National Native Title Tribunal

Registration test decision

Application name	Gunggari People #4
Name of applicant	Ethel Munn, Erica Walker, Bernys Faulkner, Kathleen Kearns, Bradley Saunders, Marshall Foster, Reeghan Finlay
State/territory/region	Queensland
NNTT file no.	QC12/14
Federal Court of Australia file no.	QUD550/12
Date application made	10 October 2012
Date of decision	**11 January 2013**

Name of delegate Heidi Evans

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

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

Date of reasons: 14 January 2013

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Heidi Evans

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 the Registrar's delegate, for the decision to accept the application for registration pursuant to s. 190A of the Act.

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

Application overview

The Registrar of the Federal Court of Australia (the Court) gave a copy of the Gunggari People #4 claimant application to the Native Title Registrar (the Registrar) on 15 October 2012 pursuant to s. 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

Given that the claimant application was made on 10 October 2012 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

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

I note that the Gunggari People #3 application (QC2012/13; QUD548/12) was also filed on 10 October 2012, and a copy of that application also provided to the Registrar on 15 October 2012. Both applications are made by the same native title claim group (represented by Queensland South Native Title Services in relation to each application), and the applications cover areas immediately adjacent to one another. The applications primarily rely on the same material (aside from information relating to the application boundaries) as providing the basis of each of the claims.

Both application areas were originally subject to the Gunggari People #1 claim (QUD6019/98), filed in March 1996. In 1998, this claim was amended to reduce the area of the claim so as to exclude those areas subject to competing native title claims. I note that the area originally covered by the Gunggari People #1 claim includes the entire areas of both the Gunggari People #3 application (QC2012/013; QUD548/12), the Gunggari People #4 application (QC2012/014; QUD550/12), and the Gunggari People #2 consent determination (QUD6027/01) finalised on 22 June 2012.

Registration test

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

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

Information considered when making the decision

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

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

The information and documents that I have considered in reaching my decision are set out below:

- Gunggari People #4 native title determination application (QC2012/014; QUD550/12);
- Geospatial assessment and overlap analysis dated 29 October 2012 (GeoTrack: 2012/1927);
- letters dated 22 October 2012 from the case manager to the State of Queensland (the State), and the relevant representative body, QSNTS, pursuant to ss. 66(2) and 66(2A);
- additional material comprising affidavits sworn by Gunggari People claim group members and a referenced version of the report at Attachment F, submitted by the applicant's representative, Queensland South Native Title Services (QSNTS) by email on 5 November 2012;
- letter to the State dated 15 November 2012 attaching a confidentiality agreement regarding use of additional material to be provided, signed by the State on 16 November 2012;
- letter to the State dated 16 November 2012 providing additional material in accordance with the above confidentiality agreement;
- replacement s. 62(1)(a) affidavits filed in the Court on 10 December 2012;
- Court order dated 11 December 2012 uplifting the original non-compliant affidavits and replacing these with the affidavits filed 10 December 2012.

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

Also, I have *not* considered any information that may have been provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice'. Further, mediation is private as between the parties and is also generally confidential (see also ss. 94K and 94L).

I note that I am also the delegate currently considering the QUD548/2012 — Gunggari People #3— QC2012/014 application for the purpose of the registration test, and that both applications were filed on the same day, being 10 October 2012.

The two applications are very similar. Whilst they cover different, but adjacent areas, they are made by the same applicant on behalf of the same native title claim group. Further, each application is supported by identical factual basis material, including information contained within the application, and additional material in the form of affidavits sworn by claim group members (submitted by the applicant by email dated 5 November 2012). I note that the covering email from the applicant's representative, QSNTS, clearly states that the additional material provided is for consideration by the delegate in relation to the registration testing of both the Gunggari People #3 application and the Gunggari People #4 application.

Thus, while I have considered each application separately and formed a view in relation to all of the procedural and merit conditions in ss. 190B and 190C for each of the applications, where I have assessed that it is appropriate (given the similarities and identical nature of almost all of the material provided for each of the applications), I have adopted similar reasoning between the applications at a number of conditions of the registration test.

Procedural fairness steps

As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are made in a fair, just and unbiased way. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication—*Hazelbane v Doepel* [2008] FCA 290 at [23] to [31]. The steps taken to ensure procedural fairness is observed in this matter are set out below.

On 22 October 2012, the case manager wrote to the State, providing a copy of the Gunggari People #4 application, and an opportunity to comment on the application by 12 November 2012. The State did not provide any comments on the application.

Also on 22 October 2012, the case manager wrote to the relevant representative body for the area of the application, QSNTS, and provided them with a copy of the application pursuant to s. 66(2A).

On 5 November 2012, by email, the applicant's representative submitted additional material, in the form of four affidavits sworn by claim group members, and a fully cited and referenced version of the report at Attachment F of the application. The case manager wrote to the State on 15 November 2012, advising of the receipt of this material, and, at the request of the applicant, sought the State's assent to a confidentiality agreement regarding their use of the material, prior to it being provided. This agreement was signed by a representative for the State on 16 November 2012, and the additional material was subsequently provided to the State by letter from the case manager that same day. The State did not make any submissions in relation to this material.

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.

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

It is also my view that I need only consider those parts of ss. 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s. 190C(2)). I therefore do not consider the requirements of s. 61(2), as it imposes no obligations of this nature in relation to the application. I am also of the view that I do not need to consider the requirements of s. 61(5). The matters in ss. 61(5)(a), (b) and (d) relating to the Court's prescribed form, filing in the Court and payment of fees, in my view, are matters for the Court. They do not, in my view, require any separate consideration by the Registrar. Paragraph 61(5)(c), which requires that the application contain such information as is prescribed, does not need to be considered by me under s. 190C(2), as I already test these things under s. 190C(2) where required by those parts of ss. 61 and 62 which actually identify the details/other information that must be in the application and the accompanying prescribed affidavit/documents.

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

Native title claim group: s. 61(1)

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

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

It is my understanding of this condition of the registration test that it is only where it appears, on the face of the application itself, that not all of the persons in the native title claim group have been included in the description, or that the group described is a subgroup of the native title

claim group, that the application may fail to satisfy s. 61(1) for the purposes of s. 190C(2) – *Doepel* at [36]. In undertaking this consideration, I note that I am not to undertake any merit assessment regarding whether the group described is, in fact, the correct native title claim group – *Doepel* at [37].

In limiting my consideration to the information contained in the application, I am of the view that there is nothing that reveals that the application has been made by something less than the native title claim group.

The application satisfies the requirements of s. 61(1) for the purposes of 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).

The persons comprising the applicant are named immediately above Part A of the Form 1. Part B of the Form 1 contains the details of the applicant's representative, and the address for service for the applicant.

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

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

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

As the Court held in *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198, the role of the Registrar at this condition of the registration test, for the purposes of s. 190C(2), is merely to ensure that the information required by s. 61(4) is contained in the application – at [34]. It is a matter of procedure, and does not allow me to consider the sufficient clarity or correctness of the description – *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 at [31] and [32].

A description of the native title claim group, in accordance with subsection (b) of s. 61(4), appears at Schedule A of the application. The application meets the condition at s. 61(4) for the purposes of s. 190C(2).

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

> The application must be accompanied by an affidavit sworn by the applicant that:
> (i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and
> (ii) the applicant believes that none of the area covered by the application is also covered by an approved determination of native title, and
> (iii) the applicant believes all of the statements made in the application are true, and
> (iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and

(v) 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).

Affidavits in the form required by s. 62(1)(a) accompanied the application filed in the Court on 10 October 2012. Having considered these affidavits, I was of the view that they were not compliant with the requirements of s. 62(1)(a). On 22 November 2012, I caused the case manager to advise the applicant in this regard. The applicant advised that they would immediately seek to rectify the issue with the affidavits, and on 10 December 2012 filed replacement affidavits in the Court, seeking to have the existing affidavits uplifted and replaced.

On 11 December 2012, the Court ordered that the existing affidavits were to be uplifted from the Court's file, and replaced with the December 2012 affidavits, which henceforth were to be taken as accompanying the filing of the Form 1 on 10 October 2012. It is the affidavits filed on 10 December 2012, subject of the Court order dated 11 December, which I have considered in my reasons below against the requirements of s. 62(1)(a), for the purposes of s. 190C(2).

Accompanying the application are seven affidavits sworn by each of the persons comprising the applicant. I understand my role at s. 62(1)(a) for the purposes of s. 190C(2), to be restricted to a consideration only of whether the accompanying affidavits contain the required statements – *Doepel* at [87].

Each of the seven affidavits contain the same ten paragraphs, which speak to the deponents' descent from a particular apical ancestor, the authorisation process undertaken regarding the application, and various other assertions. It is my view that these paragraphs contain the requisite statements prescribed by subsections (i) to (v) of s. 62(1)(a).

Each affidavit states the name and address of the deponent, has been signed by that person, is dated and appropriately witnessed.

Consequently, I am satisfied that the application is accompanied by the affidavit required by s. 62(1)(a), and meets the requirements of this condition for the purposes of s. 190C(2).

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

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

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

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

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

The application must contain information, whether by physical description or otherwise, that enables the following boundaries to be identified:
(i) the area covered by the application, and
(ii) any areas within those boundaries that are not covered by the application.

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

Schedule B refers to Attachment B as containing a description of the area of land and waters covered by the application. Attachment B is entitled 'Gunggari People #4 – External Boundary

Description', and has been prepared by Queensland South Native Title Services (24 August 2012), based on a description prepared by the Tribunal's Geospatial Services, dated 15 May 2012.

Schedule B also contains a list of general exclusion clauses, identifying those areas falling within the external boundary that are not covered by the application.

The application contains the details and information required by s. 62(2)(a).

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).

Schedule C refers to Attachment C as containing a map showing the external boundaries of the area covered by the application. Attachment C is titled 'Native Title Determination Application - Gunggari #4', and has been prepared by the Tribunal's Geospatial Services, dated 23 August 2012.

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 provides that the applicant has not conducted any searches of this nature.

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).

A description of the native title rights and interests claimed by the native title claim group in relation to the land and waters of the application area appears at Schedule E of the application.

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).

Schedule F of the application contains brief statements regarding a general description of the factual basis on which it is asserted that the rights and interests claimed exist, and refers to Attachment F/M as containing further information of this nature.

Attachment F/M is a 19-page report, containing various information relating to the three assertions at subsections (i) to (iii) of s. 62(2)(e).

The application contains the details and information required by s. 62(2)(e).

Activities: s. 62(2)(f)

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

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

The activities currently carried out by the claim group in relation to the area claimed are listed at Schedule G of the application. Schedule G also refers to Attachment F/M as containing further information relevant to this requirement.

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

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

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

Schedule H of the application states that 'the area covered by the Application is not covered by another application.' I take this to mean that the applicant is not aware of any other such applications.

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).

The details and information required by s. 62(2)(ga) appear at Schedule HA of the application which states that the applicant is unaware of any such notifications.

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

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

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

Schedule I of the application provides that the applicant conducted a search on 18 September 2012 which indicated that there are no section 29 notices relating to the whole or part of the claim area.

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).

In undertaking the task at s. 190C(3), I note that it is only where a previous application meets all three criteria set out at subsections (a) to (c), that I am required to consider whether there may be common claimants between the native title claim group for that application and the claim group for the current application – see *Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

Turning my mind to the first criterion set out at subsection 190C(3)(a), the geospatial assessment provides that there is one application as per the Register of Native Title Claims and Schedule of Applications that overlaps the current application, being Bidjara People (QC08/5; QUD216/08). I note that the current application falls entirely within the area covered by the previous application. Consequently, the previous application meets the criterion at s. 190C(3)(a).

On this basis, I have turned to consider the second criterion at subsection 190C(3)(b), namely whether the previous application appeared in an entry on the Register of Native Title Claims when the current application was made. The geospatial assessment provides that the Bidjara People application was accepted for registration, and therefore entered onto the Register, on 12 September 2008. For this reason, I am of the view that the previous application satisfies the criterion at s. 190C(3)(b).

Having reviewed the Tribunal's databases regarding registration test decisions for native title determination applications, I have verified that the previous application, filed on 23 July 2008, was subject to the provisions of the registration test and was entered onto the Register following its acceptance pursuant to s. 190A. The previous application, therefore, meets the requirements of s. 190C(3)(c).

Being of the view that the previous application satisfies all three criteria set out at subsections (a), (b) and (c) of s. 190C(3), the requirement for me to consider whether a person included in the native title claim group for the current application is a member of the claim group for the previous application is triggered.

I have had reference to the register extract for the Bidjara People application (the previous application), including a description of the native title claim group for that application. The description of the native title claim group provides that the Bidjara People are the biological descendants of 21 individual apical ancestors, and 5 apical ancestor couples.

I note that the native title claim group for the current application is described as the descendants of 14 individual apical ancestors, and 2 apical ancestor couples. Upon undertaking a comparison of the two lists of apical ancestors for the previous application and the current application, I have formed the view that there are no common claimants between the two applications. While the list of apical ancestors for the previous application fails to name some of the apical persons, referring to these individuals as 'Mother of' certain named persons, there is nothing before me which indicates that these unnamed apical ancestors are any of the persons named in the claim group description for the Gunggari People #4 application. The apical persons named in the current application do not share the same surnames as any of those persons named as children of the unnamed apical persons. Similarly, I note that there is a 'Maggie' included within the list of apical ancestors for the previous application, and that 'Maggie of the Moonie' is included within the apical ancestor list for the current application, however, again, I note that there is nothing before me to indicate or suggest that this is the same person. This is the extent of any similarities between the two lists of apical ancestors describing the native title claim groups for the overlapping applications.

In light of this, I am satisfied that no person included in the native title claim group for the current application is also a member of the native title claim group for the Bidjara People application. The application satisfies the condition of s. 190C(3).

Subsection 190C(4) Authorisation/certification

> Under s. 190C(4) the Registrar/delegate must be satisfied that either:
> (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
> (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
>
> Note: The word ***authorise*** is defined in section 251B.
>
> Under s. 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

I must be satisfied that the requirements set out in either ss. 190C(4)(a) or (b) are met, in order for the condition of s. 190C(4) to be satisfied.

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

Schedule R provides that the application has been certified and refers to the relevant certificate attached and marked Attachment R. The certificate at Attachment R is titled 'Certification of Native Title Determination Application Gunggari People #3', and is dated 5 October 2012. It has

been signed by the Chief Executive Officer of the certifying representative body, Queensland South Native Title Services (QSNTS).

In relation to the requirement of s. 190C(4)(a), in emphasising the difference between the tasks at s. 190C(4)(a) and s. 190C(4)(b), Mansfield J in *Doepel* held that 'the Registrar is to be satisfied of the fact of certification by an appropriate representative body' – at [78]. Consequently, I understand my task at s. 190C(4)(a) to be restricted to a consideration of two elements. Firstly, whether the certifying representative body has the requisite power to make that certification, and secondly, whether the certification complies with the requirements of a valid certification set out at s. 203BE(4).

Does the representative body have the requisite power to certify?

The certificate accompanying the application provides that QSNTS is a 'body funded under s. 203FE(1) ... for the purpose of performing the functions of a representative body', rather than being a recognised body pursuant to s. 203AD. In addition to this, the CEO of QSNTS who makes the certification states that he is 'a duly appointed executive officer of the representative body ... delegated the function given to QSNTS ... to certify the Native Title Determination Application'. From this statement, I understand that QSNTS assert that they are funded to perform *all* the functions of a representative body, including the function of certification pursuant to s. 203BE.

The Tribunal maintains a number of national maps containing information relevant to native title determination applications, including a map titled, 'Representative Aboriginal/Torres Strait Islander Body Areas'. This map provides, consistent with the information contained in the certificate before me, that there is no recognised body for the southern and western Queensland region, but that QSNTS is funded under s. 203FE(1) to perform such functions for this region.

On this basis, and noting that there is no contradictory information before me, I am satisfied that QSNTS have the requisite authority to make the certification of the application.

The requirements of a valid certification - s. 203BE(4)

Section 203BE(4) provides that:

> A certification of an application for a determination of native title by a representative body must:
>
> (a) include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs (2)(a) and (b) have been met; and
>
> (b) briefly set out the body's reasons for being of that opinion; and
>
> (c) where applicable, briefly set out what the representative body has done to meet the requirements of subsection (3).

Paragraphs (2)(a) and (b) of s. 203BE provide that:

> A representative body must not certify under paragraph (1)(a) an application for a determination of native title unless it is of the opinion that:
>
> (a) all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and
>
> (b) 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.

The certificate contains the statements required by subsection (a), in identical terms to the statements set out at subsection (2) of s. 203BE (above). These statements appear at paragraphs [2], [3] and [4(d)] of the certificate.

Paragraph [4] of the certificate contains certain information relating to the authorisation of the application. This information includes that the authorisation meeting took place on 23 October 2011 at Mitchell, following extensive public and personal notification processes such as publication in three newspapers in the area, mail outs to Gunggari People already known to QSNTS, and placement of the advertisement for the meeting on the QSNTS website. The certificate also provides that the meeting was well-attended, and records were kept of meeting procedures and outcomes by QSNTS staff present.

This information, in my view, is sufficient for the purposes of 'briefly' setting out QSNTS's reasons for being of the stated opinion.

Regarding the requirement of s. 203BE(4)(c), the certificate is silent.

Subsection (3) of s. 203BE places an obligation upon the relevant representative body to achieve agreement between respective groups of overlapping applications. I note that Schedule H of the application states that the area covered by the application is not covered by another application. The absence of any overlapping application is confirmed by the geospatial assessment for the application dated 24 October 2012.

On this basis, noting the introductory words of s. 203BE(4)(c) 'where applicable', I am of the view that the failure of the certificate to speak to subsection (c) does not prove fatal in its ability to meet the requirements of s. 203BE(4) of a valid certification.

Having answered the two limbs of the test in the positive, I am of the view that the application meets the requirements of s. 190C(4)(a), and that the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part.

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).

Noting the wording of the provision of s. 190B(2), I note that it is to the information contained in the application as required by ss. 62(2)(a) and (b) that I am to have regard in reaching the necessary level of satisfaction.

A written description of the external boundaries of the application area, pursuant to s. 62(2)(a), appears at Attachment B to Schedule B. Attachment B is entitled 'Gunggari People #4' and has been prepared by Queensland South Native Title Services, dated 24 August 2012. The external boundary of the application area is described at Attachment B by way of a metes and bounds description, referencing native title determination application boundaries, rivers, creeks, roads, cadastral parcels, river catchment areas and geographic coordinate points (referenced to GDA94).

Attachment B specifically excludes native title determination applications:

- QUD6027/01 Gunggari People 2 (QC01/28) as filed in the Federal Court 15 December 2011.
- QUD23/06 Karingbal 2 (QC06/5) as accepted for registration 24 March 2006.
- QUD366/08 Mandandanji People (QC08/10) as accepted for registration 30 March 2009.
- QUD245/11 Brown River People (QC11/4) as filed in the Federal Court 13 July 2012.
- QUD310/12 Karingbal People #3 (QC12/6) as filed in the Federal Court 27 June 2012.

Schedule B describes those areas within the external boundary not covered by the application by way of a list of general exclusion clauses.

A map of the application area, pursuant to the requirement of s. 62(2)(b) appears at Attachment C to Schedule C of the application. Attachment C is a colour copy of an A3 map entitled 'Gunggari #4' produced by the Tribunal's Geospatial Services, dated 23 August 2012. The map includes:

- The application area depicted by a dark blue outline and pale blue fill;
- Topographic image as a background;
- Selected native title determination application boundaries shown and labelled;
- Scalebar, northpoint, coordinate grid, legend and locality map; and
- Notes relating to the source, currency and datum of data used to prepare the map.

Regarding the use of general exclusion clauses to describe those areas within the external boundary that are not covered by the application, I am of the view that such an approach is an acceptable in meeting the requirements of s. 190B(2) – see for example *Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*) at [50] to [55]. The geospatial assessment concludes that the map and written description are consistent and identify the application area with reasonable

certainty. Noting this, and that, in my view, the map and description together enable the accurate identification of the application area on the earth's surface, I am satisfied that the information contained within the application is sufficient for it to be said with reasonable certainty, whether the native title rights and interests are claimed in relation to particular land and waters.

The application meets the requirements of s. 190B(2).

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).

In *Doepel*, Mansfield J discussed the nature of the task at s. 190B(3), commenting that its focus is 'not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members[sic] of any particular person in the identified native title claim group can be ascertained. It ... does not require any examination of whether all the named or described persons do in fact qualify as members of the native title claim group' – at [37]. In addition, His Honour held that the focus is 'whether the application enables the reliable identification of the persons in the native title claim group' – at [51].

Kiefel J agreed with this finding in *Wakaman People 2 v Native Title Registrar* [2006] FCA 1198, stating that the condition 'does not require or permit the Registrar to be satisfied about the correctness of these matters' – at [34].

Information pertaining to the native title claim group appears at Schedule A of the application. As the persons in the group are described, rather than named, I note that it is subsection (b) of s. 190(3) that provides the relevant test in my assessment of that information.

That description appears as follows:

> The Gunggari People are the descendants of the following people:
>
> (a) Jinnegah
>
> (b) Jimmy and Nelly Flourbag
>
> (c) Harry Collins
>
> (d) Old Frog
>
> (e) Coombra Jack
>
> (f) Kitty of St George and Maggie of the Moonie
>
> (g) King Billie Dick
>
> (h) Maria of Tongy Station
>
> (i) Harry Rookwood
>
> (j) Lucy of the Balonne River

(k) Charlotte Moffatt

(l) Mary of the Maranoa

(m) Nellie Walker

(n) Clifton George

(o) Mary of Bollon

(p) Kate Meathers/Meadows

I note that the requirement of the description is that it must describe the persons in the group with sufficient clarity, such that it can be ascertained whether a particular person is a member of the group. The use of a description involving the application of certain criteria, or rules, for the purposes of ascertaining the members of a group, was considered by Carr J in *Western Australia v Native Title Registrar* [1999] FCA 1591. The description in that instance was one involving three rules relating to descent from certain apical ancestors, including descent by adoption.

His Honour made the following comments on the nature of the description:

> The question is whether the application of the Three Rules describes the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is in that group. In my view it does. The starting point is a particular person. It is then necessary to ask whether that particular person, as a matter of fact, sits within one or other of the three descriptions in the Three Rules. I think that the native title claim group is described sufficiently clearly. In some cases, the application of the Three Rules may be easy. In other cases, it may be more difficult. Much the same can be said about some of the categories of land which were used to exclude areas from the claim. It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently clearly... – at [67].

The case law confirms that there is no requirement that the set of rules or principles be able to identify every member of the claimant group at the time the registration test decision is being made – see *Ward v Registrar, National Native Title Tribunal* [1999] FCA 1732 at [25] and *Lawson v Minister for Land and Water Conservation* [2002] FCA 1517 at [24].

I note that the description before me contains only one rule by which the persons comprising the native title claim group are to be identified. Those persons are the descendants of fourteen named apical ancestors, and two pairs/couples of apical ancestors. In the absence of further clarifying information, it is my understanding that the word 'descendant' is used to refer to the biological descendants of the named ancestors. While the identification of all of the biological descendants of those apical ancestors would most certainly involve an amount of factual inquiry, following from Carr J's finding above, in my view, this does not prove fatal to the description satisfying the requirements of s. 190B(3).

Subsequently, I am satisfied that the persons in the group have been described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

The application meets the requirements of s. 190B(3).

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).

The reference to the description contained in the application pursuant to s. 62(2)(d), in my view, makes it clear that it is that description that is to be the focus of my assessment in undertaking the task at s. 190B(4) – see *Doepel* at [16].

The description of the native title rights and interests claimed in relation to the application area, appears at Schedule E of the application. I note that all of the nine rights and interests claimed are expressed as non-exclusive rights and interests in relation to the land and waters of the application area.

In undertaking the task at s. 190B(4), it is my view that the 'test of identifiability', is 'whether the claimed native title rights and interests are understandable and have meaning' – *Doepel* at [99]. In making that assessment, it is also my view that regard is to be had to the definition of native title rights and interests as it appears at s. 223(1). In *Doepel*, Mansfield J held that it was open to the delegate to read the entire description, including any stated qualifications or restrictions in relation to the claimed native title rights and interests so that 'properly understood there was no inherent or explicit contradiction' within the description – at [123].

I note that the description appearing at Schedule E does not include any stated qualifications or restrictions applying generally to the operation of all of the native title rights and interests claimed. Each of the rights and interests claimed, however, in my view, is expressed in a way that clarifies the extent of that right or interest. In this way, I am of the view that the rights and interests claimed are expressed in a sufficiently clear manner, such that I find the description as a whole, one that is easily understood.

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

The task at s. 190B(5)

In undertaking the task at s. 190B(5), I am of the view that there is a correlation that exists between the requirements of s. 62(2)(e) and s. 190B(5), such that an application and accompanying affidavit/s which 'fully and comprehensively' addresses all the matters in s. 62 could provide sufficient information to enable the Registrar to be satisfied of all the matters referred to in s. 190B' – *Gudjala #2 v Native Title Registrar* [2008] FCAFC 157 *(Gudjala FC*) at [90]. Regardless of this correlation, I note that I am not restricted to the information contained within the application in reaching the required level of satisfaction at s. 190B(5) – *Doepel* at [16].

The case of *Doepel* discussed in some detail the role of the delegate at s. 190B(5). Mansfield J held that the delegate is to determine 'whether the asserted facts can support the claimed conclusions' and that 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' – at [17].

The nature of the information required to satisfy the condition at s. 190B(5) must be in 'sufficient detail to enable a genuine assessment', and be 'more than assertions at a high level of generality' – *Gudjala FC* at [92]. With this requirement for a genuine assessment in mind, I am of the view that the factual basis material must have relevance to the particular native title claimed, by the particular native title claim group over the particular land and waters of the application area – *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007)* at [39].

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

Reasons for s. 190B(5)(a)

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

In my assessment of whether the factual basis is sufficient to support the assertion at s. 190B(5)(a), it is my view that the information must possess a certain geographical particularity, such that it reveals an association with the whole of the area covered by the application – *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) at [25]. Similarly, it is my understanding that the material must indicate the nature or kind of association referred to, whether spiritual and/or physical – *Martin* at [25].

In Dowsett J's decision in *Gudjala 2007*, in reasoning not criticised by the Full Court on appeal, His Honour held that the following types of information may be necessary to support the assertion that the claim group members have, and their predecessors had, an association with the area claimed:

- 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 an association at all times;
- that there has been an association between the predecessors of the whole group and the area over the period since sovereignty – at [52].

The applicant's factual basis material – s. 190B(5)(a)

I have set out at the Application Overview above, information pertaining to the area covered by the current application, namely that the area covered by this application, and the area covered by the Gunggari People #3 application (QC2012/013; QUD548/12) were both subject to the area originally covered by the Gunggari People #1 claim (QUD6019/98) prior to the amendment of that claim. The factual basis (see report at Attachment F at [14] to [17]) provides that while the Gunggari People #1 claim area was reduced to exclude overlapping applications, the Gunggari People have always maintained their assertion to native title rights and interests across the entire area covered by the Gunggari People #1 claim.

The factual basis material in the application before me consists of a referenced and untitled report at Attachment F to Schedule F, and affidavits from four members of the claim group. As also discussed in my reasons above, the factual basis material submitted for both the Gunggari People #3 and Gunggari People #4 claimant applications is identical. Consequently, that material treats the application areas for both claims as one complete area, referring to locations across both areas throughout. Noting that the Gunggari People have continued to assert native title rights and interests across the entire area covered by the Gunggari People #1 claim (including the whole of the area covered by the current application and the Gunggari People #3 application), and the references throughout the factual basis material to locations across both the current application area and the area covered by the Gunggari People #3 application, in undertaking the task at s. 190B(5)(a), I have similarly considered it appropriate to treat the application areas for both claims as one complete area, and make an assessment of the factual basis regarding the association of the native title claim group on this premise. I have, therefore, adopted the same set of reasons (as follows) at s. 190B(5)(a) in my decision for the current application, as those appearing at s. 190B(5)(a) for the Gunggari People #3 application.

The Attachment F report contains a number of general statements regarding the claim group's association, specifically that the Gunggari ancestors occupied the application area from before 1788, and at the time at which European occupation of the area took place, which is asserted as being between 1840 and 1860 – Attachment F report at [2]. The report also states that the Gunggari people have maintained a 'continuity of occupation, connection, and association with the area'—at [3]. This is supported within the report by references to historical sources that identified the Gunggari People as being present on the area at the time of sovereignty.

In the affidavit material, claimants speak of the specific locations within and surrounding the application area with which they and their family assert an association. Broadly, claimants refer to Gunggari country as following the Maranoa River, and therefore that the Gunggari People themselves are considered as being 'of the Maranoa' – see Attachment F report at [21].

One claimant describes their knowledge of the extent of Gunggari country as follows:

> When I was about 13 or 14 years old, I was taught by Aunty **[Claimant 1 – Name Deleted]** and other Gunggari elders that Gunggari country follows the Maranoa River, which starts around Mount Moffatt, down south though Mitchell and down to almost St George where it meets the Balonne River. Gunggari country includes the towns of Mitchell, Amby, Muckadilla, Morven and Mungallala, but Mitchell is the heartland. Gunggari country also includes the upper Mungallala, Wallam, and Nebine creeks. Our neighbours are Kooma to the south, Mandandanji to the east and Bidjara to the west – affidavit of **[Claimant 2 – Name Deleted]** at [21].

Claimants speak in detail of the lifestyles of their predecessors back to two or three generations, spending time on the application area. An example is where an elderly claimant states:

> My Grandfather had an exemption, and kept his children, including my mother out on the stations where he worked, such as Forestvale and Womblebank. My Grandmother also worked out on the stations as a cook.
>
> I grew up in Mitchell with my family and lived there for most of my life until my children left for school. We lived in a small house in the town, but spent most of our time at the *Yumba* (camp) visiting family. I remember spending a lot of time down on the Maranoa River. We practically lived down there.
>
> My mother rode horses up near the top of the Maranoa on stations such as Womblebank and Crystalbrook. She would ride in the rodeos up there.
>
> My mother told me that where she worked and where her parents worked was Gunggari country. If they weren't up on the stations, they were in Mitchell – affidavit of **[Claimant 3 – Name Deleted]** at [3], [7], [11] and [12].

Statements made by claimants in their affidavits suggests that particular families assert an association with particular localities within the wider application areas. For example, one claimant states that:

> My mother's country was around Mitchell. I was told by my mother and Granny **[Claimant 4 – Name Deleted]** that Gunggari country included all of the Maranoa River down to the Balonne River, and up to the headwaters around Mt Moffatt. Granny **[Claimant 4 – Name Deleted]** was born at the junction of these two rivers and she often talked about places like Mulgavale, Albany Downs, Woodlands and Hillsborough – affidavit of **[Claimant 5 – Name Deleted]** at [28].

Regarding a present association with the application area, one young claimant states that:

> When I was in primary school, my Aunty **[Claimant 1 – Name Deleted]** and my Nan took us kids out to the Yumba looking for bush tucker and teaching us Gunggari stories and language. Aunty **[Claimant 1 – Name Deleted]** also organised camps out at the Yumba for the local kids who were mostly Gunggari – affidavit of **[Claimant 2 – Name Deleted]** at [16].

Claimants' statements indicate their strong understanding of spiritual presences within the landscape, and a respect for these forces. An example is the following statement:

> The Mundagatta is a snake that made all the water holes and lives in the rivers. He is the protector of our rivers. Our old people would say to us, "if you don't behave yourself, the Mundagatta will come and get you". So we knew that the Mundagatta lived in the rivers where we would go to play all the time, and we would always be well behaved and not do anything that was dangerous or we might get dragged under water... – affidavit of **[Claimant 6 – Name Deleted]** at [53].

In addition to these statements, claimants also speak specifically of their need to maintain their connection with their country, as a way to maintain their spiritual health. For example, one claimant states:

> Everyone has their own spirit or *manmarra*. Gunggari people keep their spirit strong through maintaining a connection with Gunggari country. That's why they must go home and revitalise their *manmarra* – affidavit of **[Claimant 6 – Name Deleted]** at [58].

Further to this, claimants refer to frequent and ongoing visits back to Gunggari country during those periods when they were living at other locations. An example of this is where one claimant states:

> ...The five of us spent our early childhood years in Mitchell. We moved to Charleville when I was eleven because Mum got a better job there. But even after we moved we would visit Mitchell almost every weekend – affidavit of **[Claimant 2 – Name Deleted]** at [13].

My consideration

For the reasons that follow, I have formed the view that I am satisfied that the factual basis is sufficient to support the assertion at s. 190B(5)(a). Firstly, the association illustrated in the material is indicated as being both physical and spiritual in nature. Claimants speak of their understandings of the various spiritual presences within the application areas, and recite the story of the rainbow serpent figure, Mundagatta, who is asserted to have formed the landscape of that area. This story has been passed onto the claimants by their predecessors. In the same way, a physical presence on the land is repeatedly demonstrated in the material, in its assertions that all of the apical ancestors were born on or within the vicinity of the application areas, and the fact that many of the claimants and their predecessors have spent a significant part of their lives residing on and working within the application areas.

Secondly, it is my view that the material speaks in some detail of the present association held by the claimants with the application areas. I note that many of the claimants continue to reside within towns or settlements within the application areas – see Attachment F report at [13]. Further, it is repeatedly asserted that those who don't live on the application area arrange for visits and camping trips back to the area, to ensure an ongoing association. The factual basis also speaks of cultural heritage activities and the maintenance and protection of important sites undertaken by claimants – see for example affidavit of **[Claimant 2 – Name Deleted]** at [31].

Thirdly, it is my view that the material pertains to an association between the predecessors of the claim group and the application area over the period since sovereignty. In their affidavits, claimants refer to their parents and grandparents, tracing their family line back to a particular apical ancestor. Claimants appear to have a thorough knowledge of the activities and interactions that those Gunggari persons before them had with the land and waters of the application area, and recite stories in illustration of this. Claimants also speak of the various Gunggari families of whom they are aware of being associated with the application area – see affidavit of **[Claimant 6 – Name Deleted]** at [23].

Finally, it is my view that the factual basis material contains the requisite geographical particularity. Throughout the report, and in the claimants' affidavits, various locations and sites are named, including the names of those places where the apical ancestors of the claim group were born and lived. It is clear that claimants and their predecessors spent time travelling across the application areas, to work, hunt, camp and to meet for ceremonies and gatherings. Using the Tribunal's iSpatial database, I have mapped these locations, and determined that the majority of these locations fall within, or adjacent to the boundary of the application areas. In addition to this, I note that claimants express a strong understanding of the boundaries of the application areas, as knowledge passed down to them by their predecessors. Similarly, they express knowledge regarding those specific areas with which their family is associated, and for which they speak.

For these reasons, I am satisfied that the factual basis is sufficient to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the application areas.

The application meets the condition at s. 190B(5)(a).

Reasons for s. 190B(5)(b)

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

In its adoption of similar terminology to that of the definition of 'native title rights and interests' at s. 223(1), it is my understanding that the assertion at s. 190B(5)(b) is to be considered in light of that definition, and, subsequently, in light of the leading authority in relation to s. 223(1), namely the High Court decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (*Yorta Yorta*).

In that case, the High Court held that a 'traditional' law or custom was one that 'had been passed from generation to generation of a society', but that the meaning of the term 'traditional' was also to be understood as comprising two elements: Firstly, that the origin of the content of the laws and customs were to be found in 'the normative rules of the Aboriginal and Torres Strait Islander societies that existed before...sovereignty' (at [46]), and secondly, that the acknowledgement and observance of those laws and customs 'had continued substantially uninterrupted since sovereignty' – at [87].

Since *Yorta Yorta*, the Federal Court has further considered the requirements of the factual basis regarding the assertion at s. 190B(5)(b), in the decisions of *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*), the Full Court decision of *Gudjala #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala 2008*) and the decision of *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*). The principles enunciated in these cases regarding the type of information that must be contained within the factual basis in order to meet the requirements of s. 190B(5)(b) are summarised as follows:

- 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 – *Gudjala 2007* 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 – *Gudjala 2007* at [65], [66] and [81];
- that the factual basis identifies the persons who acknowledged and observed the laws and customs of the pre-sovereignty society – *Gudjala 2009* at [37] and [52];
- where descent from named ancestors is the basis of membership to the group, that the factual basis demonstrate some relationship between those ancestral persons and the pre-sovereignty society from which the laws and customs are derived – *Gudjala 2009* at [40];
- an explanation of the link between the claim group described in the application and the area covered by the application, which process, in the case of a claim group defined using an apical ancestry model, may involve identification of some link 'between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage' – *Gudjala 2007* at [66] and [81];
- an explanation of how the current laws and customs of the group can be said to be traditional, being more than a mere assertion that they are – *Gudjala 2009* at [52], [55] and [69];
- details of the claim group's acknowledgement and observance of those traditional laws and customs pertaining to the claim area – *Gudjala 2009* at [74].

I have, therefore, undertaken a consideration of the applicant's factual basis material in light of these principles.

The applicant's factual basis material – s. 190B(5)(b)

As discussed above, the applicant's factual basis material comprises a referenced and untitled report at Attachment F, and four affidavits sworn by members of the claim group.

The Attachment F report provides generally that the application area was occupied by the ancestors of the Gunggari People from before 1788, and during exploration and sustained settlement of the area – at [2]. While 1788 is acknowledged as the time at which the British Crown asserted sovereignty, the report states that first European contact in the application area (involving traversing of the area by explorers Mitchell, Kennedy and Leichardt) did not occur until 1846, and that sustained European settlement took place in the 1860s – at [4].

At the time of sovereignty, the report provides that early historical accounts, ethnographic and linguistic literature identify that there was a body of Aboriginal people inhabiting the wider area known as 'Kogai' – at [5] to [6]. The Kogai cultural bloc is described within the report of comprising of an 'interconnected cluster of distinct, named groups', and that whilst these groups shared common spiritual beliefs, social organisational structures and kinship systems, they were essentially linguistically distinct landholding groups united by their acknowledgment and observance of a distinguishable system of laws and customs. The report states that Gunggari People, as one of these distinct landholding groups, have inherited the native title rights and interests in relation to the land and waters of the application area – at [8] and [9].

The rights and interests subject of the claim are asserted as being pursuant to the laws and customs of the group, and based on descent from Gunggari ancestors and through holding knowledge transmitted to the claimants by their predecessors – at [28]. These rights and interests are asserted as being held communally by all members of the group – at [27].

The report also provides that the Gunggari apical ancestors named in the application were born on, or 'firmly associated' with the area around the time of practical sovereignty – at [18]. The lifestyle and practices of the group present in the application area at the time of European settlement is indicated in the report, with references to early historical and ethnographic literature. It is asserted that archaeological records show evidence of camp sites, fish traps, stone tools, quarries, native wells, and rock art – at [49]. Additionally, the report refers to early records of explorers, missionaries and pastoralists that suggest the Gunggari people enjoyed and exercised rights of a proprietary nature in the application area—at [50], and that they extracted a range of food and other resources from the area, using them in their daily and ceremonial practices. The report also speaks to records containing details of the Gunggari people harvesting resources, and using wood and woven fibres for utensils, tools and ceremonial purposes – at [60] to [63].

The report similarly speaks of the observance of totems and associated avoidance rules with respect to hunting and eating animals, asserted as having been documented in historical records dating back to 1884. Such rules and customs are asserted to have been passed down to the claimants by their predecessors, and to which they continue to adhere today – at [68]. Early historical records are also asserted as providing details of burial practices and smoking ceremonies upheld by the group – at [73] and [81].

In their affidavits, all of the deponents speak of the way in which knowledge regarding the laws and customs of the Gunggari People have been passed to them by their predecessors, often back to two or three generations. For example, one claimant states:

> I have learned what I know about Gunggari laws and customs from my mother, aunties, uncles, grandparents, and other Gunggari people. I have passed on what I know to my children – affidavit of **[Claimant 3 – Name Deleted]** at [34].

Claimants also indicate their knowledge of the ways of life and specific practices upheld by their predecessors. For example, one claimant states:

> I remember my mother telling me that she and Aunty **[Claimant 7 – Name Deleted]** went to look at a Corroboree at Woodlands and they got so sick because they weren't allowed to go there. She said someone had to come and suck the devil out of them because they were so sick. I haven't seen a Corroboree myself but we still have smoking ceremonies on Gunggari country. My husband **[Person 1 – Name Deleted]** told me that he remembers seeing a Corroboree being held at the Top Yumba in the 1930's – affidavit of **[Claimant 5 – Name Deleted]** at [55].

And another claimant states:

> My father told me about big fights on the north side of the river, past Forestvale. Bidjara men camped on the other side and would cross the river to steal Gunggari women. When we visited the place, dad would say, "that's where the camp was". He would also point out places where people were born or where they were buried – affidavit of **[Claimant 6 – Name Deleted]** at [56].

The knowledge passed onto the claimants by their predecessors that is asserted as giving rise to their claim to native title rights and interests in the area includes information pertaining to the creation of the land and waters of the application area, and speaks of the claimants' spiritual connection to the particular lands and waters of the application area. For example, one claimant states:

> I was told about the Mundagadda, a snake serpent, and Illamagan. The Mundagadda creates the rivers and they are where he travelled across country. We were told not to swim in strange places because it wasn't safe. That's why you had to ask for permission. The Illamagan is a precious waterhole that flooded the country and to stop the floods the old people said to put a spear in the middle of it – affidavit of **[Claimant 5 – Name Deleted]** at [52].

The claimants speak in some detail of the laws and customs that they currently adhere to, and which have been passed down to them by their predecessors. Some examples of statements referring to the current laws and customs observed by the claimants include the following:

> My *yurdi* (meat or totem) is the emu. This was given to me by my mother, whose yurdi was also the emu, as was my grandmother. My children and grandchildren carry this yurdi as well. A yurdi is handed down to a child through their mothers' line. My mother told me that I must not eat my yurdi and to look after it. She also told me that I could not marry a man whose yurdi was the kangaroo – affidavit of **[Claimant 5 – Name Deleted]** at [38] to [39].

And also:

> I know that there is men's business and women's business, and was told that men were not to know about women's business and vice versa. My mother and grandmother told me that I couldn't go to certain places or know about certain things because it was only for men and only men to know about. I wasn't told any specifics, as it was taboo. But I was told things like, "you can't go there, because if you do something bad will happen to you". When we were told not to do certain

> things or go to certain places, we always listened to the old people – affidavit of **[Claimant 5 – Name Deleted]** at [54].

And also:

> I believe that sickness or death will come to those people who do the wrong thing. Our old people are watching and know what's going on, and you will be punished – affidavit of **[Claimant 6 – Name Deleted]** at [59].

And also:

> I learnt from a very young age that Gunggari people and only Gunggari people have the right to speak and make decisions about our country. That is our law. Our Gunggari elders have the right to give permission for others to access and use our country, and Gunggari people have the right to be consulted about matters relating to our country. I was taught by mum, Nan and other elders that it is part of our law to respect our Elders. I was taught from a very young age to make sure I called elders Aunty or Uncle, and to never show them disrespect. Our elders are our strength, and they play a very important role in our society – affidavit of **[Claimant 2 – Name Deleted]** at [24] to [25].

My consideration

It is my view that the factual basis is sufficient to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to their claim to native title. I have reached this view for the following reasons.

Firstly, it is my view that the factual basis speaks to the existence of a pre-sovereignty Gunggari society. This society is described within the material as being a linguistically distinct landholding group within the Kogai cultural bloc, who acknowledge and observe their own unique system of laws and customs, but who share common spiritual beliefs and social organisational structures with neighbouring groups within the broader Kogai bloc. It is asserted that the existence of Gunggari as a distinct group within the Kogai bloc allowed for their native title rights and interests in the area to be 'respected and upheld' – at [8]. This group, and the broader Kogai cultural bloc is asserted within the material as being present on the application area at the time of early exploration of the area (circa 1846), and prior to sovereignty in 1788, as indicated by various archaeological sites and evidence in the area – see Attachment F report at [49].

Secondly, it is my view, that there is a certain amount of detail regarding the laws, customs and practices upheld by that society at the time of European settlement. The material refers to numerous historical and ethnographic sources which speak to the observance and acknowledgement by the group of laws and customs. Such practices included holding bora meetings—see Attachment F report at [38], observing totemic restrictions with regards to hunting and eating animals—see at [68], and the harvesting and use of various natural products on the application area for tools, utensils and ceremonial purposes—see at [62].

The source of this information, being in-depth anthropological research, ethnographic accounts and early historical records dating back to 1861, in my view, provides sufficient information to support an assertion of the existence of, and the nature of, this society at the time of European settlement of the area (asserted as taking place in the 1860s).

In their affidavits, the claimants speak in detail of the way in which they continue to observe the laws and customs passed down to them by their predecessors, often back to two or three

generations. It is my view that the Gunggari system of laws and customs is strongly asserted as one that has been verbally transmitted through the generations to the claimants today.

From the statements made by claimants, it is my view that the material supports an assertion that the laws and customs currently acknowledged and observed are rooted in the system of laws and customs observed by the Gunggari society described in the early historical records and anthropological research referenced in the Attachment F report. For example, all claimants speak of the totemic restrictions that apply and that they uphold, the way in which they inherited their totem, and the real fear and reverence they express in ensuring these rules are upheld - see for example affidavit of **[Claimant 2 – Name Deleted]** at [18] and [19].

Similarly, the responsibility claimants feel for protecting and caring for their country is also, in my view, indicated in their statements as being connected to an understanding of the obligation or duty imposed by their laws for the particular land and waters of the application area – see for example affidavit of **[Claimant 6 – Name Deleted]** at [25]. This responsibility also appears to relate to the claimants' knowledge of significant and important sites within the application area where non-Gunggari persons cannot go – see for example affidavit of **[Claimant 6 – Name Deleted]** at [55]. In my view, this is consistent with the anthropological sources pertaining to the distinct recognition of the Gunggari people, within the Kogai cultural bloc, as the persons holding rights and interests over, and responsibility for, the land and waters of the application area.

Regarding whether the laws and customs have been observed by a continuing society, all of the claimants describe the way in which the knowledge of their laws and customs has been passed down to them through up to three generations. In addition to sharing merely knowledge of the Gunggari laws and customs, the claimants have also been told stories about certain events that happened to their predecessors, at particular sites on Gunggari country—see for example the affidavit of **[Claimant 5 – Name Deleted]** at [55]. Information of this nature, in my view, provides details of the way in which the observance of Gunggari laws and customs pertains to the particular land and waters of the application area, and similarly, supports an assertion that the laws and customs have been observed by a continuing society.

Observance by a continuing society is further supported, in my view, by the information within claimants' statements tracing their descent back to a particular apical ancestor named in Schedule A. These ancestors are asserted as being present on the application area, and members of the Gunggari society, at the time of European settlement of the area, circa the 1860s. A number of the claimants are of an elderly age, and subsequently are only removed from these ancestors by three generations. Claimants express clear memories of their grandparents, and the rules and customs taught to them by their grandparents. Claimants also provide considerable detail of the lives of their predecessors – see for example the affidavit of **[Claimant 3 – Name Deleted]** at [2], [3], and [9] to [12]. In this way, I am of the view that the system of laws and customs expressed in the material as currently acknowledged and observed by the claimants, is a system that has been observed by a continuing society since European settlement.

In the same way, I am also of the view that the material explains an asserted link between the named apical ancestors and the Gunggari society at sovereignty or European settlement.

In light of my consideration above, for the reasons expressed, it is my view that the factual basis is sufficient to support the assertion at s. 190B(5)(b), that there exist traditional laws

acknowledged by, and traditional customs observed by, the native title claim group that give rise to their claim to native title rights and interests.

The application meets the requirements of s. 190B(5)(b).

Reasons for s. 190B(5)(c)

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

The wording of the condition at s. 190B(5)(c), in my view, makes it clear that the requirements of this condition are directly linked to the system of laws and customs answering the assertion at s. 190B(5)(b). On that basis, it is only where I am able to be satisfied that the factual basis is sufficient to support the assertion at s. 190B(5)(b), that I can reach the required level of satisfaction regarding the requirement at s. 190B(5)(c) - see *Martin* at [29].

It is my understanding of the assertion at s. 190B(5)(c) that it can be equated with the latter element of the meaning applied to the term 'traditional laws and customs' in the High Court's consideration of that term in *Yorta Yorta*, namely that the native title claim group have continued to acknowledge and observe their traditional laws and customs in a substantially uninterrupted way – see *Yorta Yorta* at [87]. Similarly, the High Court held that a system of traditional laws and customs was one that 'has had a continuous existence and vitality since sovereignty' – at [47].

In *Gudjala 2007*, Dowsett J indicated that the following types of information may be required to support the assertion:

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

I have already discussed above at s. 190B(5)(b), my reasons for being satisfied that the factual basis is able to support an assertion of a pre-sovereignty Gunggari society, united by the common acknowledgement and observance of a system of laws and customs. I have also already discussed above, my reasons for being satisfied that the laws and customs described within the material as currently acknowledged and observed by members of the claim group, are rooted in, and derived from, the system of laws and customs acknowledged and observed by that society in existence at European settlement.

Similarly, I discuss above my satisfaction regarding the factual basis' support of an assertion of the continuity of the Gunggari society, in the claimants' explanation of their descent from the named apical ancestors asserted as being present in the area at the time of European settlement.

On this basis, my consideration here is primarily focussed on whether those laws and customs can be said to have been acknowledged and observed in a substantially uninterrupted manner since sovereignty, or European settlement, of the application area. I have formed the view that the factual basis is sufficient to support the assertion at s. 190B(5)(c) for a number of reasons, set out below.

Firstly, various statements made by claimants within the material refer to a strong maintenance of Gunggari culture, including Gunggari language. An example of this is in the following statement by a claim member:

> When I was in primary school, my Aunty **[Claimant 1 – Name Deleted]** and my Nan took us kids out to the Yumba looking for bush tucker and teaching us Gunggari stories and language. Aunty **[Claimant 1 – Name Deleted]** also organised camps out at the Yumba for the local kids who were mostly Gunggari – affidavit of **[Claimant 2 – Name Deleted]** at [16].

Another example is the following statement:

> Nan was born in Mitchell on 30 September 1938. She was raised and lived her whole life in Mitchell. Nan spoke the Gunggari language and practised Gunggari traditions. Nan also taught her children, including Mum, Gunggari stories, language, bush tucker and traditions, and this was passed down to her children and grandchildren, including me – affidavit of **[Claimant 2 – Name Deleted]** at [5] to [7].

Statements such as these, in my view, support an assertion that the Gunggari culture has been maintained and upheld by the claim group over a number of generations, including back to European settlement of the area. The material further supports this assertion in speaking frequently of the continued physical presence of claim group members and their predecessors on Gunggari country despite white settlement of the area. The material asserts that historical records indicate a strong resistence by the Aboriginal occupants of the area against explorers and early settlers – Attachment F report at [11]. Similarly, records are asserted as describing a dual occupancy between early settlers and the Gunggari people, until a time when pastoralists in the area drew on the local Aboriginal population as a labour force – at [12].

Rather than having the effect of interrupting the observance and acknowledgement of traditional laws and customs, both the material within the Attachment F report, and the statements made by claimants in their affidavits, assert that the involvement of Gunggari people in the pastoral industry enabled the group to maintain their connection to their country, and to continue to carry out traditional customs and practices – see for example Attachment F report at [12], [22], [35] and [38] and affidavit of **[Claimant 5 – Name Deleted]** at [12] and [13]. The significance of the Gunggari people's involvement in the pastoral industry is further suggested in the material providing that the camp sites used by the Gunggari people's predecessors whilst working on various stations are now considered important sites by the Gunggari People, and requiring protection – see affidavit of **[Claimant 2 – Name Deleted]** at [31].

The passing down of knowledge regarding Gunggari traditional laws and customs is strongly asserted by the material. Claimants were taught laws and customs, spiritual and creation stories regarding the landscape, the boundaries of their country, and Gunggari language, by their parents, grandparents and other Gunggari elders and relatives. Claimants similarly state that they continue to pass this knowledge onto their own children and grandchildren – see for example the affidavit of **[Claimant 5 – Name Deleted]** at [48].

For these reasons, I am of the view that the material supports an assertion of a system of laws and customs that has been acknowledged and observed by the native title claim group since European settlement in a substantially uninterrupted way, and that this system is one that has had a continuous existence and vitality since that time.

Consequently, I am satisfied that the factual basis is sufficient to support an assertion that the native title claim group have continued to hold the native title in accordance with the Gunggari traditional laws and customs.

The application meets the requirements of s. 190B(5)(c).

Subsection 190B(6)
Prima facie case

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

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

In undertaking the task at s. 190B(6), it is my view that the wording of the condition indicates that even where not all of the rights and interests claimed can be established, the requirements of the condition can still be met – *Doepel* at [16]. I note, however, that it is only those rights and interests that can, prima facie, be established that will be included in an entry on the Register of Native Title Claims where the application passes the registration test.

My consideration of the condition at s. 190B(6), in my view, necessarily requires an understanding of the meaning of the term 'prima facie'. The decision of *Doepel* upheld the ordinary meaning of the phrase as the correct interpretation to be applied, being "at first sight; on the face of it; as appears at first sight without investigation" – see *Doepel* at [134] and *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at [615] to [616]. Mansfield J held that: 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis' – *Doepel* at [135].

It is also my view that the task at s. 190B(6) should be undertaken having regard to the meaning of the term 'native title rights and interests' in s. 223(1). Subsequently, in my reasoning below, I have turned my mind to whether the rights and interests claimed, i) exist under the traditional laws or customs of the Gunggari People; ii) are native title rights or interests in relation to land or waters; and iii) are rights and interests that can be recognised by the common law of Australia.

In *Doepel*, Mansfield J held that s. 190B(6) allowed for the consideration of material beyond the application itself, and that for this purpose, the sources specified in s. 190A(3) may be relevant – at [16]. On this basis, I have also considered the additional material submitted by the applicant, in the form of affidavits sworn by claim group members, and a fully cited and referenced version of the Attachment F report, in undertaking the task at s. 190B(6).

For the reasons set out in relation to each of the individual rights and interests listed below, I have formed the view that those rights and interests are, prima facie, established. It is, in my view, important to note at this stage that none of the rights and interests claimed are exclusive in nature, and consequently, it is my understanding that the Gunggari People do not make a claim to exclusive possession of any part of the application area, to the exclusion of all others.

The right to access, be present on, move about on and travel over the application area

The material speaks in considerable detail of the ongoing physical connection of the Gunggari People with the application area. Statements within the Attachment F report assert that many claimants have lived their whole lives on the application area and continue to live there. Similarly, the claimants' statements within their affidavits indicate that they have travelled across Gunggari country throughout their lives, often accompanied by their families, for work, to attend funerals and ceremonies, and to hunt and gather natural products.

Examples of these statements include:

> My mother was **[Claimant 8 – Name Deleted]** and she was a Gunggari woman who was born in Jandowie. My grandfather was a drover who took his family everywhere with him... – affidavit of **[Claimant 6 – Name Deleted]** at [2].

And also:

> Gunggari people maintain contact with each other through living on and accessing Gunggari country, such as Mitchell; visiting each other; attending family celebrations and funerals; telephone calls; and attending meetings. We all identify as being Gunggari – affidavit of **[Claimant 3 – Name Deleted]** at [17].

And also:

> I moved with members of my family from Charleville to Logan in 2006. My eldest sister **[Claimant 9 – Name Deleted]** moved back to Mitchell instead of moving to Logan. I still travel back to Mitchell often to visit my family and my country as I have done since I first moved away. I visit Mitchell about four or five times a year. Mostly for weekends, but also for longer periods such as at Christmas when I'll stay for two weeks. I mostly stay with Aunty **[Claimant 1 – Name Deleted]**, but there are lots of other Gunggari people in Mitchell to stay with – affidavit of **[Claimant 2 – Name Deleted]** at [23].

In my view, these statements show that accessing, living on and travelling through Gunggari country is inherent in the lifestyle and culture of the Gunggari People, and that claimants have inherited this understanding of their rights and interests in relation to the application area from their predecessors. In this way, I understand the right asserted to be one that is traditional in nature. I note that the material indicates that claimants continue to exercise this right today.

I consider, therefore, that the right to access, be present on, move about on and travel over the application area is, prima facie, established.

The right to camp on the application area and, for that purpose, erect temporary shelters on the application area

It is clear from various statements within the material that the claimants and their predecessors lived a largely nomadic life, setting up camp sites, including constructing temporary shelters, in accordance with work undertaken at pastoral stations across the application area. Examples of these statements include the following:

> I lived with my parents on the bank of the Wallam Creek in Bollon until we moved to Roma around 1934 for work reasons. We lived along the bank of the Bungil Creek in Roma in a humpy that was made of timber and corrugated iron, with holes cut in them for windows. I remember the windows always had curtains on them that my mother made. We didn't have a floor, just the dirt ground, and we didn't have beds to sleep on – affidavit of **[Claimant 5 – Name Deleted]** at [8].

And also:

> Whenever we camped out on country, including when my family lived at the yumba on Mitchell, we always gathered what we could from the bush, including wood, water, bush foods and bush medicine. Even later on, when **[Person 1 – Name Deleted]** and I took our children camping, we would take what we could from the country – affidavit of **[Claimant 5 – Name Deleted]** at [64].

The significance of sites where the claimants' predecessors spent the majority of their lives camping, is indicated in the claimants' expressed desire to protect these sites from the general public – see for example the affidavit of **[Claimant 2 – Name Deleted]** at [31]. Noting that the statements indicate that claimants' predecessors back to three generations previously enjoyed this lifestyle, and additionally, that the historical records referred to in the Attachment F report suggest that this way of life was the same as that observed by early explorers to the area at the time of first European contact, I am of the view that the right expressed can be considered to be a traditional one.

The right to camp on the application area, and for that purpose, erect temporary shelters on the application area I therefore consider to be, prima facie, established.

The right to take (including by hunting and gathering) and use traditional natural resources from the application area for personal, domestic and non-commercial communal purposes

The Attachment F report makes a number of references to historical sources documenting the use by the Gunggari people of various natural products of the application area – see at [60] to [64]. These products were used for a wide range of purposes, including food, medicine, tools, utensils and ceremonial purposes. Similarly, statements made by claimants in relation to both the practices of their predecessors, and their own lifestyles, speak to the use of such products for these purposes, and demonstrate the way in which this knowledge was passed to them by those predecessors. Examples include the following statements:

> I still go out on Gunggari country all the time with my daughter **[Claimant 10 – Name Deleted]** and **[Claimant 1 – Name Deleted]**. We go at least once a fortnight and sometimes take the kids. We gather resources, such as bush foods and bush medicines. We also go out to check on things and see what's growing because the seasons have changed since I was younger. For example, Maypans are meant to come out in May, but now they come out during November- January – affidavit of **[Claimant 6 – Name Deleted]** at [66].

And also:

> The men go out hunting for kangaroo, goanna and porcupine. We would get the goanna's from hitting them with a stone or boomerang or finding them in holes down the river. We would also find them in the trees, but they would be camouflaged. I would only eat the sand goanna's and not the black ones – affidavit of **[Claimant 6 – Name Deleted]** at [63].

In the way that knowledge of the use of natural products of the application area has been passed down to the claimants by their predecessors, and noting that these practices were observed and documented at the time of European settlement, it is my view that the material supports the right claimed as being one that is traditional in nature, and one that is in relation to the land and waters of the application area. The material shows that claimants continue to use these products in the same way, similarly passing this knowledge on to their own descendants.

Therefore, I consider that the right to take and use traditional natural resources from the application area for personal, domestic and non-commercial communal purposes is, prima facie, established.

The right to conduct religious and spiritual activities and ceremonies on the application area

Various statements within the claimants' affidavits, in my view, support a claim by the Gunggari people to a right to conduct religious and spiritual activities and ceremonies on the application area. Such statements include the following:

> When **[Claimant 11 – Name Deleted]** passed away, we held a smoking ceremony at the *Yumba*. My daughter **[Claimant 10 – Name Deleted]** and I collected sandalwood for the ceremony. My father told me that this ceremony is about letting the spirit go and sending them home. The last traditional burial held in Mitchell that I know of was Granny **[Claimant 12 – Name Deleted]** at the Top Yumba. She was Granny **[Claimant 4 – Name Deleted]**s' sister. My father told me this – affidavit of **[Claimant 6 – Name Deleted]** at [73].

And also:

> I remember my mother telling me that she and Aunty **[Claimant 7 – Name Deleted]** went to look at a Corroboree at Woodlands and they got so sick because they weren't allowed to go there. She said someone had to come and suck the devil out of them because they were so sick. I haven't seen a Corroboree myself, but we still have smoking ceremonies on Gunggari country. My husband **[Person 1 – Name Deleted]** told me that he remembers seeing a Corroboree being held at the Top Yumba in the 1930's – affidavit of **[Claimant 5 – Name Deleted]** at [55].

In addition to statements of this nature, the report at Attachment F refers to certain historical records documenting ceremonies and spiritual practices carried out by the Gunggari people observed at the time of European settlement in the area – see for example at [38]. Noting this, and that claimants' statements demonstrate that their predecessors were involved in such activities, I am of the view that the right expressed is shown to be one that is traditional in nature. Statements by claimants also indicate the importance of places within the application area relating to this spiritual or religious realm, for example places where Gunggari persons have been buried—see for example the affidavit of **[Claimant 6 – Name Deleted]** at [55], and places where initiation ceremonies took place—see affidavit of **[Claimant 5 – Name Deleted]** at [56]. In this way, I am of the view that the right claimed is one that is in relation to the land and waters of the application area.

In light of the above, I consider that the right to conduct religious and spiritual activities and ceremonies on the application area is, prima facie, established.

The right to maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places and areas, by lawful means, from physical harm

Each of the deponents of the affidavits within the material before me speaks to their sense of obligation regarding the protection of, and care for, Gunggari country, and specific sites within the application area. Examples of statements of this nature are as follows:

> We have many burial sites on Gunggari country, including Crystalbrook, Womblebank and Forestvale. These sites must be protected.
>
> I know that there are caves and paintings at Ambi, which is Gunggari country. There are animal and hand prints. My uncle, **[Claimant 13 – Name Deleted]**, was a ranger out on Gunggari country, and he would check on our important sites. It was his job to record our sites. It is important that our artefacts are not removed from country. We believe that if you take something from our country, you will get sick – affidavit of **[Claimant 3 – Name Deleted]** at [38] and [39].

And also:

> Aunty **[Claimant 1 – Name Deleted]** taught me, and continues to teach me, about important Gunggari on Gunggari country in and around the Yumba along the Maranoa River. I am taught that as Gunggari people we must protect these places. This is also part of our law. The 'Top' and 'Bottom' Yumbas at Mitchell are very significant places for Gunggari people because they are at the heart of Gunggari country, but also because they were the places where Gunggari people lived and camped for generations. Many members of my extended family lived and grew up on the Bottom Yumba, and Aunty **[Claimant 1 – Name Deleted]** has played a huge role in protecting the site of the Bottom Yumba, including setting up the museum in the old murri school building. I visit the Bottom Yumba everytime I go back to Mitchell – affidavit of **[Claimant 2 – Name Deleted]** at [31].

These statements indicate that knowledge regarding the location of these sites has been passed down to them by their predecessors, and is knowledge pertaining to and in accordance with Gunggari laws and customs. Similarly, claimants refer to the protection of Gunggari country as 'their law', which in my view, suggests that it is a well-accepted and long-standing principle within Gunggari culture and amongst Gunggari People – see for example the affidavit of **[Claimant 2 – Name Deleted]** at [31]. Consequently, I consider that the right is one that is traditional in nature, and is therefore, prima facie, established.

The right to teach on the application area the physical and spiritual attributes of the application area

As noted above, the material includes numerous references to the on-going presence of the Gunggari People and their predecessors on the land and waters of the application area. Claimants speak in detail of time spent living on the application area, and as kids, being taught the various aspects of Gunggari laws and customs, including creation and spiritual stories, use of bush products, responsibilities regarding protection of sites within the application area, and Gunggari language. Such statements include the following:

> When I was in primary school, my Aunty **[Claimant 1 – Name Deleted]** and my Nan took us kids out to the Yumba looking for bush tucker and teaching us Gunggari stories and language. Aunty **[Claimant 1 – Name Deleted]** also organised camps out at the Yumba for the local kids who were mostly Gunggari – affidavit of **[Claimant 2 – Name Deleted]** at [16].

And also:

> My father told me about big fights on the north side of the river, past Forestvale. Bidjara men camped on the other side and would cross the river to steal Gunggari women. When we visited the place, Dad would say, "that's where the camp was". He would also point out places where people were born or where they were buried – affidavit of **[Claimant 6 – Name Deleted]** at [56].

And also:

> We catch fish such as Yellow Belly and Cod and still cook them in mud. We take the younger ones with us when we go out to teach them about the country, but also how to hunt and fish. We show them how to find mussels in the rivers, and to catch *booglies* (cray fish). I was taught to wrap the fish we caught in mud and cook it on the hot coals – affidavit of **[Claimant 6 – Name Deleted]** at [62].

In addition to this, claimants speak of the importance of passing on knowledge to their own children and grandchildren – see for example the affidavit of **[Claimant 5 – Name Deleted]** at [48]. In my view, the material asserts that this passing on of knowledge is a crucial element of Gunggari traditional laws and customs, and that there are rules and restrictions that apply in the

way this knowledge is imparted – see for example the affidavit of **[Claimant 6 – Name Deleted]** at [10].

In light of this material within the application, I am of the view that the right to teach on the application area the physical and spiritual attributes of the application area is, prima facie, established.

The right to light fires on the application area for domestic purposes including cooking, but not for the purposes of hunting or clearing vegetation

The material contains numerous references to the claimants and their predecessors camping on the application area, and hunting and cooking food in accordance with particular techniques and methods whilst camping. Examples of statements made by claimants include the following:

> We always cooked our food on the hot coals. We didn't have a stove and we lived in camps. We would always make the fire early so that we had the hot coals to cook on. My mum used to collect the fire wood every day. We would put the food on there, porcupine, goanna and the vegetables, potatoes, onions, and yams. Sometimes, we would also dig a hole and cook our food in the ground, so it worked like a hot oven. I think our food cooked better in the ground – affidavit of **[Claimant 5 – Name Deleted]** at [62].

And also:

> We still cook our food on the hot coals when we are out on country. When we cook kangaroo tail, we would first singe the hair off, and then wrap it in leaves or alfoil before placing it on the hot coals to cook – affidavit of **[Claimant 6 – Name Deleted]** at [65].

In addition to this, the Attachment F report contains references to historical sources documenting the Gunggari people in the area around the time of European settlement, camping and hunting and fishing, and from this, I have inferred that lighting fires for cooking and illumination purposes also took place. Similarly, archaeological records are referred to within the report as evidencing camp sites, and I have inferred that this similarly indicates the lighting of camp fires in the application area prior to European settlement.

On this basis, my view is that the material allows me to consider that the right to light fires on the application area is a right that is held in accordance with the traditional laws and customs of the Gunggari People, and that it can, prima facie, be established.

The right to hunt and fish in or on, and gather from, the water for personal, domestic and non-commercial communal purposes

It is clear from various statements within the material that the waterways of the application area were and continue to be an important aspect of Gunggari laws and customs and the everyday lives of the Gunggari People. All of the deponents of the affidavits explain their understanding of the creation of these waterways within the landscape of the application area by *Mundagadda*, the Rainbow Serpent – see for example affidavit of **[Claimant 5 – Name Deleted]** at [52]. Similarly, the Attachment F report asserts that the Gunggari were known as being the people 'of the Maranoa [River]' – see at [21]. Examples of statements regarding the importance of the application area's waterways include the following:

> We always lived on the banks of rivers. It was our playground, chemist shop, and supermarket. We had everything we needed. You could catch fish in the rivers, pick berries, tomatoes, bananas, limes, gum and find bush medicine – affidavit of **[Claimant 5 – Name Deleted]** at [13].

And also:

> When I was younger we would go fishing in the river and mainly catch Yellow Belly and Jew Fish, using worms, grasshoppers or meat as bait. We would cover the fish in mud then cook them on the hot coals. As they cooked, the mud would become hard and when you pulled off the mud, the scales would come off too. We still cook fish like that today to show our grandchildren – affidavit of **[Claimant 5 – Name Deleted]** at [57].

It is my understanding of these statements, and information within the Attachment F report, that the Gunggari People and their predecessors, including back to European settlement of the area, have always relied heavily on the resources of the waterways, and that this reliance is in accordance with their traditional laws and customs.

I therefore consider that the right to hunt or fish in or on, and gather from, the water for personal, domestic and non-commercial communal purposes is, prima facie, established.

The right to take and use the water for personal, domestic and non-commercial communal purposes

In forming the view that the material supports the rivers and waterways of the application area as playing a crucial role in Gunggari culture and system of traditional laws and customs, it can be inferred that the water resources of these waterways would have been and continue to be used for numerous personal and domestic purposes in the everyday lives of the Gunggari People and their predecessors. The following statements support this inference:

> I remember we had chores to do every morning before school. The water was delivered in 44 gallon drums, for about 5 shillings. Others would collect water from the River, even when it was dry. They would just need to dig for it – affidavit of **[Claimant 6 – Name Deleted]** at [11].

And also:

> We were also told how to find gumbi gumbi and boil it up to wash with for sore joints. You could also drink it. We also washed in water that was boiled with the supple jack tree. This was also good for sore joints. I have passed this knowledge to my children and grandchildren – affidavit of **[Claimant 5 – Name Deleted]** at [66].

Noting that claimants possess knowledge passed down to them regarding their predecessors' use of these water resources, and the central role of the application area's waterways in Gunggari traditional laws and customs, it is my view that the right expressed is shown to be one that is traditional in nature, and one that is held in relation to the land and waters of the application area.

I consider, therefore, that the right to take and use the water for personal, domestic and non-commercial communal purposes is, prima facie, established.

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).

In my consideration of whether one member of the claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, it is my view that the use of the word 'traditional' necessarily requires me to have regard to the meaning of that term as discussed by the High Court in *Yorta Yorta*. In light of the findings in that case (discussed in further detail above in my reasons at s. 190B(5)(b)), I am of the view that the material must demonstrate how that connection is one that is in accordance with the laws and customs of the Gunggari People or society, a system having its origins in the normative rules of the society that existed at sovereignty – see *Yorta Yorta* at [46].

This approach is supported in the decision of Dowsett J in *Gudjala 2007*, where his Honour held that:

> The delegate considered that the reference to 'traditional physical connection' should be taken as denoting, by the use of the word "traditional", that the relevant connection was in accordance with the laws and customs of the group having their origin in pre-contact society. This seems to be consistent with the approach taken in Yorta Yorta. As I can see no basis for inferring that there was a society of the relevant kind, having a normative system of laws and customs, as at the date of European settlement, the Application does not satisfy the requirements of subs 190B(7) – at [89].

In line with this finding, it is my understanding that where an application fails to provide a sufficient factual basis to meet the requirements of the condition at s. 190B(5), it may not be able to satisfy the requirement of s. 190B(7).

Regarding what can be considered as amounting to a 'traditional physical connection', the explanatory memorandum to the Native Title Amendment Bill 1997 suggested that the connection referred to in s. 190B(7) 'must amount to more than a transitory access or intermittent non-native title access' – at [29.19]. In addition to this, the decision in *Yorta Yorta* indicates that there may be a need for an actual presence on the land to be demonstrated by the material – at [184].

The task at s. 190B(7) was described by Mansfield J in *Doepel* in the following way:

> 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].

In this way, it is my view that the application must contain information which speaks specifically to a connection of the type prescribed by s. 190B(7).

Noting that the requirement of the condition is that 'at least one member of the native title claim group' has the traditional physical connection, I have focussed my attention on the information within the factual basis material pertaining to one particular claim group member, being **[Claimant 6 – Name Deleted]**.

[Claimant 6 – Name Deleted] was born in Roma in 1949. She now lives in Mitchell, within the area covered by the Gunggari People #4 application. Regarding whether Ms Nixon is a member of the native title claim group, she asserts that she is a Gunggari woman through both her father and her mother, and that her father's mother, 'Granny **[Claimant 4 – Name Deleted]**' is a descendant of apical ancestor 'Old Frog' – see affidavit of **[Claimant 6 – Name Deleted]** at [1], [21] and [22].

There are a number of statements made by **[Claimant 6 – Name Deleted]** in her affidavit forming part of the applicant's factual basis material, pertaining to the connection she asserts with the application areas. The following statements by **[Claimant 6 – Name Deleted]** indicate that she has spent a considerable part of her life travelling across and camping on Gunggari country:

> I finished school when I was about 14 and went to work. My first job was ironing and cleaning at the **[Family 1 – Name Deleted]** property filling in for Aunty **[Claimant 14 – Name Deleted]**. I then went to work out at Tomoo Station for about 6 months. I was doing domestic duties. I also worked at other stations (Warren Point, Havelock, Bungaringa, Crystalbrook, Cytherea) and then at the Peaks and Hotel Mitchell. Some of the Gunggari men I remember at the stations were: **[Claimant 15 – Name Deleted]**, **[Claimant 16 – Name Deleted]** and **[Claimant 13 – Name Deleted]**. On my days off I would go down to the creek for a fish or swim. The men would go hunting for kangaroo, goanna and porcupine. I remember they used boomerangs – at [16].

And also:

> I have travelled across Gunggari for work and with my father – at [34].

Further statements by **[Claimant 6 – Name Deleted]** indicate that she continues to exercise a physical presence on the application areas. Examples of these statements include the following:

> Many Gunggari families live on Gunggari country, including my family. We still go out hunting and fishing around Mitchell – at [61].

And also:

> We catch fish such as Yellow Belly and Cod and still cook them in mud. We take the younger ones with us when we go out to teach them about the country, but also how to hunt and fish. We show them how to find mussels in the rivers, and to catch *booglies* (cray fish). I was taught to wrap the fish we caught in mud and cook it on the hot coals – at [62].

Noting that the locations referred to by **[Claimant 6 – Name Deleted]** fall across both application areas, and that **[Claimant 6 – Name Deleted]** continues to reside at Mitchell, a place identified by a number of claimants as falling within Gunggari country, in my view, these statements indicate **[Claimant 6 – Name Deleted]** has maintained a strong physical presence on the land and waters of the application areas.

I have already discussed above at s. 190B(5)(b), my satisfaction regarding the factual basis in support of the assertion that there exist traditional laws acknowledged by, and traditional

customs observed by, the Gunggari People. As to whether the connection asserted by **[Claimant 6 – Name Deleted]** is 'traditional', in my view, there are various statements which go towards supporting a connection of this nature. I consider the following statements of relevance in this regard:

> We were also told about bush medicine by Granny **[Claimant 4 – Name Deleted]**. She told us which plants we could use, how to prepare it and what it could be used for. The main bush medicine was *Umbi Umbi*. That could be used to wash with or to drink. Another plant was the emu bush. Most of the bush medicines we had could be used for anything: coughs, colds, sores, and skin irritations – at [14].

And also:

> The Mundagatta is a snake that made all the water holes and lives in the rivers. He is the protector of our rivers. Our old people would say to us, "if you don't behave yourself, the Mundagatta will come and get you". So we knew that the Mundagatta lived in the rivers where we would go to play all the time, and we would always be well behaved and not do anything that was dangerous or we might get dragged under water. My grandson **[Claimant 17 – Name Deleted]** has also done paintings of the Mundagatta as well – at [53].

And also:

> My father told me about the caves up at Mt Moffatt and that people are not supposed to go there because that's where the old people are resting. It would be against our law and people could die. I know that there are men's sites and women's sites. A man cannot go to a woman's site and vice versa.
>
> My father told me about big fights on the northern side of the river, past Forestvale. Bidjara men camped on the other side and would cross the river to steal Gunggari women. When we visited the place, dad would say, "that's where the camp was". He would also point out places where people were born or where they were buried – at [55] and [56].

In my view, these statements suggest that **[Claimant 6 – Name Deleted]**, in spending the majority of her life within the application areas, has gained a considerably detailed knowledge of the land and waters of her country. This knowledge has, in accordance with the pattern of teaching pursuant to Gunggari traditional laws and customs, been passed to her by both her father and her grandmother, whilst on country. In the same way, **[Claimant 6 – Name Deleted]** continues to pass this knowledge onto her own children and grandchildren during visits to country, in particular, regarding the use of natural products found in the application area and their harvesting and use.

In addition to this, **[Claimant 6 – Name Deleted]** has knowledge of the spiritual creation stories of the landscape of her country and important sites within the area, and consequently, expresses her understanding of the rules and restrictions that apply pursuant to Gunggari traditional laws and customs regarding the protection and use of those sites and the broader landscape. **[Claimant 6 – Name Deleted]** also possesses knowledge regarding her predecessors' lifestyles and practices in relation to the application area.

In light of the above, I am of the view that **[Claimant 6 – Name Deleted]**'s connection with the application area asserted by the material, is one that is in accordance with Gunggari traditional laws and customs, and therefore, that **[Claimant 6 – Name Deleted]** has had and continues to have, a traditional physical connection with the land and waters of the application area.

The application meets the requirement of s. 190B(7).

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

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

Section 61A provides:

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

(2) If :

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

(b) either:

(i) the act was an act attributable to the Commonwealth, or

(ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act;

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

(3) If:

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

(b) either:

(i) the act was an act attributable to the Commonwealth, or

(ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act;

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

(4) However, subsection(2) and (3) does not apply if:

(a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and

(b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

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

Reasons for s. 61A(1)

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

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

The geospatial assessment prepared for the application dated 29 October 2012 provides that no determinations of native title fall within the external boundary of the application as at 26 October 2012. Since the completion of the geospatial assessment, I have referred to the information

contained in the Tribunal's iSpatial database, which confirms this. Consequently, I am satisfied the application has not been made in relation to an area for which there is an approved determination of native title.

The application meets this condition for the purposes of s. 190B(8).

Reasons for s. 61A(2)

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

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

Schedule B of the application lists a number of general exclusion clauses, being areas within the external boundary of the application that are not covered by the application. The definition of 'previous exclusive possession act' appears at s. 23B. I note that paragraphs [1] and [2] of Schedule B set out, in identical terms to s. 23B, the various types of previous exclusive possession act covered by that definition, such that they are excluded from the application area.

On this basis, I consider that the application does not offend the provisions of s. 61A(2), and the application has not been made over areas covered by a previous exclusive possession act.

Reasons for s. 61A(3)

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

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

Paragraph [3] of Schedule B specifically states that 'exclusive possession is not claimed over areas which are subject to valid previous non-exclusive possession acts done by the Commonwealth or the State of Queensland'. I am satisfied, therefore, that the application meets this condition of s. 190B(8).

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

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

(a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or

(b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or

(c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss. 47, 47A or 47B.

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

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

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

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

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

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

Schedule P provides that the application does not make any claim to an offshore place.

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

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

Paragraph [6] of Schedule B provides that the area covered by the application excludes land or waters where the native title rights and interests claimed have been otherwise extinguished.

[*End of reasons*]

Attachment A
Summary of registration test result

Application name	**Gunggari People #4**
NNTT file no.	**QC12/14**
Federal Court of Australia file no.	**QUD550/12**
Date of registration test decision	**11 January 2013**

Section 190C conditions

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

Test condition	Subcondition/requirement		Result
		s. 62(2)(h)	Met
s. 190C(3)			Met
s. 190C(4)			Overall result: Met
	s. 190C(4)(a)		Met
	s. 190C(4)(b)		NA

Section 190B conditions

Test condition	Subcondition/requirement	Result
s. 190B(2)		Met
s. 190B(3)		Overall result: Met
	s. 190B(3)(a)	NA
	s. 190B(3)(b)	Met
s. 190B(4)		Met
s. 190B(5)		Aggregate result: Met
	re s. 190B(5)(a)	Met
	re s. 190B(5)(b)	Met
	re s. 190B(5)(c)	Met
s. 190B(6)		Met
s. 190B(7)(a) or (b)		Met
s. 190B(8)		Aggregate result: Met
	re s. 61A(1)	Met
	re ss. 61A(2) and (4)	Met

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

[*End of document*]