National Native Title Tribunal

Registration test decision

Application name	Gudjala People
Name of applicant	Gloria Santo, Elizabeth Dodd, Andrew (Smokey) Anderson, Christine Hero and Priscilla Michelle Huen
NNTT file no.	QC2005/006
Federal Court of Australia file no.	QUD80/2005
Date application made	22 March 2005
Date application last amended	12 December 2013

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

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

Date of decision: 14 July 2014

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Renee Wallace

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act* 1993 (Cth) under an instrument of delegation dated 30 July 2013 and made pursuant to s 99 of the Act.

Edited Reasons for decision

Introduction

[1] This document sets out my reasons, as the delegate of the Native Title Registrar (the Registrar), for the decision to accept the claim for registration pursuant to s 190A of the Act.

[2] All references in these reasons to legislative sections refer to the *Native Title Act* 1993 (Cth) 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 and background

[3] The Registrar of the Federal Court of Australia (the Court) gave a copy of the Gudjala People claimant application to the Registrar on 17 December 2013 pursuant to s 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

[4] On 8 January 2014 the applicant's legal representative requested that the registration test for this amended application (and the related amended application, Gudjala People #2) be deferred until 18 March 2014. The basis for the request being made and granted was that the matters were scheduled for a consent determination on that date. If the consent determination were to proceed, there would be no requirement for the registration test to be applied. Under s 190A(7), notification from the Court that a determination to the effect that the application is finalised would require the Registrar to cease considering the claim for registration.

[5] The consent determination in both matters (Gudjala People and Gudjala People #2) did proceed on 18 March 2014. However, the determination was only made over part of the land and waters covered by the applications. The applicant provided information to the Registrar that thirty-eight parcels of land (relating to both the Gudjala People and Gudjala People #2 claims) remain undetermined. This is because of a question of extinguishment over those parcels of land. Thus, it is necessary to decide whether or not to accept the claim made in the applications for registration.

[6] I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply. The application that I must consider was not amended because of an order under s 87A. On 18 March 2014, the Court did make a consent determination for part of the area covered by the application. However, the amended application that must be considered for registration is that which was made on 12 December 2013 and it was not amended because of an order under s 87A. Section

190A(6A) does not apply because the nature of the amendments to the application are not of the nature specified in s 190A(6A)(d).

[7] The nature of the amendments to the application include an amendment of the native title claim group description and other amendments that are listed in Schedule S.

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

[9] I note that I am also the delegate currently testing the related application of Gudjala People #2 (QC2006/008:QUD147/2006). Whilst both applications cover different (but proximate) areas, they are made by the same applicant on behalf of the same native title claim group. Further, each application is supported by identical affidavit material and identical factual basis material. Thus, while I have considered each application separately and formed the view that it satisfies the requirements of s 190B and s 190C, I have in most part (given the similarities and identical nature of some of the material) adopted identical reasons for both applications.

Registration test

[10] 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.

[11] Pursuant to s 190A(6), the claim in the application must be accepted for registration because it does satisfy all of the conditions in ss 190B and 190C.

Information considered when making the decision

[12] 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.

[13] 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.

[14] I refer throughout my reasons to the information that I have considered.

[15] 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 of the Act.

[16] Also, I have not considered any information that may have been provided to the Tribunal in the course of mediation in relation to this or any other claimant application.

Procedural fairness steps

[17] 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 that I and other staff assisting the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

[18] The case manager for the matter wrote to the applicant and State on 29 April 2014 informing them of the date by which the registration decision was expected to be made and also gave each an opportunity to provide any additional information or submissions to the Registrar.

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.

[19] 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.

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

[21] In reaching my decision for the condition in s 190C(2), I understand that this condition is essentially 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] to [39]. In other words, does the application contain the prescribed details and other information?

[22] 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). 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.

[23] Below I consider 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)

[24] Section 61(1) requires that the application be made by persons who are authorised by the native title claim group, being those 'who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed…'— see s 61(1).

[25] In relation to the Registrar's task generally at s 190C(2), the law elicits the limited ambit of this consideration, being that which is confined to the information contained in the application itself. Thus, this assessment does not involve the Registrar going beyond the application, nor does it require any form of merit assessment of the material to determine whether 'in reality' the native title claim group described is the correct native title group— *Doepel* at [37] and [39].

[26] Ultimately, its purpose is to ensure that the application contains all the details and information required by ss 61 and 62, and if those contents are found to be lacking, this necessarily signifies problems. Thus, there is no merit assessment of this requirement but it is important for the purpose of registration 'to ensure that a claim, on its face, is brought on behalf of all members of the native title claim group'—*Doepel* at [35].

[27] In that way, it is about ensuring that the application contains fulsome details of the persons who are said to be authorised and details of the native title claim group (as that term is defined in s 61(1)) on whose behalf the application is made.

[28] I note that Part A of the application names the persons who are the applicant and states that they are authorised on behalf of the native title claim group. There are five (5) persons named as together comprising the applicant, being Glorio Santo, Elizabeth Dodd, Andrew (Smokey) Anderson, Christine Hero and Priscilla Michelle Huen. Schedule A contains a description of the native title claim group. The native title claim group is described in reference to the descendents of named ancestors.

[29] I have considered the description of the native title claim group and other information in the application, and it is my view that the application contains the information required by s 61(1) for the purpose of s 190C(2). The claim, on its face, appears to be brought on behalf of all members of the native title claim group.

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

Name and address for service: s 61(3)

[31] The name and address for service of the applicant appear in Part A and Part B of the application.

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

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

[33] Section 61(4) requires that the persons in the native title claim group be either named (s 61(4)(a)) or described sufficiently clearly (s 61(4)(b)) in the application.

[34] From the description contained in Schedule A, it follows that the provision of s 61(4)(b) applies and that the application must contain the details/information that 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' — s 61(4)(b).

[35] The nature of the task at s 61(4) is similarly confined by the parameters of the task at s 190C(2). The task at s 190C(2) is discussed above.

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

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

[37] Section 62(1)(a) requires an affidavit from the applicant in a prescribed form. This requires the inclusion of prescribed statements in the affidavit/s.

[38] In *Doolan v Native Title Registrar* [2007] FCA 192 (*Doolan*), Spender J held that '[a]s a matter of language (and in fact practice), the requirements of s 62 are satisfied by the filing of affidavits by each of the persons who constitute 'the applicant' deposing to the specified beliefs. The 'applicant' in s 62(1), in my view, is a reference to each of the persons who comprises 'the applicant' for the purpose of s 61 of the Act'—at [67].

[39] Thus, the filing of separate affidavits from each of the persons jointly comprising the applicant is quite appropriate. Given that, it may be taken that each of the affidavits must be considered in conjunction.

[40] I also note that I am assessing the requirement at s 62(1)(a)(v), as it stood prior to the *Native Title Amendment (Technical Amendments) Act 2007*. The requirement as it then stood is for the affidavit to state 'the basis on which the applicant is authorised as mentioned in (iv).'

[41] As stated above, there are five (5) persons named as together comprising the applicant. The application is accompanied by affidavits of each of those persons, sworn in 2009. There is also an additional affidavit of William Santo accompanying the application. However, William Santo is not named as an applicant. I note that on 17 June 2011, Logan J made orders under s 66B removing William Santo as a person comprising the applicant on the basis that Mr Santo was unwilling to continue acting in that capacity — see *Dodd on behalf of the Gudjala People Core Country Claim #1 and #2 v State of Queensland* [2011] FCA 690.

[42] Each of the affidavits of the five (5) persons who together comprise the applicant contains the statements required by s 62(1)(a)(i)-(v). In that regard, each of the affidavits sets out that:

2. I believe that the native title rights and interests claimed by the Gudjala Peoples native title claim have not been extinguished in relation to any part of the area covered by the application; and
3. I believe that none of the area covered by the Gudjala Peoples native title claim is also covered by an approved determination of native title; and
4. I believe that all of the statements made in the Gudjala Peoples native title application are true; and
5. I am authorised by all the persons in the Gudjala Peoples native title claim group to make this application and to deal with matters arising in relation to it; and
6. The decision making process that led to my authorisation to make this application is in accordance with the Gudjala Peoples traditional laws and customs.

[43] It is my view that the statements contained in the affidavits meet the requirements of s 62(1)(a).

[44] The application is accompanied by the affidavit required by s 62(1)(a).

Details required by s **62(1)(b)**

[45] Subsection 62(1)(b) requires that the application 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)*

[46] The application must contain details and other information which describe the boundaries of the application area referred to in s 62(2)(a)(i) and (ii). These are the area covered by the application (s 62(2)(a)(i)) and any areas within those boundaries that are not covered (s 62(2)(a)(ii)).

[47] Schedule B and Attachment B of the application contains all details and other information required by s 62(2)(a).

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

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

[49] Section 62(2)(b) requires the application to contain a map of the application area.

[50] Schedule C states that a map of the application area is contained in Attachment C. Attachment C contains a map of the application area.

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

Searches: s *62(2)(c)*

[52] Section 62(2)(c) requires details and results of any 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 application area.

[53] Schedule D contains the statement that 'NQLC has not carried out any searches.'

[54] The applications contains all details and other information required by s 62(2)(c).

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

[55] Section 62(2)(d) requires that the application contain a description of the native title rights and interests claimed. This description must not merely consist of a statement that all native title rights and interests in relation to the area are claimed.

[56] Schedule E of the application contains a description of the native title rights and interests claimed. It does not merely consist of a statement that all native title rights and interests in relation to the area are claimed.

[57] The application contains all details and other information required by s 62(2)(d).

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

[58] The application must contain a 'general description' of the factual basis on which it is asserted that the native title rights and interests are said to exist. This general description must include details and other information relating to the particular matters described in s 62(2)(e)(i), (ii) and (iii).

[59] Various Schedules (including Schedules F and G) and Attachment F of the application contain information about the factual basis of the claim. It is my view that the application contains a general description of the factual basis.

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

Activities: s *62(2)(f)*

[61] The application must contain details relating to any activities carried out by the native title claim group in relation to the land or waters.

[62] Schedule G of the application contains a list of activities that are said to be carried out by members of the native title claim group within the application area.

[63] The application contains the details and other information required by s 62(2)(f).

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

[64] The application must contain details in relation to any other applications, of which the applicant is aware, that have been made in relation to the whole or part of the area covered by the application.

[65] Schedule H of the application states that the applicant is not aware of any other such applications.

[66] The application contains the details and other information required by s 62(2)(g).

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

[67] Section 62(2)(h) requires details of any notifications under s 29 (or under a corresponding law), which relate to the application area and which the applicant is aware.

[68] Schedule I of the application refers to Attachment I, which contains details of s 29 notices that relate to the application area as at 26 September 2013.

[69] The application contains the details and other information required by s 62(2)(g).

Conclusion

[70] The application contains the details specified in ss 62(2)(a) to (h), and therefore contains all details and other information required by s 62(1)(b).

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.

[71] The requirement here is that the Registrar 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. This requirement, however, is only triggered if the previous application meets all of the criteria in s 190C(3)(a), (b) and (c)— see *Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

[72] Those requirements are that the previous application covered the whole or part of the area covered by the current application (s 190C(3)(a)), that there was an entry on the Register of Native Title Claims for the previous application when the current application is made (s 190C(3)(b)) and that the entry was made (or not removed) as a result of consideration of the previous application under s 190A (s 190C(3)(c)).

[73] The Geospatial assessment and overlap analysis dated 6 January 2014 (geospatial assessment) does not identify any overlapping applications per either the Schedule of Applications or the Register of Native Title Claims (Register). I am satisfied that this still remains

the case at the date of this decision – see Overlap Analysis dated 4 July 2014 which identifies technical overlaps only of two other claims (these overlaps do not occur on the ground).

[74] In that regard, I agree with the geospatial assessment that there are no overlapping applications on the Register.

[75] I understand that the requirements of s 190C(3)(a)–(c) speak in the past tense. For instance, the requirement is to consider if a 'previous application *covered* the whole or part of the area *covered* by the current application' [my emphasis] (s 190C(3)(a)) and further, to consider if that 'previous application *was* on the Register of Native Title Claims when the current application was made' [my emphasis] (s 190C(3)(b)) and whether it *was* an entry made pursuant to s 190A (s 190C(3)(c)).

[76] However, it is my view that it is not the intention of this legislative provision to cause the Registrar to undertake a historical search of the circumstances of the Register at the time when the current application was made when there is currently no overlapping application on the Register. Rather, the intention of s 190C(3) is to prevent the registration of multiple applications with overlapping members being <u>on</u> the Register at the <u>same</u> time. Thus, a historical search of the Register would be an administrative waste of time and could lead to an unreasonable outcome if at the time when this application was made there was on the Register a 'previous application' with common members.

[77] 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 of the Act by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
> (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
>
> Under s 190C(4A), the certification of an application under Part 11 of the Act 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.

[78] 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.

[79] Attachment R of the application is a document titled 'Certificate of an Application for a Determination of Native Title Under Section 203BE of the Native Title Act 1993 (Cth): Gudjala Native Title Claim (QUD80/2005).' Thus, s 190C(4)(a) contains the relevant requirements.

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

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

[81] The certificate is provided by the North Queensland Land Council (NQLC) and is dated 20 November 2013. It is signed by the CEO of the NQLC. The geospatial assessment identified the NQLC as the only representative body for the area over which the application is made. The certificate also states that the area of land and waters covered by the application are wholly within the area for which NQLC is the representative body and that it is the body recognised under s 203AD. In that regard, I consider that NQLC is the relevant representative body and that it can certify the application.

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

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

[84] The certificate contains the required statement.

[85] Pursuant to s 203BE(4)(b) the certificate must also briefly set out the representative body's reasons for being of the opinion set out in s 203BE(4)(a).

[86] In that regard, the certificate sets out that:

- the members of the claim group attended an authorisation meeting on 4 and 5 September and on 8 November 2013 at which there was general discussion on issues;
- there is a traditional decision making process where group members defer to and take into account the knowledge and advice of the Elders. Decisions do not need to be unanimous;
- all decisions at the meeting were endorsed by the wider group and there was no dissent;
- the identification of persons in the native title claim group has involved extensive and detailed research being undertaken in the region by an anthropologist; and

- the description of the claim group has been the subject of consideration by the claim group.

[87] In my view, the certificate briefly sets out the representative body's reasons for being of the relevant opinions.

[88] Where applicable, the certificate must also set out what has been done by the representative body to meet the requirements of s 203BE(3) in order to comply with s 203BE(4)(c). Section 203BE(3) relates to overlapping applications for a determination of native title.

[89] As identified in the geospatial assessment there are no applications as per the Schedule of Applications — Federal Court that fall within the external boundary of this application. The certificate contains reference to this fact.

[90] In my view, this means that this requirement is not applicable.

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

Merit conditions: s 190B

Subsection 190B(2)
Identification of area subject to native title

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

[92] This condition of registration requires that the Registrar 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 and waters.

[93] This requires the Registrar to undertake a consideration of the description and map of the application area, and to be satisfied that the boundaries of the area covered, and those areas not included, can be sufficiently identified.

[94] The geospatial assessment and overlap analysis provides an assessment of the description and map of the agreement area and states that the application area is identified with reasonable certainty. I agree with that assessment.

[95] The areas not covered by the application are identified in Schedule B of the application. This includes a list of general exclusions and also specifically excludes some areas that were covered by the original application.

[96] Upon my understanding, the general formulaic approach is one that is typically used in native title determination applications and is an approach that reflects that such issues are often not settled until the final stages of a matter.

[97] I am of the view that both the written description and the map of the application area are clear and identify the area with reasonable certainty. Thus, it is my view 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 the native title rights and interests are claimed in relation to particular land or waters.'

[98] The application satisfies the condition 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.

[99] Schedule A of the application contains a description of the native title claim group, such that consideration falls under s 190B(3)(b).

[100] The nature of the task at s 190B(3)(b) is for the Registrar to consider 'whether the application enables the reliable identification of persons in the native title claim group' — *Doepel* at [51].

[101] That is, the description in the application must operate to effectively describe the claim group such that members of the claim group can be identified — *Gudjala People 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala*) at [33].

[102] The native title claim group description is contained in Schedule A:

> The criteria for membership of the Gudjala native title claim group is in accordance with traditional laws acknowledged and customs observed by the Gudjala People who are traditionally connected to the area described in Schedule B ("application area") through:
>
> 1. Physical, spiritual and religious association; and
> 2. Genealogical descent; and
> 3. Processes of succession; and
>
> Who have communal native title in the application area, from which rights and interests derive.
>
> The Gudjula native title claim group is comprised of all persons descended from the following ancestors:
>
> Alice Anning (also known as Alice White) of Bluff Downs station;
> Cissy McGregor
> Maggie "Ton Ton" Thomson
> Topsy Hann
> Zoe (mother of Hoya Siemon/Bowman)

[103] Reading the description as a whole, it is my understanding that descent from the ancestors is the only criteria. The beginning of the description, cited above, can essentially be taken to be an explanatory note of who the Gudjala People are, rather than containing any criteria for membership.

[104] In *Western Australia v Native Title Registrar* (1999) 95 FCR 93 (*WA v NTR*) Carr J considered a description of a native title claim group where members were described using three criteria or

rules, including descent (biological) and adoption. His Honour infers that the necessity to engage in some factual inquiry regarding the criteria 'does not mean that the group has not been described sufficiently.' Nor is it fatal that the application of the rule may prove difficult — at [67].

[105] In that regard, I consider the criterion of descent from the named persons offers an objective point of inquiry into whether a person is a member of the native title claim group. Describing a claim group in reference to named ancestors is one that has been accepted by the Court as satisfying the requirements of s 190B(3)(b). I am of the view that with some factual inquiry it will be possible to identify the persons who fit that part of the native title claim group description — see *WA v NTR* at [67].

[106] The application satisfies the condition 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.

[107] For the purpose of s 190B(4) the Registrar must be satisfied that the description of the native title rights and interests claimed 'is sufficient to allow the native title rights and interests claimed to be readily identified.'

[108] Whilst it is open to me to find at s 190B(4), with reference to s 223 of the Act, that some of the claimed rights and interests may not be 'understandable' as native title rights and interests, I am of the view that a consideration of the rights and interests in reference to s 223 should be the task at s 190B(6) — *Doepel* at [123].

[109] The native title rights and interests that are claimed appear at Schedule E of the application. It is my view that the rights and interests claimed can be understood and have meaning as native title rights and interests.

[110] The application satisfies the condition 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.

Combined reasons for s 190B(5)

[111] Fundamental to the test at s 190B(5) is that the applicant describe the basis upon which the claimed native title rights and interests are alleged to exist. Accordingly, this is a reference to rights vested in the claim group and further that it is 'necessary that the alleged facts support the claim that the ***identified claim group*** [emphasis added] (and not some other group) **[**hold] the identified rights and interests (and not some other rights and interests)'—*Gudjala [2007]* at [39].

[112] The Registrar must consider whether each particularised assertion outlined in s 190B(5)(a), (b) and (c) is supported by the claimant's factual basis material. In that regard, the law provides specific content to each of the elements of the test at s 190B(5)(a) to (c) — see, for instance, *Gudjala [2007]* and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala [2009]*).[1]

[113] Whilst the Registrar must assume that the facts asserted are true and only consider whether they are capable of supporting the claimed rights and interests, there must be adequate specificity of particular and relevant facts within the claimant's factual basis material going to each of the assertions before the Registrar can be satisfied of its sufficiency for the purpose of s 190B(5) — *Gudjala FC* at [92]; *Doepel* at [17].

Factual basis material to which I will have regard

[114] As noted above in my reasons, the application was partly determined by the Court on 18 March 2014. That determination was by consent. In that regard, it is relevant to cite some of the reasons of the Court for making orders under s 87A for the purpose of s 190B(5). It is my understanding that parts of the claim remain undetermined essentially because of the question about whether, for certain parts of the claim area, native title has been extinguished.

[115] I also note that I was the delegate who previously tested the related application of Gudjala People #2 (QC2006/008) on 30 June 2010, where I had regard to 'Draft Anthropologist's Report: Gudjala #1 (QUD80/05), Gudjala #2 (QUD147/06)' by Dr Anthony Redmond (Redmond report).' That report is referred to in the determination decision of the Court.

[116] I note that one amendment to the application is to the native title claim group description, being the addition of an apical ancestor. This ancestor, however, was recognised in the consent determination on 18 March 2014.

[117] Below I will take extracts from my consideration of that report from my decision of 30 June 2010.

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[1] Also note that the Full Court in *Gudjala FC,* did not criticise generally the approach that Dowsett J took in relation to these elements in *Gudjala [2007]*[1], including His Honour's assessment of what was required within the factual basis to support each of the assertions at s 190B(5)— See *Gudjala FC* [90]–[96]. His Honour, in my view, took a consonant approach in *Gudjala [2009]*.

[118] In His Honour's reasons for making the consent orders, Logan J sets out some of the relevant factual material of which he is aware. This includes information about the identification of the Gudjala People and the relevant pre-sovereignty society. This includes the following:

> Identification as part of the Gudjala People is based from principles of perpetual filiation to a small number of ancestors who were themselves owners of the country within the claim area. The ethnographic evidence indicates that Gudjala people are members of what senior anthropologist Bruce Rigsby, terms "*a single regional Aboriginal jural public, and the several beneficial titles to particular lands and waters are not constituted in isolation from that wider jural public"* (2002/200). The traditional laws and customs are shared with their close neighbours the Gugu Badhum, Wulguru and Warungu to their north and east — at [23].
>
> Despite forced dislocations, frontier conflict, coercive labour practices and draconian state interventions into Gudjala people's personal and social lives, the Gudjala native title claim group and their predecessors have continuously exercised their right of possession, occupation, use and enjoyment of their traditional country since before assertion of British Sovereignty (26 January 1788 (the date of legal Sovereignty)) — at [27].
>
> The recollection of stories concerning traditional locations in the claim area continued to be transmitted across the generations. Gudjala people place strong emphasis upon the narrator being properly "in place" because they believe that it adds legitimacy and authority to the stories themselves, with the stories told, continue to be a focus of belonging to country in the contemporary contact and concern the natural and supernatural events — at [31].
>
> Anthropological records and linguistic literature from the twentieth century establish considerable evidence that antecedents of the Gudjala claimant group expressed a physical connection to the claim area through kinship, marriage, mortuary practices and spiritual beings — at [31].
>
> The material provides that the Gudjala People have an identity and a connection to the land through the application of a shared body of traditional laws and customs that forms part of the greater jural public. Evidence exists of a normative system of law and custom in regard to marriage laws and the observation of section protocols. These laws and customs are salient to the reproduction of the claimants' society — at [32].

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

[119] For the purpose of s 190B(5)(a), the factual basis must demonstrate that the whole claim group presently have an association with the claim area and that their predecessors also had an association since sovereignty, or at least since European settlement. This, however, should not be taken to mean 'that all members must have such an association at all times' but rather that there be some 'evidence that there is an association between the whole group and the area' and a similar association of the predecessors—*Gudjala [2007]* at [52]; *Gudjala FC* at [90]–[96].

[120] I am to be informed as to the nature of the claimant's association with the application area on the basis of the information provided, but I am not obliged to accept broad statements which

are not geographically specific—*Martin v Native Title Registrar* [2001] FCA 16 at [26] and *Corunna v Native Title Registrar* [2013] FCA at [39].

Factual basis in support of s 190B(5)(a)

[121] As noted above, my reasons for decision in the related application of Gudjala People #2 dated 30 June 2010 contain information that is relevant. This information was extracted from the Redmond report, which relates to both claims by the Gudjala People.

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

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

[123] The following information from the Redmond report is also relevant to the factual basis for the assertion in subparagraph (a) of s 190B(a):

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

[124] Claimant accounts of their own association with the application area also form part of the factual basis, some of which are detailed in the Redmond report, including:

- [interview with **[Person 1 – name deleted]**, 7 April 2009] 'My father's mother is a tribal woman from Maryvale, **[Person 2 – name deleted]**. I've seen **[Person 3 – name deleted]** come out with the **[Family name 1 – name deleted]**. We lived in slab huts...My uncle **[Person 4 – name deleted]**, my father's brother, was there at Maryvale, and **[Person 5 – name deleted]** was there...' [It should also be noted that Dr Redmond opines that **[Person 2 – name deleted]** (an identified apical ancestor) was born at Maryvale Station no later than the 1860s and that her children were also born there]—at [424].
- [interview with **[Person 1 – name deleted]**, 7 April 2009] 'We knew that was our traditional country growing up in Maryvale'—at [424].
- [interview with **[Person 6 – name deleted]**, 6 April 2009] 'We were shown cave paintings, and tribal dance grounds around the stations on Allensleigh and Maryvale and Wandovale, Pentland. I worked on them all...Another fellow is **[Person 1 – name deleted]**, my first cousin, born at Maryvale, belonged there, lived and worked it'—at [124].
- [interview with **[Person 7 – name deleted]**, 28 April 2009] **[Person 8 – name deleted]** is from Toomba'— at [432]. Dr Redmond places **[Person 8 – name deleted]** birth date sometime in the early to mid 1860's in the Bluff Downs, Maryvale, Toomba area, with records showing her sons being born at Bluff Downs Station in 1889 and 1891—at [13] to [16].
- [interview with **[Person 9 – name deleted]**, 30 April 2009] 'I was born in Charters Towers, raised on Gainsford Station...I take my daughter out to Gainsford whenever I can. I protect my country by not telling people about sites I know about around Gainsford**...[Person 21 – name deleted]** showed us bora ring at Gainsford ... '—at [440].
- [interview with **[Person 10 – name deleted]**, 6 April 2009] ' I was born in Maryvale on 3/8/31. Grew up there. Mum and Dad were living there...First job at Allendale (near Homestead), then Bluff Station ... Stayed there till went back to Allendale'—at [442].
- [interview with **[Person 11 – name deleted]**, 24 February 2009] 'Featherby Wall, old story Place. At certain times of the year you can see old people with firesticks when we were small. Big water hold but the waters gone now, another waterhole further on where Dad took us hunting for turtle and eels. My granny **[Person 12 – name deleted]** walked out along the Development Road, catching snakes to eat, rock-python and porcupine'—at [283].

Consideration

[125] The consent determination recognises that the claim group described in the application, including the five named ancestors, have and had a connection with the land and waters covered by the determination. Favourable inferences can be drawn from the consent determination in relation to those areas that remain undetermined. For instance, Logan J refers to the 'ongoing occupation' of the predecessors with 'their traditional country.' This presumably would relate to the whole of the claim areas covered, not just the areas determined — at [29] of consent determination.

[126] Also, as previously noted in my reasons for decision of 30 June 2010 in the related claim of Gudjala People #2:

> a factual basis is provided to support the assertion that the Gudjala people are part of a pre-sovereignty society, whose members (including the native title claim group) and their predecessors 'have continuously exercised their rights of possession, occupation, use and enjoyment of their traditional country since before the assertion of British sovereignty', and that this was despite such factors as forced dislocations and conflict within the area—Redmond report at [32] and [38].
>
> Also, a factual basis is provided for how this continuity of association with the area has been maintained by contemporary members and their predecessors. Whilst suggesting that working life on stations is a feature of the claimant's association with the area, the assertion is that '[t]he central focus of people's memories of living and working on the stations is their kin groupings, and the elder people who constituted the core of their social world.' A factual basis is provided to support this assertion—Redmond report at [38] to [41].
>
> Further, the Gudjala people's claimed association to the area and factual basis is not limited to their physical presence on parts of the application area continuously/from time to time. I accept that such an assertion can be made[2]. Furthermore, the applicant has provided a factual basis in support. There is, for instance, material which points to an enduring spiritual association, such as stories and accounts of teachings of significant places and sites within the area that have been passed down through the generations. I accept this as part of the factual basis which supports the assertion that the claimant's have, and their predecessors had, an association with the application.

[127] Given the above information, I consider that the factual basis material is sufficient to support the assertion that the native title claim group have and their predecessors had an association with the claim area. The factual basis is also sufficient to support the assertion of a continuity of association from the period at sovereignty.

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

[128] In requiring that the factual basis describe the basis of the native title claim group's entitlement to the claimed rights and interests, the focus of s 190B(5)(b) is upon the existence of traditional laws and customs acknowledged and observed and that give rise to the claimed native title rights and interests.

[129] The phrase 'traditional laws acknowledged by, and traditional customs observed by' is of a similar vein to that employed in s 223 of the Act and, thus, the meaning to be afforded to the term 'traditional' in s 190B(5)(b) can be derived from cases that explore s 223—see *Gudjala [2007]*—at

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

[26] and [62]–[66] (citing the High Court in *Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors* (2002) 214 CLR 422;[2002] HCA 58 (*Yorta Yorta*)).[3]

[130] In *Gudjala [2007]*, Dowsett J observed that that '[t]here can be no relevant traditional laws and customs unless there was, at sovereignty, a society defined by recognition of laws and customs from which such traditional laws and customs are derived', with the starting point for any consideration being whether the facts identify an indigenous society at the time of sovereignty — at [66].

[131] In the context of the registration test (and explicitly the task at s 190B(5)(b)), it is clear that the facts asserted, assuming that they are true, must be capable of supporting the assertion that there are 'traditional' laws and customs, acknowledged and observed by the native title claim group and that give rise to the claimed native title rights and interests—*Gudjala [2007]* at [62] and [63].

Factual basis in support of s 190B(5)(b)

[132] In my reasons for decision in the related application of Gudjala People #2 dated 30 June 2010, I noted that the Redmond report contained a factual basis relevant to the existence of a society at contact of which it is implicit that the predecessors of the group were a part.

[133] In that regard, I cited the following:

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

[3] This aspect of the judgment was not criticised by the Full Court, and see *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala [2009]*)—at [19]–[22].

- The evidence is sufficient to infer 'the geographical extent of Gudjala country at first settlement despite the changes in language group nomenclature ... '—at [225], and further, the historical record is supportive of the present claim area comprising 'country identified by senior people born before the turn of the twentieth century with the label Gudjala or a cognate variant thereof'—at [126].

[134] In terms of the traditional laws and customs, I also cited the following from the Redmond report and other affidavit material:

> Dr Redmond describes a 'traditional mode of recruitment' for the region (and for Gudjala people) that recognised a range of 'legitimate pathways for acquiring rights in land...'—at [168], and I accept that the factual basis is sufficient to support the assertion that the current approach to membership of the group is consistent with that traditional mode, even given that patrifiliation may have yielded somewhat.
>
> It appears that ancestry was, at sovereignty, and has continued to be, the most significant means of recruitment to the native title claim group, but that there are other pathways to acquiring rights in land such as acquiring some rights through marriage and adoption (and that such pathways are not inconsistent with traditional means of recruitment). It may be, given the description of the native title claim group in Schedule A, that these 'other pathways' could only result in those individuals acquiring secondary rights. As to what rights are ultimately acquired, and by whom, is a matter for the Court.
>
> It is asserted that territoriality was an important feature of the society at sovereignty. However, this is to be viewed in the context of 'complex patterns of alliance and interaction with neighbouring groups' within that regional society. This meant that there could be movement between the areas of close neighbouring groups but with the understanding and respect for the fact that particular tracts of country belonged to certain groups, such as Gudjala—Redmond report at [75] and [58] to [126].
>
> The historical record provides evidence to support the conclusion that 'Aborigines who are likely to have been the predecessors of the Gudjala claimant group occupied, used and defended their territories from both indigenous and non-indigenous intruders'—Redmond report at [76] to [126] and [135].
>
> While the assertion of language group 'boundedness' is more prominent in the contemporary context [referring to some claimant's statements on this matter], it is asserted that this is not necessarily a move away from traditional laws and customs, but rather 'drawing into the social foreground something possessed as a more backgrounded identity in earlier times'. As indicated, recruitment to country at sovereignty was at the local country group level rather than at the language level, but with language identity having 'some salience to territoriality.' This appears to remain a feature of the society in the present context—Redmond report at [75] and [326].
>
> **[Person 13 – name deleted]**, in his affidavit sworn 11 September 2006, identifies himself as belonging to the 'Gurrdjal language group', although he can only speak about half of that language. He also states that the boundaries of Gudjala country are well known, and that such knowledge has been imparted from the elders of the group over time—at [1.2] and [2.7].

> The material is not suggestive of many contemporary members of the group maintaining the knowledge of the language spoken by their predecessors. However, it seems evident from the material that language affiliations and identities, of particular groups within the region, remain an important feature of the society, and has done so since contact.
>
> Stories about the Rainbow Serpent and its importance to the society are recounted by Gudjala people indicating that 'it was a powerful being attributed with both creative and destructive energies which could be used to reproduce the normative force of traditional law and custom'—Redmond report at [57]. Examples of its continuing importance to the Gudjala people are also detailed in the Redmond report: see sections 4.1, 4.3 and 4.7.
>
> The historical record of the regional society of which the Gudjala people were a part, points to 'a lively ceremonial world'. The stories that have been transmitted to current members of the group from previous generations relate to traditional places of significance and these sites and stories have been protected in the contemporary context. These 'stories which are told by contemporary Gudjala people about their experiences of natural and supernatural events on country have continued to be a focus of belonging to country'. Ceremonies, meetings and cultural activities continue to be conducted on country—Redmond report at [189] and [348] to [353].

Consideration

[135] The determination of native title in favour of the Gudjala People over areas of land and waters within the vicinity of the remaining claim area, goes to supporting the assertion that the pre-sovereignty society (which was the basis of that consent determination) also exists in the undetermined areas. It is, in my view, an obvious inference that the relevant society exists over the remaining claim area.

[136] In my previous reasons for decision dated 30 June 2010 (in the related matter of Gudjala People #2), after having considered the claimant's factual basis in support of this assertion, I noted the following:

> It is open to me to form the view that the link between the native title claim group and the relevant pre-sovereignty society has been demonstrated in the applicant's factual basis. Primarily, in my view, that link is shown by detailing, within the factual basis, the existence of a regionally active society (at or around the time of contact) of which, Dr Redmond opines, the Gudjala people are members and derive their laws and customs from—Redmond report at [30] to [47].
>
> Importantly, the Redmond report provided in support of the application, in my view, appears to address in a more fulsome and detailed manner the factual basis relevant to each of the assertions. It supplements what was before Dowsett J in *Gudjala [2007]* and *Gudjala [2009]*, and is such that it now enables a 'genuine assessment' of the applicant's factual basis—*Gudjala FC* at [92].
>
> The material and information presented on behalf of the applicant, in my view, equates to a sufficient factual basis, supportive of the assertion that there was a pre-sovereignty society relevant to the present claim group now known as the Gudjala people, from which the

> traditional laws and customs, giving rise to the claim to native title rights and interests, have been derived (noting that this, in my view, appears consonant with the approach taken by Dowsett J in *Gudjala [2007]* and *Gudjala [2009]*—at [66] and [33] respectively).

[137] I am satisfied that the factual basis material supports the assertion at s. 190B(5)(b).

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

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

[139] In addressing this aspect of the test in *Gudjala [2009]*, Dowsett J considered that where the claimant's factual basis relied upon the drawing of inferences, that:

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

[140] Given the information cited above, it is my view that the factual basis is sufficient to support the assertion at s 190B(5)(c). In that regard, the factual basis is sufficient to support the assertion that there has been a continuity of the Gudjala People's traditional laws and customs since sovereignty.

Conclusion

[141] 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).

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 nature of the task at s 190B(6)

[142] I understand that a right or interest may be said to be prima facie '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].

[143] The task at s 190B(6) is said to involve some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed.' Furthermore, where appropriate, 's. 190B(6) may also require consideration of controverting evidence' —*Doepel* at [126], [127] and [132].

[144] Primarily, however, I must have regard to the relevant law as to what is a native title right and interest, specifically the definition of native title rights and interests contained in s 223(1) of the Act (see *Gudjala [2007]* at [85]). That is, I must examine each individual right and interest claimed in the application to determine if I consider, prima facie, that they:

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

[145] In that native title '***owes its existence and incidents to traditional laws and customs*** [emphasis added], not the common law' (*Yorta Yorta* at [110]) I consider that a prima facie case to establish a particular native title right or interest would be one that provides a sufficient factual basis that the right or interest arises from the laws and customs of the pre-sovereignty society.

[146] I note that there is a question in relation to the remaining undetermined areas of land and waters as to any extinguishment of native title rights and interests. This question will be answered by the Court.

[147] As I understand it, the remaining areas were at sometime subject to military orders under the *National Security Act* 1939 (Cth) and the High Court will hear and decide the effect of such orders on native title rights and interests. As the law stands, the Full Court in *Congoo on behalf of the Bar-Barrum People #4 v State of Queensland* [2014] FCAFC 9 held that the effect of such military orders was that they did not extinguish native title rights and interests. The Full Court found that the rights that the Commonwealth took under the military orders were not inconsistent with native title rights and interests. Further, any underlying native title rights and interests that existed prior to the military orders continued — at [51] to [58].

[148] In that regard, I understand that such military orders are not considered under the common law to even be akin to a previous non-exclusive possession act (as defined by the Act). That is, in my view there is nothing in the joint judgement of North and Jagott JJ which suggests to me that a claim to exclusive possession could not be maintained over areas that are subject to such military orders. Thus, any exclusive native title rights and interests that existed under the traditional laws and customs of the claim group would have continued.

[149] I now turn to consider each of the native title rights and interests that are claimed in the application. These are set out in Schedule E of the application. In some instances, I have grouped certain rights and interests together.

Exclusive rights claimed

The native title rights and interests claimed are the right to possession, occupation, use and enjoyment of the claim area as against the whole world, pursuant to the traditional laws and customs of the claim group but subject to the valid laws of the Commonwealth of Australia and the State of Queensland [claimed in relation to land and waters where there has been no prior extinguishment of Native Title or where s 238 (the non-extinguishment) principle applies].

[150] As noted above, I consider it possible that exclusive native title rights may be capable of recognition in relation to the remaining areas of the claim.

[151] I previously considered whether this right arose under the traditional laws and customs of the Gudjala People in relation to the claim area in my decision of 30 June 2010 for the related application of Gudjala People #2.

[152] In those reasons, I noted that:

> A review of the material outlined above, at s. 190B(5), indicates to me that, prima facie, this exclusive right claimed by the native title claim group is shown to exist under traditional law and custom over those areas where they have not been extinguished. I refer to the following material within the applicant's factual basis that, in my view, prima facie, supports the existence of the right to possession, occupation, use and enjoyment of the claim area as against the whole world:
>
> - the Gudjala people are members of a regional Aboriginal jural public which includes their close neighbouring groups (particularly the Gugu Badhun, Warungu and Wulguru). This is the relevant society—Redmond report at [30] to [46].
> - it is this regional Aboriginal jural public from which the laws and customs of the Gudjala group are derived. There is a factual basis as to the active participation of the Gudjala group within this regional society—Redmond report at [30] to [225].
> - the recognition of each group's rights in land 'is ultimately legitimated by the laws and customs shared by the broader regional society...' Language affiliations and territoriality are an important feature of this society, however movement between the territories of neighbouring groups is also noted—Redmond report at [58] to [75] and [230] to [237].
> - the 'predecessors of the Gudjala native title claim group occupied, used and defended their territories from both indigenous and non-indigenous intruders.' The archaeological record, suggests that those within this claim region at sovereignty 'possessed laws and customs under which they occupied, used, enjoyed and spoke for country within the claim area ...'—Redmond report at [127] to [135].
> - the Gudjala people and their neighbours have only a limited tolerance for infringement of boundaries, with the potential for verbal and physical confrontation when the wrong person speaks for the wrong country—Redmond report at [295].
> - while trespassing on the land of a neighbouring group may not be discovered and/or punished by the land-holding group, 'punishment may ensue from supernatural agencies', with 'spirit induced malaise' being widely recognised amongst Gudjala people for speaking 'out of place' in relation to country that is not theirs—Redmond report at [295] to [297].

It is claimed that, within the Gudjala native title claim group, the right to speak for country is ordered within the group, namely that smaller kin groupings may have the right to speak for particular tracts of country, although communal title is still vested in the whole group: see affidavit of **[Person 13 – name deleted]**, sworn 11 September 2006 at [4.4] and Redmond report at [294].

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

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

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

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

[153] I also note that the consent determination recognised this right in relation to the determination area.

[154] The above right is prima facie established.

Non-Exclusive rights claimed

[155] I note that in the determination of 18 March 2014, that the Court recognised some rights and interests that are similarly expressed to those below.

[156] The application states that the following rights and interests claimed are not to the exclusion of all others and are the rights to use and enjoy the claim area in accordance with the traditional laws acknowledged and customs observed by the Gudjala People.

Accessing land and waters

Entering and remaining on the land being claimed

[157] I previously considered the above rights and interests in relation to the Gudjala People #2 claim. In that regard, I primarily considered information in the Redmond report. In my previous reasons for decision dated 30 June 2010, I noted that:

> The native title claim group's right to access, enter and remain on the land and waters within the application area is well documented in the material. That material suggests that these rights exist under the traditional laws and customs of the group.
>
> In his report, Dr Redmond details historical record in relation to the use and occupation of country within the claim area, together with evidence pertaining to occupation of stations within the claim area. This is coupled with material on the laws and customs relevant to such use and occupation, such as local country groupings and group membership, dispute settlement and spiritual obligations in relation to the land—at [136] to [225] and [406] to [468].
>
> In his affidavit of 11 September 2006, **[Person 13 – name deleted]** says that '[a]s a Gurrdjal [referring to his language group], I do not have to ask permission of any person to be or walk on Gurrdjal Country even for burning on Country'—at [3.2].
>
> **[Person 14 – name deleted]**, in his interview with Dr Redmond on 6 April 2009, states that he has a right to speak for his country and 'to hunt and fish and get bush foods, to camp in the country anywhere, no government is stopping us in our traditional lands and no one can stop us, pastoralists or whatever, we can walk about there'—Redmond report at [347].

[158] At the time I considered that the material before me prima facie established that the above rights exist under the traditional laws and customs of the claim group. I consider that the information provides an arguable basis that these rights exist in relation to the land and waters covered by this claim.

[159] The above rights are prima facie established.

Hunting

Fishing

Gathering and using the products of the claim area such as food, medicinal plants, timber, bark, ochres, and earths, stone and resin, minerals, and using natural water resources of the area

[160] I previously considered the above rights and interests in relation to the Gudjala People #2 claim. In that regard, I primarily considered information in the Redmond report. In my previous reasons for decision dated 30 June 2010, part of the material cited in support of these rights included:

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

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

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

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

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

[Person 13 – name deleted], in his affidavit of 24 January 2006, says that his **[Person 15 – name deleted]** taught him how to fish near Gainsford, in the claim area. She would tell him 'not to take home all of the fish we caught but to leave some for the *uranji* as an offering.' He was taught about many other natural resources in the claim area and how to find and cultivate them. He has also taught his nephews about such practices—at [11] to [21]. There is also material in the affidavit of **[Person 13 – name deleted]**, sworn 11 September 2006, that provides support for above native title rights and interests, including details of hunting and fishing practices, the use of bush medicines and the gathering and use of various resources by the claim group in the application area—at [3.3] to [3.9].

[161] At the time I considered that the above material prima facie established that these rights and interests exist under the traditional laws and customs of the claim group. I consider that the information provides an arguable basis that these rights exist in relation to the land and waters covered by this claim.

[162] The above rights are prima facie established.

Camping and erecting shelters

[163] I previously considered the above right in relation to the Gudjala People #2 claim. In that regard, I primarily considered information in the Redmond report. In my previous reasons for decision dated 30 June 2010, part of the material cited in support of this right included:

> In opining that the predecessors of the native title claim group occupied and used the application area, Dr Redmond points to the historical and archaeological record, showing frequency of the presence of camp-sites noted in the area and infrequent records of cited rockshelters, sacred trees, wells and burial sites—at [127] to [135].
>
> Claimant accounts of this right being exercised in more contemporary times are also set out in the Redmond report, including:
>
> [interview with **[Person 6 – name deleted]**, 6 April 2009] 'We can camp anywhere in our country, you know. I mean, no government is stopping us from camping in our country... If we want to go out walkabout, we can go out walkabout'—at [342].
>
> [interview with **[Person 13 – name deleted]**, 28 June 2009] 'We got with **[Person 16 – name deleted]** at Flat Rock (on the Braughton) and we'd go camping at Flat Rock for a week'—at [346].
>
> [interview with **[Person 17 – name deleted]**, 3 May 2009] 'We always go to Fletcher camping, we just came back after 6 weeks there. All mum's side of the family came up, they camped on the other side...'—at [441].

[164] At the time I considered that the above material prima facie established that this right exists under the traditional laws and customs of the claim group. I consider that the information provides a prima facie basis that this right exists in relation to the land and waters covered by this claim.

[165] This right is prima facie established.

Engaging in cultural activities

Conducting ceremonies and holding meetings

Teaching the physical and spiritual attributes of locations and sites

[166] I previously considered the above rights and interests in relation to the Gudjala People #2 claim. In that regard, I primarily considered information in the Redmond report. In my previous reasons for decision dated 30 June 2010, part of the information I cited included:

> Dr Redmond relies on a range of historical data that he opines points to the participation, at sovereignty, of the regionally active population, including the Gudjala people, in initiation ceremonies, ceremonial dispute resolution, art and bodily adornment. He concludes that the data is indicative of 'a lively ceremonial world which was shared across the broader cultural region encompassing the current claim area'—at [174] to [225].
>
> Referring to the teaching of the physical and spiritual attributes of locations and sites, Dr Redmond cites the transmission of stories 'to those now living from previous generations of Gudjala people (often referred to simply as "old people").' Such stories have continued to be

> transmitted across generations and there is 'a strong emphasis upon a narrator being properly "in place"'—at [348] to [353].

[167] At the time I considered that the above and other information before me prima facie established that these rights exist under the traditional laws and customs of the claim group. I consider that the information provides an arguable basis that these rights exist in relation to the land and waters covered by this claim.

[168] The above rights are prima facie established.

Participating in cultural practices relating to births, marriages, and deaths on the claim area

[169] I previously considered the above right in relation to the Gudjala People #2 claim. In that regard, I primarily considered information in the Redmond report. In my previous reasons for decision dated 30 June 2010, part of the information I noted in relation to this claimed right included:

> There is material within the Redmond report indicating that the right to participate in cultural practices relating to births, marriages and deaths exists under the traditional laws and customs of the native title claim group.
>
> In the historical context, Dr Redmond identifies a 'four section marriage class system' as being relevant to the society of which the Gudjala are a part. Citing Gaggin (cited in Howitt 1904:498-499; Kennedy 1948:1) Dr Redmond recounts that:
>
> the supernatural being known as **[Being's name deleted]** who lived in the Milky Way **[Aboriginal name deleted]** became angered by anyone who married the wrong marriage class, who ate forbidden foods, or failed to observe proper mourning protocols causing them to die—at [156].
>
> Dr Redmond opines that this, and other material cited, provides evidence of a normative system of laws and customs within the region that relate to marriage and mortuary rites—at [156]:see also Redmond report at [136] to [157] and [199] to [209].
>
> Contemporary accounts detail how such laws and customs have been carried on by the native title claim group. For instance, claimants continue to visit places which were set aside for marriage promises. Such sites are believed to possess 'an enduring power and possible danger for strangers'. Furthermore, the focus of senior people's concerns about kinship practices relates to the law that marriage should be avoided between people who are 'too closely related'—Redmond report [262] to [272].
>
> As with their ancestors' mourning practices, today's claimants' practices involve 'an entire social group' and periods of mourning extend until the 'family is satisfied'. Further, cultural norms, such as avoidance of speaking the names of deceased persons, persist in the current context—Redmond report at [298] to [305].
>
> In relation to the existence of a right to participate in cultural practices relating to births, there is, in my view, a dearth of material.

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

[170] At the time I considered that the above and other information before me prima facie established that this right exist under the traditional laws and customs of the claim group. I consider that the information provides an arguable basis that this right exists in relation to the land and waters covered by this claim.

[171] The above right is prima facie established.

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

[172] I previously considered the above right in relation to the Gudjala People #2 claim. In that regard, I primarily considered information in the Redmond report. In my previous reasons for decision dated 30 June 2010, part of the information I noted in relation to this claimed right included:

> The native title claim group's right to make decisions, pursuant to Aboriginal law and custom about the use and enjoyment of the land by Aboriginal people is evidenced in the material. I consider, prima facie, that this is a right that exists under the traditional laws and customs of the native title claim group.
>
> Dr Redmond, in his report details the role of elders as authoritative structures 'particularly in regard to their authority in assessing the connections to country associated with different family groups'—at [281]. He opines that 'local authority is vested in knowledgeable elders, particularly in any discussions about land and its resources'—at [25].
>
> Claimant accounts also detail how this right has been exercised by the native title claim group, including:
>
> [interview with **[Person 18 – name deleted]**, 2 April 2009] 'Elders give the clearance. Different families talk for special areas'—at [281].
>
> [interview with **[Person 19 – name deleted]**, 8 April 2009] 'The old people, **[Family name 2 – name deleted]**, lived at Corinda (near airport, just out of town) and they used to tell me about the country and life on the stations. The oldest sibling has to tend the family and talk for country'—at [282].

[173] I note that the consent determination does not recognise this right. At the time of previously considering whether this right could be recognised as a non-exclusive right, I noted that:

There is some divergence within the authorities as to whether this right as expressed is one that is capable of recognition as a non-exclusive right,[4] with the suggestion that such a right, as expressed, equates to a right 'to control access', and therein lies the inconsistency.

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

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

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

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

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

[174] I consider that the information provides an arguable basis that this right exists in relation to the land and waters covered by this claim. It will ultimately be for the Court to decide whether the right is capable of recognition.

[175] The above right is prima facie established.

Conclusion

[176] The application satisfies the condition of s 190B(6).

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

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

(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.

[177] Based on the 'evidentiary' material the Registrar must be satisfied of a particular fact(s), specifically that at least one member of the claim group 'has or had a traditional physical connection' with any part of the claim area. While the focus is necessarily confined, as it is not commensurate to that of the Court in making a determination, it 'is upon the relationship of at least one member of the native title claim group with some part of the claim area'—*Doepel* at [18].

[178] Here, the term 'traditional' should be construed in accordance with the approach taken in *Yorta Yorta—Gudjala [2007]* at [89].

[179] In describing the necessary physical connection in the 'traditional' sense as required by s 223 of the Act, the members of the joint judgment in *Yorta Yorta* felt that:

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

[180] Exploring how this understanding of 'traditional' may feature in the task of the Registrar at s 190B(7), Dowsett J in *Gudjala [2009]* observed that '[i]t seems likely that such connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs'—at [84].

[181] In my reasons for decision dated 30 June 2010 for the Gudjala People #2 application, I noted that:

> In my view, within the anthropological reports of Dr Redmond and Mr Hagen and the affidavit material of **[Person 13 – name deleted]** and **[Person 20 – name deleted]**, there are numerous and specific references to current and previous members of the native title claim group which provide evidence of the requisite traditional physical connection by members of the native title claim group. For instance, the anthropological report of Dr Redmond provides claimant accounts of members of the group accessing the application area, pursuant to their traditional laws and customs, including by hunting, fishing, camping, visiting significant sites, conducting ceremonies and meetings.

[182] The information in the Redmond report and the affidavit material relates to the land and waters covered by both applications.

[183] For instance, in the affidavit of **[Person 20 – name deleted]** dated 1 March 2005, which accompanies the application, she tells of her traditional physical connection with the claim area. She says that:

> I have lived all of my life either on stations in or near the claim area, or in Charters Towers, which is also within the claim area. My mother, grandmother and great grandmother did the same. My grandchildren live here in Charters Towers today. There have always been members of my family living on the claim area from before white people started settling here up to the present day.
>
> As a senior woman in the Gudjala community I help teach the younger people in the community about their ancestors and about life in earlier days. I help to look after the young ones and make sure that they grow up understanding about their own culture and family.

[184] The application satisfies the condition 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 in relation to an area; 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 provision 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 in relation to an area; 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 provision 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 claimed confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.

(4) However, subsection (2) or (3) does not apply to an application if:

(a) the only previous exclusive possession act or previous non-exclusive possession act concerned 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 section 47, 47A or 47B, as the case may be, applies to it.

[185] In the reasons below, I look 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.

Section 61A(1)

[186] 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.

[187] The claim area that is being tested relates to the area of land and waters covered by the application that was not subject to the consent determination on 18 March 2014.

Section 61A(2)

[188] 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.

[189] Schedule B of the application excludes areas that are subject to previous exclusive possession acts.

Section 61A(3)

[190] 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.

[191] Schedule E of the application states that the application does not include a claim for exclusive possession over areas that have been the subject of previous non-exclusive possession act except where the Act allows.

Conclusion

[192] In my view the application does not offend any of the provisions of ss 61A(1), 61A(2) and 61A(3) and therefore the application satisfies the 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.

[193] I consider each of the subconditions of s 190B(9) in my reasons below.

Section 190B(9)(a)

[194] The native title claim group does not make a claim to minerals, petroleum or gas wholly owned by the Crown — Schedule Q of the application.

Section 190B(9)(b)

[195] The native title claim group does not make any claim to exclusive possession of all or part of an offshore place — Schedule P of the application

Section 190B(9)(c)

[196] The native title rights and interests claimed have not, to my knowledge, been extinguished. The application excludes any areas of land or waters where native title rights and interests have been extinguished — Schedule B(2) of the application

Conclusion

[197] In my view the application does not offend the provisions of ss 190B(9)(a), (b) and (c) and therefore the application meets the condition of s 190B(9).