja country. The overarching system of laws gives other neighbouring groups the rights they have in their country. The Wadja people acknowledge the rights we have, and others have in their country. Previous Gangalu and Kanalou generations acknowledged this system too.

74. ... was the matriarch of the Kanalou people. She was recognised by her group and the Wadja people as a senior woman who could make decisions about Kanalou country.

75. The original Kanalou claim did not overlap or take in any part of Wadja country. This is because ... acknowledged the Wadja people are the traditional owners of the country we claim. ... attended a meeting between Wadja people and neighbouring groups to explain where Kanalou, Gangalu

and Ghanagalu country ends. She explained these groups do not cross over into Wadja country; they do not cross the ranges. ... explained that her country goes to the bottom of the foothills.

Mr **[Claimant 6 – Name Deleted]** discusses the dispute between the Wadja and Gangulu claimants; however I am mindful that I cannot resolve this dispute and it is not appropriate to go into it in any great detail here. My knowledge of the region and indeed the applicant's own factual basis materials point to the fact that European settlement had the most profound effect on the lives of the Aboriginal people of the region and the conflicts and debates raised in the material before me are indicative of this. It is likely that there will be significant evidentiary hurdles to proving the substantially uninterrupted continuity of traditional law and custom by either the Wadja or the Gaangalu Nation claimants; however that is not the task for me in undertaking the assessment here of the applicant's factual basis materials.

As I have outlined, the authorities discussed above clarify that s. 190B(5) only requires the applicant to put forward the facts said to support their argument about the identity of the relevant native title holders and the normative system under which their asserted native title is said to derive; I must accept that what is asserted is true, and I do (cf. *Doepel* at [17]; *Gudjala (2008)* at [82]–[85]). It is my view that the factual basis materials in this case are more than assertions at a high level of generality and do allow a genuine assessment of the application (cf. *Gudjala FC* at [92]). The dispute that arises on those facts is for the trial judge to resolve.

Based on the applicant's factual basis materials, I am satisfied that the factual basis is sufficient to support an assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claimed rights and interests. There is strong material within the affidavits I have reviewed which shows, in my view, an inter-generational practice of traditional law and custom that dates back to the earliest days of the arrival of the settlers, particularly by the descendants of **[Apical Ancestor 1 – Name Deleted]** and **[Apical Ancestor 2– Name Deleted]**. The factual basis materials discuss the relationships of the group overall in a cogent and factually specific way which, in my view, provides a sufficient factual basis for this particular assertion.

Continued to hold the native title—s. 190B(5)(c)

For the reasons that follow, I am **satisfied** that the factual basis on which it is asserted that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs is sufficient to support that assertion.

General principles

I understand that the reference in s. 190B(5)(c) to 'those traditional laws and customs' is a reference to the traditional laws and customs asserted to be acknowledged and observed by the native title claim group, for which a factual basis is provided under s. 190B(5)(b). As I have explained, I am not satisfied that the factual basis for the assertion of subparagraph (b) is sufficient to support an assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group which give rise to the claim to native title rights and interests.

Gudjala 2007 indicates that this particular assertion may require the following kinds of information:

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

The Full Court in *Gudjala FC* at [96] agreed that the factual basis must identify the existence of an Indigenous society observing identifiable laws and customs at the time of European settlement in the application area.

Consideration

I am of the view that the applicant's factual basis material overall provides sufficient detail to support an assertion that the claim group have continued to acknowledge and observe the traditional laws and customs of the society in existence at sovereignty. I refer to my discussion at ss. 190B(5)(a) and 190B(5)(b) about the specifics of this material.

To summarise, the applicant has identified that the relevant pre-sovereignty society is Wadja and provides details of how this is a name associated with the Aboriginal groupings or tribes which originated here, in the ethno-historical record. The native title claim group describe their descent from four Aboriginal women, connected with the application area in the post-settlement period, and this is supported by their own oral histories, and in some cases, by the genealogical notes kept by Tindale.

The native title claim group have been able to maintain familial connections and access to their country due to the Woorabinda mission being on that country and many of them residing there. Those who were removed nonetheless have maintained these connections and access to country through visiting Woorabinda and staying with relatives and also through connection with other Wadja people whilst away. There is much discussion in the affidavits about a continuing social structure or system by which the Wadja acknowledge and revere family relations, including their Elders, and that this is based on having a blood connection to their known Wadja ancestors from the early days of settlement.

This information is discussed extensively in my reasons for the assertion of s. 190B(5)(b). I am satisfied that it provides a sufficient factual basis for the assertion that the native title claim group have continued to observe and acknowledge the traditional laws and customs of their forebears and this has included an enduring association with the application area over the course of time, including walking that land, using its bush resources, hunting there, calling out to the ancestors and the passing on of inter-generational knowledge about its special stories and places. This association appears linked to and derived from their descent from known Aboriginal persons who were in turn associated with this area in the post settlement era. I am satisfied, based on the material before me, that the factual basis provided is sufficient to support the assertion described by 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 the reasons that follow.

General principles

Mansfield J discussed the nature of the Registrar's task in relation to s. 190B(6) in the following passages from *NT v Doepel*:

> Section 190B(5), (6) and (7) clearly calls for consideration of material which may go beyond the terms of the application, and for that purpose the information sources specified in s 190A(3) may be relevant. Even so, it is noteworthy that s 190B(6) requires the Registrar to consider 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. Indeed it may be that the Registrar, upon being satisfied that some of the native title rights and interests claimed can, prima facie, be established, might not apply that evidentiary test to each of the claimed native title rights and interests—at [16].

His Honour also commented in *NT v Doepel* that s. 190B(6):

- requires 'some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration'—at [18].
- is a prima facie test and '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'—at [135]
- involves some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed'—at [126], [127] and [132].

Having regard to these comments and the limited ambit of the test, as explained by Mansfield J in *NT v Doepel* and the Full Court in *Gudjala (2008)* discussed extensively above, it is my view that it would not be appropriate to have regard to information from the competing Gaangulu native title claim group as to whether, prima facie, the claimed native title rights and interests can be established.

I now look at each of the rights outlined in Schedule E, the evidentiary material provided and whether I consider, prima facie, the right is established:

Exclusive right not established

1. Over areas where a claim to exclusive possession can be recognised (such as where there has been no prior extinguishment of native title or where s.238, and/or ss 47, 47A or 47B apply), the Wadja People claim the right to possess, occupy, use and enjoy the land and waters of the application area as against the whole world, pursuant to their traditional laws and customs.

In *Western Australia v Ward* (2002) 213 CLR 1; (2002) 191 ALR 1; [2002] HCA 28 (*Ward HC*), the majority considered that the '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' and conveys 'the assertion of rights of control over the land'—at [89] and [93].

More recently, the Full Court reviewed the case law in *Griffiths v Northern Territory* (2007) 243 ALR 7 (*Griffiths FC*) about what was needed to prove the existence of exclusive native title in any given case and found that it was wrong for the trial judge to have approached the question of exclusivity with common law concepts of usufructuary or proprietary rights in mind:

> [T]he question whether the native title rights 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 usufructuary or proprietary. It depends rather on consideration of what the evidence discloses about their content under traditional law and custom. It is not a necessary condition of the existence of a right of exclusive use and occupation that the evidence discloses rights and interests that "rise significantly above the level of usufructuary rights"—at [71] (Underlining added).

Griffiths FC indicates at [127] that what is required to prove an exclusive right is to show how, under traditional law and custom, being those laws and customs derived from a pre-sovereignty society and with a continued vitality since then, the group may effectively 'exclude from their country people not of their community', including by way of 'spiritual sanction visited upon unauthorised entry' and as the 'gatekeepers for the purpose of preventing harm and avoiding injury to country'. The Full Court stressed at [127] that:

> [It is also] important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people.

I have considered the following information from Attachment F in relation to this right:

> *25. Rights to Wadja country are, and were, exercised by members of the Wadja community comprised of persons descended from ancestors named as part of this application. Claimants and their forebears gained rights in land and membership of the community on the basis of descent from ancestors with such rights, and acknowledgment by the Wadja jural public.*
> *26. People gain the authority to speak for country through the possession of geographical and cultural knowledge. Claimants use the phrase 'speaking for county', or a similar one, when discussing how people assert rights to country.*
> *27. The Wadja claimants believe they are responsible for their country and assert the right and duty to take care of it. The right derives from their obligation under their law and custom to ensure the well-being of the land subject to this application.*
> *28. Others who are not members of the Wadja community are, and were, required to seek permission prior to entering, gathering or hunting on the claim area. While Wadja claimants recognise that they are united with neighbouring groups within and by a shared body of law and custom, it is the rights and interests in the claim application area that distinguish the Wadja people from other groups who have rights and interests elsewhere and identify with different named groups.*

I have also considered the affidavits provided to me. Although there is discussion that it is a bloodline connection which give rise to a right to speak for Wadja country and how bad things happen to those who try and assert this, when they do not have the necessary bloodline connection [e.g. discussion by Mr **[Claimant 6 – Name Deleted]** on this topic] it is my view that this right is not prima facie established. It is my view that there is no real explanation as to how, under the traditional laws and customs of the relevant normative system, members of the group may effectively 'exclude from their country people not of their community' (see *Griffiths FC* at [127]) and have the right to control access of outsiders to the application area (see *Ward HC* at [89]). In my view, further evidence is required as to how such a right arises under the traditional

law and custom of the pre-sovereignty society or normative system. To find that existence of such a right is established prima facie.

Non-exclusive rights prima facie established

Paragraph 2 of Schedule E identifies a series of rights and interests relating to their access to and use of the application area over areas 'where a claim to exclusive possession cannot be recognised'. I have grouped those that are similar in content, as discussed below:

(a) the right to access the application area

(b) the right to camp on the application area

(c) the right to erect shelters on the application area

(d) the right to live on the application area

(e) the right to move about the application area

(f) the right to exist and be present on the application area

(g) the right to hold meetings on the application area

(l) the right to light campfires for cooking, heating and lighting purposes on the application area; domestic purposes including cooking but not for the purposes of hunting or clearing vegetation

The material I have reviewed is replete with examples of the exercise of these rights under traditional laws and customs. See:

[Claimant 1 – Name Deleted] [11/2/12] at 2–3, 11–12, 17, 21–22, **[Claimant 2 – Name Deleted]** [1/5/12] at 5, 7, **[Claimant 3 – Name Deleted]** [12/12/11] at 4–5, 13–17, 22, **[Claimant 4 – Name Deleted]** [8/2/12] at 3, 7, 10, 14, 17–19, **[Claimant 5 – Name Deleted]** [1/12/11] at 14, 17–19, 40, **[Claimant 6 – Name Deleted]** [9/11/11] at 4–6, 9, 65 and **[Claimant 7 – Name Deleted]** [1/10/11] at 18–23

(h) the right to hunt on the application area

(i) the right to fish on the application area; the right to take and use the natural water resources of the application area, including the beds and banks of watercourses

(j) the right to take, use, share or exchange the natural resources on the application area

(k) the right to gather the natural products of the application area (including food, medicinal plants, timber, stone, ochre and resin) according to traditional laws and customs

(u) the right to cultivate and harvest native flora according to traditional laws and customs.

The material which prima facie supports these rights is: **[Claimant 1 – Name Deleted]** [11/2/12] at 26, 37–40, **[Claimant 3 – Name Deleted]** [12/12/11] at 10, 49–53, 56, **[Claimant 4 – Name Deleted]** [8/2/12] at 21–23, **[Claimant 5 – Name Deleted]** [1/12/11] at 9–10, 32, 34–39, **[Claimant 6 – Name Deleted]** [9/11/11] at 67 and **[Claimant 7 – Name Deleted]** [1/10/11] at 54–62.

(m) the right to teach about the physical and spiritual attributes of the application area

(n) the right to conduct ceremony on the application area

(o) the right to participate in cultural activities on the application area

(p) the right to maintain places of importance under traditional laws, customs and practices in the application area

(q) the right to protect places of importance under traditional laws, customs and practices in the application area

(r) the right to conduct burials on the application area

(s) the right to be accompanied onto the application area by non-claim group members required under traditional laws and customs for the performance of ceremonies or cultural activities and to assist in observing and recording traditional activities in the application area

(t) the right to transmit the cultural heritage of the native title claim group including knowledge of particular sites

The material which prima facie supports these rights are: **[Claimant 1 – Name Deleted]** [11/2/12] at 28–32, 38, **[Claimant 3 – Name Deleted]** [12/12/11] at 23, 44–45, 47, 62, 65–67, **[Claimant 4 – Name Deleted]** [8/2/12] at 12, 17–19, 24–29, **[Claimant 5 – Name Deleted]** [1/12/11] at 31, 45–48, **[Claimant 6 – Name Deleted]** [9/11/11] at 36–38, 57–60, 39–41 and **[Claimant 7 – Name Deleted]** [1/10/11] at 44–49.

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).

Mansfield J had this to say in *NT v Doepel* about the task at s. 190B(7):

> Section 190B(7) ... does require the Registrar to be satisfied of a particular fact or particular facts. It therefore requires evidentiary material to be presented to the Registrar. The focus is, however, a confined one. 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. It can be seen, as with s 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration—at [18].

Having regard to these comments and the limited ambit of the test, as explained by Mansfield J in *NT v Doepel* which I have discussed extensively above, it is my view that it would not be appropriate to have regard to information from the competing Gaangalu native title claim group which would seek to impugn the information that is before me on this topic.

I understand that the phrase 'traditional physical connection' means a physical connection in accordance with the particular 'traditional' laws and customs relevant to the claim group, as was

discussed in *Yorta Yorta*. I note also that [29.19] of the explanatory memorandum to the *Native Title Amendment Act 1998* indicates that parliament intended that the connection described in s. 190B(7) 'must amount to more than a transitory access or intermittent non-native title access'.

I refer to the affidavits of **[Claimant 1 – Name Deleted]** [11/2/12], **[Claimant 2 – Name Deleted]** [1/5/12], **[Claimant 3 – Name Deleted]** [12/12/11], **[Claimant 4 – Name Deleted]** [8/2/12], **[Claimant 5 – Name Deleted]** [1/12/11], **[Claimant 6 – Name Deleted]** [9/11/11] and **[Claimant 7 – Name Deleted]** [1/10/11] and the most recent statements by **[Claimant 8 – Name Deleted]**, **[Claimant 9 – Name Deleted]** and **[Claimant 10 – Name Deleted]**. I am satisfied that these persons are members of the native title claim group and that they provide evidence of their traditional physical connection to the application. They also provide evidence of their acknowledgement and observance of traditional laws and customs. I refer to my reasons at ss. 190B(5) and 190B(6) for references to this material. I am satisfied that they currently have or previously had a traditional physical connection with the land or waters covered by the application.

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.

The application **satisfies** the condition of s. 190B(8).

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

No approved determination of native title: 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.

The application meets the requirement under s. 61A(1). There are no approved determinations of native title over the application area.

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

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

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

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

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

The application meets the requirement under s. 61A(2), as limited by s. 61A(4). Any areas over which there is a PEPA and in respect of which ss. 47, 47A or 47B do not allow extinguishment to be disregarded, have been excluded from the application area: see statements to this effect in Schedule B.

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

Under s. 61A(3), the application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where:

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

The application meets the requirement under s. 61A(3), as limited by s. 61A(4). Schedule E is clearly drafted such that any claim of exclusive possession, occupation, use and enjoyment is only made over areas where there has been no extinguishment or where any extinguishment is to be disregarded because of ss. 47, 47A or 47B (refer to my reasons for s. 190B(4) above).

Subsection 190B(9)
No extinguishment etc. of claimed native title

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

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

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

(a) The application satisfies s. 190B(9)(a) as Schedule Q states that the application does not make any claim for ownership of minerals, petroleum or gas wholly owned by the Crown.

(b) The application satisfies s. 190B(9)(b) as it is located well inland and does not extend to offshore places.

(c) The application satisfies s. 190B(9)(c). The application does not disclose, nor is there any information before me to indicate, that the claimed native title rights and interests have been otherwise extinguished.

[*End of reasons*]