



# Registration test decision

Application name	Gulngay People
Name of applicant	Doris Kinjun, Clarence Kinjun and Joanne Kinjun
NNTT file no.	QC2014/002
Federal Court of Australia file no.	QUD308/2014
Date application made	27 June 2014

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:** 26 September 2014

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Jessica Di Blasio

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cwlth) under an instrument of delegation dated 8 August 2014 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 Gulngay People claimant application to the Registrar on 30 June 2014 pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

[4] Given that the claimant application was made on 27 June 2014 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

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

## **Registration test**

[6] 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.

[7] 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**

[8] 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.

[9] 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.

[10] I have had regard to the following documents in my consideration of the application for the purposes of the registration test:

- Form 1 and all attachments; and
- Gulngay People [additional material], provided to the Registrar as additional material on 28 August 2014

[11] 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.

[12] 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**

[13] 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]–[31]. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

[14] The case manager with carriage of this matter wrote to both the applicant and the State of Queensland (the State) on 27 August 2014 providing a timeframe for registration testing as well a timeframe for any submissions they may wish to make in relation to the application of the registration test.

[15] On 28 August 2014 the applicant provided a copy of the Gulngay People [additional material] as additional material to the Registrar for the purposes of the registration test. Following a phone conversation on 2 September 2014 between the case manager for this matter and a representative of the State about the receipt of the [additional material] the case manager received an email, dated 2 September 2014 from the State confirming that it did not wish make any submissions in relation to the application of the registration test in this matter and did not

wish to receive a copy of the [additional material] submitted as additional material. The case manager confirmed this by return email sent 4 September 2014. At the date of making this decision no submissions have been received from the State.

## *Procedural and other conditions: s 190C*

### **Subsection 190C(2)**

#### **Information etc. required by ss 61 and 62**

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

[16] 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.

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

[18] 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.

[19] 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)**

[20] In *Doepel*, Mansfield J confined the nature of the consideration for this requirement to the information contained in the application—at [37] and [39]. I therefore understand that I should consider only the information contained in the application and should not undertake any form of merit assessment of the material when considering whether I am satisfied that ‘the native title claim group as described is in reality the correct native title claim group’—*Doepel* at [37].

[21] If the description of the native title claim group in the application were to indicate that not all persons in the native title group were included, or that it is in fact a subgroup of the native title claim group, then, in my view, the relevant requirement of s 190C(2) would not be met and the claim could not be accepted for registration—*Doepel* at [36].

[22] There is a description of the claim group included at Schedule A of the application.

[23] There is nothing on the face of the application which suggests that the application is not brought on behalf of all members of the native title claim group, I am therefore satisfied that the native title claim group as described in Schedule A meets the requirement of s 61(1).

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

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

[25] The name and address for service of the applicant is included at Part B of the application.

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

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

[27] I understand that this provision is ‘a matter of procedure’ and does not require me to consider whether the description is ‘sufficiently clear’, merely that one is in fact provided—*Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [31] and [32]. I am not required or permitted to be satisfied about the correctness of the information in the application naming or describing the native title claim group—*Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198—at [34].

[28] The native title claim group is described at Schedule A of the application.

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

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

[30] The application is accompanied by three (3) affidavits each sworn by one of the persons comprising the applicant.

[31] Each of the affidavits include the statements required by s 62(1)(a)(i)–(v) and is competently signed and witnessed

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

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

[33] 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)*

[34] Attachment B of the application includes a written description of the external boundaries of the application area.

[35] 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)*

[36] Attachment C of the application includes a map of the application area.

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

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

[38] Schedule D of the application states '[t]o the best of the knowledge of the Applicant no such searches have been conducted.'

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

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

[40] Schedule E includes a description of the native title rights and interests claimed in the application.

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

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

[42] Information relevant to the asserted factual basis for the claim in the application is contained at Schedule F of the application. I am of the view that I need only consider whether the information regarding the claimants' factual basis addresses in a general sense the requirements of s 62(2)(e)(i)–(iii). I understand that any 'genuine assessment' of the sufficiency of the factual basis is to be undertaken by the Registrar when assessing the application for the purposes of s 190B(5). I am of the view that this approach is supported by the Court's findings in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [92].

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

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

[44] Schedule G includes details of activities currently carried out by the native title claim group in the application area.

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

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

[46] Schedule H of the application states '[t]he Applicant is unaware of any other pending application to the High Court Federal Court, or a recognised State/Territory body that seek a determination or compensation in relation to native title in relation to the whole or any part of the claim area.'

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

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

[48] Schedule HA of the application states '[t]here are no s24MD(6B)(c) notification that are relevant to this claim area as at 16 May 2014.'

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

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

[50] Schedule I of the application states '[t]here are no s29 notifications or notices under a corresponding provision of a law of the State of Qld of which the Applicant is aware that related to the claim area as at 16 May 2014'.

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

*Conclusion*

[52] The application contains the details specified in ss 62(2)(a)–(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.

[53] This requirement is concerned to ensure that the Registrar is satisfied that no person included in the native title claim group for the current application is a member of the native title claim group for any previous application.

[54] I understand that this requirement only arises if the conditions specified in subsections (a), (b) and (c) are all satisfied — *State of Western Australia v Strickland* [2000] FCA 652. I therefore must first consider if there are any previous claims that overlap the application area, that were on the Register when the current application was made, and that remain on the Register at the date of this decision. If there is no such claim, then there will be no ‘previous overlapping application’ for the purposes of this requirement.

[55] The Tribunal’s Geospatial Services prepared a Geospatial assessment and overlap analysis of the application area dated 8 July 2014, which states that no applications as per the Register of Native Title Claims overlap the external boundary of this application. My own searches of the Tribunal’s databases confirm this. As such, there is no ‘previous overlapping application’ for the purposes of this requirement.

[56] The application satisfies the condition of s 190C(3).

### **Subsection 190C(4)**

#### **Authorisation/certification**

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

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

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

Under s 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

[57] 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.

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

[59] Schedule R of the application states the Certificate of the North Queensland Land Council is attached as Attachment R1. Attachment R1 of the application is a certificate from North Queensland Land Council (NQLC) dated 10 June 2014 signed by both the Chair of the board and another board member nominated by the Chair. I have had regard to the Geospatial assessment



dated 8 July 2014 which identifies NQLC as the only representative body responsible for the area covered by the application. NQLC is therefore the only body that could certify the application.

[60] Section 203BE(4) sets out particular statements that must be included in a certification for a native title determination application. Namely that the representative body must be of the opinion that the requirements of ss 203BE(2)(a) and (b) have been met, their reasons for being of that opinion, and where applicable set out what the body has done to meet the requirements of s 203BE(3). The necessary opinions at ss 203BE(2)(a) and (b) relate to authorisation of the claim by members of the native title claim group and that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

*Section 203BE(4)(a)*

[61] This provision requires a statement from the representative body that they are of the opinion that the requirements set out in s 203BE(2)(a) and (b) have been met.

[62] The certificate contains the required statements.

*Section 203BE(4)(b)*

[63] This provision requires the representative body to set out their reasons for being of the opinion required at s 203BE(4)(a).

[64] The certificate provides the following relevant information with regard to the claim group authorising the making of the application:

- An authorisation process, described as a traditional decision making process was undertaken, this involved a combination of both the idea that according to traditional laws and customs those members of the native title claim group who have particular native title rights and interests in the land and waters concerned have the authority to speak for that area and to make decisions about any matters that might affect their native title rights and interests in that area. Additionally majority consent of the senior members of that native title claim group was given, having regard to the land and waters to be covered by the application.
- The authorisation process involved extensive consultation with the members of the native title claim group.

[65] The certificate provides the following relevant information with regard to ensuring all reasonable efforts were made to describe or otherwise identify all the persons in the native title claim group:

- The identification of the claim group involved the engagement of a consultant anthropologist who has undertaken extensive research in the region, including in relation to the land and waters covered by the application
- The description of the native title claim group has been considered by the members of the native title claim group and instructions given to the legal representative of the claimants
- An expert anthropological report in respect of the claim concludes that the claim group as presently described in the application is properly constituted.

[66] The certificate contains the required information pursuant to s 203BE(4)(b)

*Section 203BE(4)(c)*

[67] This provision requires that, where applicable, the representative body briefly set out what it has done to meet the requirements of s 203BE(3), namely that the representative body make all reasonable efforts to reach agreement between any overlapping claimant groups and to minimise the number of overlapping applications in relation to the application area. Section 203BE(3) further provides that a failure to comply with this subsection does not invalidate any certification of the application by a representative body.

[68] The certification states:

The NQLC has checked the NNTT register and the Application is not covered in part or in whole by any other applications. In addition, adjoining determinations of native title have been expressly excluded from the claim area in the Application

[69] In my view the certification meets the requirements of s 203BE(4)(c).

*My decision*

[70] For the above reasons I am satisfied that the application has been certified under Part 11 by the only representative body that could certify the application and I am satisfied that it complies with s 203BE(4).

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

## *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.

[72] A description of the application area is included at Attachment B. Attachment B contains a metes and bounds description that refers to native title determination application boundaries, rivers and creeks, cadastral parcels and coordinate points to six (6) decimal places referenced to GDA94.

[73] Attachment C contains a colour copy of an A3 map titled 'Gulngay' prepared by the Tribunal's Geospatial services dated 16 April 2014 and includes:

- the application area depicted by a dark blue outline;
- topographic background;
- scalebar, northpoint, coordinate grid, legend and locality map; and
- notes relating to the source, currency and datum of data used to prepare the map.

[74] Section 190B(2) requires that the information provided in the boundary description and map be sufficient for the Registrar to be satisfied that it can be said with reasonable certainty whether the native title rights and interests are claimed in the particular land and waters covered by the application. That is, the written description and map should be sufficiently clear and consistent.

[75] I have had regard to the Geospatial assessment provided by the Tribunal's Geospatial Services on 8 July 2014. The Geospatial assessment concludes that the description and maps are not consistent and do not identify the application area with reasonable certainty. The Geospatial assessment states that the written description included in Attachment B is a transcription of a written description written and provided by the Tribunal's Geospatial services. The Geospatial assessment notes that there is a transcription error in the written description included at Attachment B.

[76] Having considered the written description myself it is clear that lines five (5), six (6) and half of seven (7) are exactly repeated in the second half of line seven (7) and all of lines eight (8) and nine (9). That is the words '17.978220° South; then north westerly to an unnamed creek at Longitude 145.781310° East, Latitude 17.976400° South; then generally north westerly and

generally north easterly along that creek to Davidson Creek; then generally westerly along the centerline of that creek to Longitude' have been transcribed twice. It is my view that this is clearly a typographical error, it is plainly obvious on the face of the document that there is a simple transcription error and that the duplication of the above lines is unintentional.

[77] Reading the written description without the duplication of the above extracted lines the written description clearly identifies the area intending to be claimed and is consistent with the map at Attachment C. Geospatial services confirmed this by email dated 5 August 2014.

[78] In my view the requirement at s 190B(2) is concerned with reasonable certainty. That is it must be reasonably possible to identify, based on the information in the application, the land and waters claimed by the application. In my view, despite the transcription error, the written description and map are reasonably certain. It is possible to identify the nature and extent of the error and reasonably identify the area claimed in the application despite the error in the written description. In my view, the requirement at s 190B(2) is met.

[79] 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.

[80] The application contains a description of the native title claim group. Thus, I must consider whether 'the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.'

[81] The native title claim group is described as follows:

The Gulngay Native Title Claim Group is comprised of people descended from Joe Kinjin (Ginydjubayil) aka Kinjufile sometimes referred to as King of the Gulngay People—Schedule A

#### ***The requirements of s 190B(3)(b)***

[82] The nature of the task at s 190B(3)(b) is for the Registrar to focus upon the adequacy of the description to facilitate the identification of the members of the native title claim group, rather than upon its correctness—*Doepel* at [37] and [51].

[83] It may be that determining whether any particular person is a member of the native title claim group will require 'some factual inquiry' however 'that does not mean that the group has

not been described sufficiently.’ — see *Western Australia v Native Title Registrar* [1999] FCA 1591 at [67] (*WA v NTR*).

[84] In *WA v NTR*, Carr J found that a claim group description which described the group according to descent from, or adoption by, identified ancestors and their descendants was sufficiently clear to satisfy the condition of s 190B(3)(b). Carr J found that it was possible to begin with a particular person, and then through factual inquiry, determine whether that person fell within one of the criteria identified in the description — at [67]. For the same reasons I am satisfied that the description of the native title claim group, being descent from an apical ancestor, (as described above) is sufficient for the purposes of s 190B(3)(b).

[85] I am therefore satisfied that the overall requirement of s 190B(3)(b) is met, as it is possible, through some factual inquiry, to ascertain, by reference to the description in Schedule A of the application, whether a particular person is a member of the native title claim group.

[86] 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.

[87] Mansfield J, in *Doepel*, stated that it is a matter for the Registrar to exercise ‘judgment upon the expression of native title rights and interests claimed’. His Honour considered that it was open to the decision-maker to find, with reference to s 223 of the Act, that some of the claimed rights and interests may not be ‘understandable’ as native title rights and interests — at [99] and [123].

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

[89] The following list of native title rights and interests claimed in the application area is included at Schedule E:

1. In relation to land where there has been no prior extinguishment of native title or where s 238 (the non-extinguishment principle) applies, the native title rights and interests claimed are the exclusive rights 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, and

2. with regard to all remaining land and waters within the claim area the native title rights and interests claimed are not to the exclusion of all others and are the rights to speak for country, be present on, have access to and use the claim area and its cultural resources, namely to:

- (a) speak for country in the claim area;
- (b) traverse and travel across the claim area;
- (c) conserve and maintain the claim area;
- (d) hunt on the claim area;
- (e) fish on the claim area;
- (f) gather bush food on the claim area;
- (g) gather natural resources on the claim area;
- (h) gather bush medicines on the claim area;
- (i) protect and maintain the claim area and its natural and cultural resources for the benefit of native title holders;
- (j) care for the claim area on behalf of and for the benefit of the native title holders;
- (k) use the claim area on behalf of and for the benefit of the native title holders;
- (l) use the natural resources of the claim area for social, cultural, economic, religious, spiritual, customary, healing and traditional purposes;
- (m) use the bush medicines in the claim area for cultural, economic, religious, spiritual, customary, healing and traditional purposes;
- (n) reside on the claim area;
- (o) build permanent and temporary structures on the claim area;
- (p) camp on the claim area;
- (q) exercise and carry out economic life on the claim area;
- (r) take natural resources in the claim area for sharing, trade and exchange;
- (s) prepare food in the claim area for sharing, exchange and trade;
- (t) grow, husband, harvest and produce food in the claim area for sharing, exchange and trade;
- (u) produce artifacts in the claim area for exchange and trade;

- (v) use of sand in the claim area;
- (w) use of ochres in the claim area;
- (x) use of clays in the claim area;
- (y) use of gravels in the claim area;
- (z) use of rocks in the claim area;
- (aa) use of products produced by the exercise of native title rights and interests in the claim area;
- (bb) discharge the cultural rights, duties, obligations and responsibilities on and in relation to the claim area and its welfare;
- (cc) discharge spiritual rights, duties, obligations and responsibilities on and in relation to the claim area and its welfare;
- (dd) discharge traditional rights, duties, obligations and responsibilities on and in relation to the claim area and its welfare;
- (ee) discharge customary rights, duties, obligations and responsibilities on and in relation to the claim area and its welfare;
- (ff) preserve sites of significance to the native title holders in the claim area;
- (gg) conduct secular activities in the claim area concerning the claim area and its welfare;
- (hh) conduct ritual activities in the claim area concerning the claim area and its welfare;
- (ii) conduct spiritual activities in the claim area concerning the claim area and its welfare;
- (jj) conduct religious activities in the claim area concerning the claim area and its welfare;
- (kk) conduct cultural activities in the claim area concerning the claim area and its welfare;
- (ll) conduct ceremonial activities in the claim area concerning the claim area and its welfare;
- (mm) conduct burials and be buried on the claim area;
- (nn) maintain the cosmological relationship between beliefs, practices, customs and institutions through ceremony, custodianship and teaching of the claim area;
- (oo) maintain special and sacred sites in the claim area;
- (pp) inherit and dispose of native title rights and interests in relation to the claim area in accordance with traditional laws and customs;

(qq) resolve disputes between native title holders and other Aboriginal persons in relation to the claim area;

(rr) light fires in the claim area for domestic purposes including cooking but not for the purpose of hunting or clearing vegetation[;]

(ss) take and use water for domestic, personal, cultural, spiritual, ceremonial and non commercial communal use in the claim area;

The asserted native title rights and interests for both exclusive and non exclusive areas are subject to;

(a) Valid laws of the State of Queensland and the Commonwealth of Australia;

(b) Rights past and present conferred upon persons pursuant to the valid laws of the Commonwealth and the laws of the State of Queensland; and

The asserted native title rights and interests for both exclusive and non exclusive areas

(a) do not include a claim to ownership of any minerals, petroleum or gas wholly owned by the Crown in a manner which is inconsistent with continuing native title rights and interests residing in those substances;

(b) are not exclusive rights or interests if they relate to waters including in an offshore place (if applicable), and will not apply if they have been extinguished in accordance with valid State or Commonwealth laws

To avoid doubt, references to cultural resources include natural and traditional resources.

[90] It is my view that the native title rights and interests as described above are understandable and have meaning. I am satisfied that the description contained in the application is sufficient to allow the native title rights and interests to be readily identified.

[91] 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.



[92] I consider each of the three assertions set out in the three paragraphs of s 190B(5) in turn in my reasons below.

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

[93] The nature of the Registrar's task at s 190B(5) was the subject of consideration by Mansfield J in *Doepel*. It is to 'address the quality of the asserted factual basis' but 'not to test whether the asserted facts will or may be proved at the hearing, or assess the strength of the evidence...' I am to assume that what is asserted is true and then consider whether 'the asserted facts can support the claimed conclusions' — *Doepel* at [17].

[94] The Full Court in *Gudjala FC* agreed with Mansfield J's characterisation of the task at s 190B(5). The Full Court also said that a 'general description' of the factual basis as required by s 62(2)(e), provided it is 'in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and [is] something more than assertions at a high level of generality', could, when read together with the applicant's affidavits swearing to the truth of the matters in the application, satisfy the Registrar for the purpose of s 190B(5)—at [83]–[85] and [90]–[92].

[95] The above authorities establish clear principles by which the Registrar should be guided when assessing the sufficiency of a claimants' factual basis:

- the applicant is not required 'to provide anything more than a general description of the factual basis' — *Gudjala FC* at [92];
- the nature of the material provided need not be of the type that would prove the asserted facts — *Doepel* at [47]; and
- the Registrar is to assume the facts asserted are true, and to consider only whether they are capable of supporting the claimed rights and interests — *Doepel* at [17].

[96] It is, however, important that the Registrar consider whether each particularised assertion outlined in s 190B(5)(a), (b) and (c), is supported by the claimant's factual basis material. Dowsett J in *Gudjala* [2007] and *Gudjala People #2* [2009] FCA 1572 (*Gudjala* [2009]) gave specific content to each of the elements of the test at s 190B(5)(a)–(c). The Full Court in *Gudjala FC*, did not criticise generally the approach taken by Dowsett J in relation to each of these elements in *Gudjala* [2007],<sup>1</sup> including his assessment of what was required within the factual basis to support each of the assertions at s 190B(5). His Honour, in my view, took a consonant approach in *Gudjala* [2009].

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<sup>1</sup> See *Gudjala FC* [90]–[96]

[97] In line with these authorities it is, in my view, fundamental to the test at s 190B(5) that the claim provides a description of the basis upon which the claimed native title rights and interests are alleged to exist. More specifically, this was held to be a reference to rights vested in the claim group and further that 'it was necessary that the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)' – *Gudjala* [2007] at [39].

[98] The following information is relevant to my consideration of this requirement:

- Form 1 and all attachments, especially affidavits sworn by the people comprising the applicant;
- Gulngay People [additional material] provided to the Registrar as additional material.

### **Reasons for s 190B(5)(a)**

[99] Dowsett J observed in *Gudjala* [2007] (not criticised by the Full Court on appeal), with respect to this aspect of the factual basis, that the applicant must demonstrate:

- that the claim group as a whole presently has an association with the area, though not all members must at all times;
- that there has been an association between the predecessors of the whole group and the area over the period since sovereignty – at [52]; and
- that there is information which supports that the claim group is associated with the 'area as a whole' – *Gudjala* [2009] at [67].

[100] I also note that broad statements about association with the application area that do not provide geographic particularity may not provide the requisite factual basis for this section – *Martin v Native Title Registrar* [2001] FCA 16 at [26].

### ***Applicant's factual basis material***

[101] I understand that the native title claim group is comprised of all descendents of Joe Kinjin and that it is asserted that the Gulngay People have been associated with the application area since prior to sovereignty. I understand it is asserted that native title rights and interests in the area arise as a result of biological descent, that it is through the generations of the claim group that a body of traditional laws and customs, including knowledge of and responsibility for country is passed. It is asserted that the traditional laws and customs which give rise to the claimed native title have their origin in a series of creation stories, especially the rainbow snake story.

[102] Schedule F provides some very general statements about the association of the claim group and their predecessors with the application area. Examples of these general assertions include:

- i. Members of the claim group continue to have close association, including spiritual connection with the claim area according to their traditional laws and customs;
- ii. Members of the claim group continue to pass on to their descendants traditional laws and customs stories and beliefs concerning their traditional country including the claim area—Schedule F.

[103] Each of the people who comprise the applicant have sworn an affidavit and these three (3) affidavits provide information which supports the factual basis of the claim, including in relation to the association of the claim group and their predecessors with the application area. It is stated in their affidavits that both [Applicant 1 – name deleted] and [Applicant 2 – name deleted] were born on Gulngay country within the application area and that all three of the persons comprising the applicant have spent most of their lives living around the Tully River area in the application area. [Applicant 1 – name deleted] states:

Gulngay country includes the land and waters shown on the map attached to the application. This is my country because I have ancestral connection through my father, and his father, both of whom were Gulngay. I was born at Tully and my home was always been in the area. My father was born in 1886 at Tully River and lived and worked in this area for most of his life—at [18]

[104] The spiritual association of the Gulngay people with their country is discussed by the claim group members in their affidavits at several points. Much of this information is further explained and detailed in the Gulngay People [additional material] ([additional material]). As an example [Applicant 2 – name deleted] explains:

My totem is the Rock Wallaby. A totem connects the family back to the ancestors. Animals came before humans so you get your totem from the animal you are in the beginning. Its spirit follows you and connects family back to the ancestors.

Girrugar was the first creator who passed through Gulngay country. He left a footprint in a rock at Bulgan. He left another footprint at Yarrabah. He named all the plants, animals, river bends, fish, creeks, mountains, streams, lagoons, waterholes on Gulngay country. Girrugar created the waterhole Gugarr (Goanna). It is the place for the Crocodile Story. It is where people caught a goanna and went to collect firewood so they could cook it. They put it in a hollow log while they went away. The goanna escaped from the end of the log and changed into a crocodile which happened at Alligator Bend, a creation place. The people chased him down and two of the ladies turned into rocks. Girrugar came all the way from Cape York and walked through Gulngay country and is half man. He changed into an eel when he went travelling round the ocean—at [19] and [20].

[105] I understand that many of the sacred or culturally significant sites across Gulngay country and within the application area have Aboriginal names, many of which claim group members are

associated with and are also known by. [Applicant 1 – name deleted] speaks about her Aboriginal name in her affidavit:

My name place is in Kings Range behind Munro Hill. There are houses there now. I was an eel. My parents had a dream about an eel that went back into the cave. “*Jajanu*” means “moving back”. *Jajanu* is my Aboriginal name. You have to climb up the hill to find the cave. It is on country shared with the Jirrbal—at [17].

[106] The affidavit material also details that the claim group members believe they have rights to take and use the resources within the application area and that they have learnt about those rights and the places for those activities from preceding generations. [Applicant 2 – name deleted] describes areas where he collects food and is able to fish across the application area as follows:

I have a right to take and use traditional natural resources from Gulngay country and I exercise this right by fishing and gathering natural resources on Gulngay country. These days I go to Tully River, Jarra Creek, Echo Creek and Murray River. There is a spiritual connection to country—at [31].

[107] Similarly [Applicant 3 – name deleted], in her affidavit, speaks of camping ‘up behind Munro Plains or at the top of Davidson Road’ and of fishing and camping with her sons at Running Beach, a special place for Gulngay people and the place where she takes her language name from, *Gunya*, meaning mountain prawn—at [24].

[108] It is also clear from the affidavit material that the claim group members have learnt about sacred and culturally significant places from their predecessors and that they continue to pass this knowledge on to the younger generations of the claim group. As an example [Applicant 1 – name deleted] explains:

Today I visit story places and special places like Running Beach where my parents used to take us camping, fishing, and crabbing when we were young. They taught us things about country and showed us how to fish and collect pippis, berries, seeds, and many types of plants. Running Beach is important to my family, both past and present. Running Beach needs protecting and looking after—at [27].

[109] [Applicant 2 – name deleted] speaks about having learnt about the creation stories from older generations and about having been taught that his rights as a Gulngay man arise as a result of these stories. He talks of learning traditional ways of fishing and hunting, rules about food taboos and bush medicines and other cultural practices from the older generations and explains that he now teaches his nephews and sons these things. As an example he states:

I exercise my right to fish by teaching my nephews spear fishing and how to smoke eel. I hand this knowledge down to the next generation. That is the Law. I take my nephews on country. I like to camp and fish on country. I like quiet country. My grandfather and my aunties taught me to fish, how to clean them and cook them underground. When I lived at ‘The Dip’, I spent most of my time

fishing. I'd catch black bream, barra and eel. Fish were very plentiful in those days. Running Beach is a special place. We use it for camping, walking up the beach, fishing, crabbing and spearing mullet – at [27].

[110] These and other statements like them in the affidavit material provide a great deal of information about the current claim group member's association with various places across the application area. The [additional material] further details the extent of Gulngay country and the historical association that the claim group have had with the area over the period since at least first European settlement.

[111] I understand from the [additional material] that it is asserted that the Gulngay people are a society of people that are part of a wider regional society of Dyirbal dialect speakers. It is asserted in the [additional material] that Dyirbal dialect speakers share many laws and customs and are loosely understood to be the 'rainforest Aboriginal' groups often considered together in historical writings about the region. The [additional material] identifies particular land and waters that are the sole responsibility of the various groups within the Dyirbal dialect regional society and it is these groups that also have language and customary distinctions which it is asserted hold native title rights and interests. The [additional material] explains that Gulngay is an identity term that is understood by Gulngay people and other Aboriginal people in the region to denote both language, social identity and a defined area of land and waters:

Among Gulngay people, as well as among their Aboriginal neighbours (namely, Girramay, Ma:mu and coastal Dyirbal people), the ethonym, Gulngay, broadly denotes three elements of social and cultural identity: (i) an Indigenous way of speaking; (ii) an identifiable group of Aboriginal people, who claim kinship connection to Gulngay-speaking forebears, and (iii) a defined area of land and waters. Broadly envisaged in this way, the term, 'Gulngay', distinguishes Gulngay people from other Aboriginal peoples and from other named native title claim groups in the region, such as Giramay, Dyirbal, and Mamu, on the basis of language, social identity and country – at [37].

[112] The [additional material] considers the boundaries of Gulngay country on the basis of a series of secondary sources, including research and notes from various anthropologists and early European settlers as far back as around 1900, as well as primary information from current claim group members. It is asserted that Gulngay people have and had an association with the entirety of their country. In summary I understand that the report states that the application area is claiming, broadly speaking, the whole of asserted Gulngay country.

[113] The [additional material] also provides a great deal of information about Joe Kinjun, variously spelled throughout different publications and eras as Joe Gin Gin, Joe Kingun, Joe Kingen, Joe Kingin and Kinjufile. I understand references throughout the [additional material] to Joe Kinjun to be a reference to the apical ancestor in Schedule A (referred to by various names in Schedule A, most notably Joe Kinjin), descent from this ancestor being the way the claim group is described.

[114] The [additional material] asserts that Joe Kinjun was born on the Tully River, within the application area between 1890 and 1893. Secondary sources, particularly government records suggest Joe Kinjun's parents names were Jimmy or perhaps Jimmy Killinjin and Nellie, though it is stated that not a lot is known about them. I understand the reason the claim group has been defined from the generational level of Joe Kinjun is that there is greater information about his association with Gulngay country and greater evidence which points to his carrying out traditional laws and customs in the area.

[115] The [additional material] states that historical record indicates that the area of and around the application area was first impacted by the establishment of Cardwell in 1864 and from this point for the next 20 years European settlement 'took over the most accessible parts of these territories' — at [7]. Given this I understand that Joe Kinjun was likely born around the time that European settlement was beginning to impact the region and Gulngay country and the application area more specifically. The [additional material] states:

As reported in the 1976 Townsville Daily Bulletin article, Joe Kinjun was "a man who has lived the history of his people— a tragic history— for almost a century". As reported in the newspaper article, citing local historian, [Historian 1 – name deleted], Joe Kinjun was born at a time when there was "no radical change in their adherence to the age-old traditions of the tribes" (loc. Cit). At the time that Joe Kinjun was born, and through his youth and into adulthood, the Gulngay Aboriginal people of the Tully River continued to live in traditional thatched dwelling of midja (see photograph 22) on the sand bars formed on the bends and curves of the Tully River, and they continued to ply up and down the river in sewn bark canoes (*gagyi*) and on traditional log rafts, *wardjan*— at [697].

[116] It is asserted that Joe Kinjun was one of the only Gulngay survivors following a series of massacres in Gulngay country. It is asserted that he was born on and spent most of his life (although was removed for a short period to Palm Island) on Gulngay country. There is a great deal of information in the [additional material] about both the historical and ongoing association of the Kinjun family with Gulngay country.

[117] It is clear from both the [additional material] and the affidavits sworn by the persons comprising the applicant that there is a direct link between Joe Kinjun and current claim group members. I note that [Applicant 1 – name deleted] states that her father was Joe Kinjun and talks about how her father taught her about the boundaries of Gulngay country — at [15] and [21]. Also [Applicant 2 – name deleted] states that Joe Kinjun was his grandfather and that Joe Kinjun, along with the assistance of other Gulngay women, helped to bring him up — at [16].

[118] The [additional material] also details the sites, story places, burial sites and campsites that have been identified across Gulngay country, and therefore the application area. There are several maps of Gulngay country included in the [additional material] that visually show the number and distribution of these sites and places. There is clearly a concentration of sites around the southern portion of the application area where the main river systems are located. However there

are sites and places spread across the entire application area, including the more northern portions further from the river systems. These maps identify sites which are unique to Gulngay people only and, especially around the borders of Gulngay country, identify sites that are both Gulngay and shared with others of the Dyirbal dialect speaking groups from the wider regional society of which Gulngay are asserted to be a part.

[119] Finally I note that much of the information about the life and experiences of Gulngay people from as far back as the early 20<sup>th</sup> Century as explained in the [additional material] is taken directly from transcripts of interviews conducted with Joe Kinjun himself. Joe Kinjun lived until the early 1980s and there are various records of his being an informant and providing information about Gulngay association with country, about Gulngay laws and customs, boundaries and social practices to researchers throughout his lifetime. Some of this information includes his very early memories as well as stories from before his memory passed to him from other older Gulngay people present in the application area some time before first European contact.

*My consideration*

[120] Based on the above information I am satisfied that the claim group as a whole presently has and previously had an association with the application area.

[121] The information contained in the application at Schedule F along with that provided in the affidavits and the [additional material] is detailed and clearly outlines that the claim group as a whole comprise a single society, united by their understanding of the Gulngay stories as the origin of their spiritual association with their country and from which they derive their traditional laws and customs. I understand that this society is one of many groups that form the Dyirbal dialect regional society and that this regional group often share traditional laws and customs and interact on a broader regional scale, but that the Gulngay people are the sole group which has responsibility for or rights and interests in Gulngay country.

[122] Many of the place names or landmarks discussed in the material, as summarised above, fall within the external boundary of the application area or within close proximity to it. In particular I note that the [additional material] provides detailed maps of the locations of important sites, story places, burial sites and campsites across the whole application area.

[123] Each applicant person is a member of the native title claim group and they understand that their affiliation and rights and interests in Gulngay country arise as a result of their descent from other Gulngay people. It is asserted that this pattern of descent based membership to the group extends back many generations to a time before sovereignty. Each of the affidavits, in my view, clearly demonstrates that members of the native title claim group (and their predecessors) have (and had) an association with the application area. This association has been passed to them through generations and the material asserts this transmission of knowledge extends back to the

time of the creation stories. I am of the view that the information can be said to contain geographic particularity, which supports the assertion of an association held by the claim group members and their predecessors with locations across the whole claim area.

[124] It is clear that the claim group have a strong physical association with the application area through, for example, being born on the application area and living their lives on the application area. It is also asserted that claim group members continue to carry out traditional activities like fishing, collecting bush foods and medicines and undertaking camping trips across the application area. It is clear that senior members of the claim group take responsibility for protecting their country and are charged with continuing the knowledge and social norms of their society by teaching younger generations.

[125] The material demonstrates that the claim group also have a strong spiritual association with the application area. I understand that the claim group derive their belonging to country and the traditional laws and customs from their belief in a creation period and spiritual and mythical beings who created Gulngay country.

[126] It is asserted in the information before me that a strong tradition of oral transmission of cultural knowledge including with respect to significant places on the application area continues to be a foundation of the claim group's traditional laws and customs. The affidavit material demonstrates a strong pattern of teaching laws and customs such as fishing and collecting food. It is my view that this pattern of teaching paired with an understanding of the spiritual origins of the claim group's societal identity demonstrates that the claim group and their more immediate predecessors have (and had) an association with the application area. On this point, I note that Joe Kinjun, being the apical ancestor used to describe the claim group, was born sometime between 1890 and 1893 and the [additional material] asserts that he would have spent most of his young life living a traditional lifestyle mostly uninterrupted by European settlement, such that it is possible to infer that the lifestyle, association and laws and customs described by Joe Kinjun in historical interviews and records would be much the same as that of the Gulngay people prior to sovereignty.

[127] It is therefore my view that there is an available inference that the pattern of oral teaching would have continued in much the same way beyond the generations remembered by the deponents of the affidavits and prior to the generation of Joe Kinjun, such that the pattern of teaching extends to the generations who were present on the application area in a time prior to sovereignty, and, according to the spiritual beliefs of the claim group, back to the creation time.

[128] On this basis, I am of the view that the material supports an assertion that there is an association of the whole claim group and their predecessors over the area throughout the period since sovereignty.



[129] For the above reasons I am satisfied that the application meets the criteria in s 190B(5)(a).

### **Reasons for s 190B(5)(b)**

[130] Dowsett J in *Gudjala* [2007] linked the meaning of ‘traditional’ as it appears in s 190B(5)(b) with that at s 223(1) in relation to the definition of ‘native title rights and interests’. This idea of ‘traditional’ necessarily requires consideration of the principles derived from *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta*). This aspect of Dowsett J’s decision was not criticised by the Full Court on appeal – *Gudjala FC* at [90]–[96].

[131] Dowsett J’s examination of *Yorta Yorta* lead him to conclude that a necessary element of this aspect of the factual basis is the identification of a relevant society at the time of sovereignty, or at least, first European contact – *Gudjala* [2007] at [26]. I understand that a sufficient factual basis needs to address that the traditional laws and customs giving rise to the claimed native title have their origins in a pre-sovereignty normative society with a substantially continuous existence and vitality since sovereignty.

[132] Dowsett J stated in *Gudjala* [2007] that the facts necessary to support this aspect of the factual basis must address:

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

### ***The applicant’s factual basis material***

[133] As stated above in my reasons at s 190B(5)(a) it is asserted that the Gulngay people understand that their rights and interests in country and the traditional laws and customs which they acknowledge and observe have their source in a series of creation stories or a creation time. I have extracted an example above from [Applicant 2 – name deleted] affidavit that explains the Crocodile Story. This and other stories, relating to weather patterns, particularly making rain and the story of the rainbow snake as a creation being that played a significant role in the creation of the river system which is central to the Gulngay people’s lifestyle are key stories that it is asserted form the basis of the Gulngay people’s understanding of their culture and their identity as

Gulngay people. It is asserted that these stories have been passed from older generations to the current members of the claim group and it is through this process of oral transmission of knowledge that the traditional laws and customs of the Gulngay people continue.

[134] The [additional material] provides a great deal of in depth information regarding the traditional laws and customs of the Gulngay people at a time close to first European contact. In particular, the [additional material] undertakes an extensive analysis of the available historical written record, especially a report produced about the 'blacks of the lower Tully River' (the Gulngay People) written in 1900 by [Report author 1 – name deleted]. [Anthropologist 1 – name deleted], the anthropologist who authored the [additional material], undertakes a comparison of [Report author 1 – name deleted] 1900 report with other later historical records as well as information received from Gulngay people today in order to form conclusions about the normative system of traditional laws and customs of the Gulngay people.

[135] The [additional material] considers spiritual, sacred and everyday laws and customs. These include the language system of the Gulngay people, the marriage and kinship rules, subsistence practices like food collection, erecting shelters and camping and collecting bush foods and medicines, ceremonial practices and taboos or avoidance rules relating to foods and places as a result of spiritual beliefs, amongst other things—see chapter 5.

[136] An example of the comparison undertaken with regard to the catching and cooking of eels is explained as follows:

The line and hook, and trapping methods used for procuring eels described by [Report author 2 – name deleted] in 1992, are practically identical to those described by [Report author 1 – name deleted] in his 1900 report (1900:9-11). In the course of my research in 2013, I also recorded details about how Gulngay people caught and continue to catch and cook *djaban* ('eels'), previously using traditional woven eel traps (*wungarr*), and today, using a nylon line and metal hooks— a modification of the traditional-style fishing lines and hooks reported by [Report author 2 – name deleted]—at [537].

Similar to the example of catching eel [Anthropologist 1 – name deleted] compares the food taboos recorded by [Report author 1 – name deleted] in his 1900 report to her own research in 2013 and concludes that the rules relating to which foods can be eaten when and other food taboos continue in much the same way. The [additional material] states:

...[Report author 1 – name deleted] observed that, "there are certain foods which are forbidden to all, except the old men and old women" (1900:75). According to [Report author 1 – name deleted] account, any prohibited foodstuffs deriving from the sea, including "barramundi, stingaree, mullet, trevally, and salmon", are generically called 'chalmolo', while forbidden items from the land are called 'kamma'. For Gulngay people, '*gama*' refers to 'danger' or something that is prohibited. In relation to the concept of '*gama*', [Applicant 2 – name deleted] informed me that, "*gama* is like you

not allowed to touch something, taboo. *Mayinggi* water [ie water occupied by a 'rainbow snake'] is *gama* water. They also got a *gama* dance, only the men do that *gama* dance secretly, it's not a public dance" –at 552]

[137] [Anthropologist 1 – name deleted] goes on to conclude in relation to food and other taboos as discussed in the example above, 'more than a hundred years after [Report author 1 – name deleted] recorded these food prohibitions, I also recorded from the Gulngay informants the same taboos...' [Anthropologist 1 – name deleted] goes on to summarise a series of food taboos that are similar to or match those recorded by [Report author 1 – name deleted] –at [555].

[138] There are many examples of the continuation of traditional laws and customs in the [additional material]. Those extracted above are just two simple examples. [Anthropologist 1 – name deleted] concludes chapter 5 of her [additional material], which focuses on the normative system of laws and customs by stating the following:

As such, it can also be anthropologically concluded that the laws and customs of Gulngay people are 'traditional', from both an Indigenous and a legal point of view, insofar, as established in this chapter and the previous chapters, that; (1) they are said by Gulngay people to derive from the antecedents of the Gulngay group, whether deceased ancestors of living ancestors, (2) they are said by Gulngay people to have been passed from generation to generation of Gulngay people, in a continuous manner, in the form of oral accounts, common and observed practices, and/or as socially-acknowledged prescriptions and taboos, (3) they are of sufficient antiquity and durability, that they were recorded by early European observers soon after sustained European contact and settlement in the region, and thus, they appear to have their origins in the pre-sovereignty laws and customs of Gulngay people, and (4) they were recorded by European observers, including anthropologists and linguists, at various points in time in the twentieth and early twenty-first centuries, establishing the continuous existence and vitality of these laws and customs since sovereignty – at [685].

[139] The affidavit material also provides information relevant to the condition at s 190B(5)(b). In particular, details about the current practices of the claim group and of how they have been taught these cultural practices from older generations is provided. This information includes details about the hunting, fishing, gathering and preparation of food, the knowledge of and use of bush medicines and witch doctors and spiritual healing as well as rules about talking to country and spirits that are believed to inhabit the landscape.

[140] [Applicant 1 – name deleted] explains some of the hunting and food preparation activities she currently undertakes. She explains how she hunts and cooks goanna as follows:

We hunt for goanna. Last year the boys caught a goanna and cooked it underground. We call our ground oven a *cut-mari*. We like to cook in the sand because we are the *Malanbara* the "sand river people". We believe that if we kill a goanna and the blood goes into the water there will be a big storm. The ground oven is dug out by hand or with sticks, we put rocks and leaves in it. We then put the fish or goanna on the leaves. We then put another layer of Ginger leaves on, followed by sand.

On top of the sand we make a fire. We often make the fire and put the fish or goanna in the ground oven before lunch. It is ready for dinner time—at [35].

[141] Similarly [Applicant 2 – name deleted] talks of how he possesses traditional bush medicine knowledge and talks about the continuing use of bush medicine:

We have bush medicine which I know and still use. Wild nutmeg for skin sores and irritation, sap from the blackwood tree for sores and cuts, like iodine, plants for diarrhoea [sic] and blade grass root for worms. A long time ago they used clay as a medicine for arsenic poisoning; you take the clay and then regurgitate it to get the arsenic out. There is also good and bad magic to cure people, using bones. This is healing the spiritual way. My grandfather knew black magic. Mt Tyson is a white rock of the spear of the flying man, a clever man, a witch doctor—at [37].

[142] [Applicant 3 – name deleted] explains the importance of speaking to country and following rules regarding the presence of spirits in the landscape:

I exercise my right to fish by going fishing when I am camping at weekends. I go to the beach or up behind Munro Plains, or else I visit the rainforest. I have a boat for fishing.

Before fishing I say to country that I am there. I say my language name (*Gunya*) and ask the spirit for taking fish. When I leave I say 'thanks' and leave a cooked one for the spirits. I catch barramundi (*barragull*), red bream, black bream (*bugal*), catfish and eel (*jaban*). The first three types are caught either at the mouth of Murray River or at Tully Heads. The last one is caught in the Tully River itself. When you go in deep water, fishing and swimming, you first talk to the Rainbow Snake (*Mayinggi*) My parents taught me this and I teach my kids. I catch the fish on a line. Worms, prawns and little crabs are used as bait. I cook the fish in the ground oven or on the fire. I also use the Wild Ginger leaf Baija for flavouring—at [28]

### ***My consideration***

[143] My reasons above at s 190B(5)(a) outline that the region the application area covers was first impacted by European settlement around 1864 with the establishment of Cardwell and from this point for the next 20 years European settlement 'took over the most accessible parts of these territories'—[additional material] at [7]. I also outline above that the apical ancestor used to describe the claim, Joe Kinjun, is said to have been born between 1890 and 1893 on Gulngay country. The [additional material] asserts that he lived most of his life on country (with the exception of a small period where he was removed to Palm Island). The [additional material] further asserts that Joe Kinjun would have lived his childhood and early adult life in a traditional way, mostly uninterrupted by European settlement.

[144] The [additional material] extensively explores the life of Joe Kinjun and the connection of the Kinjun family with Gulngay country. Further, the [additional material] extensively details the laws and customs exercised by the claim group today and compares these with historical records

from throughout the twentieth century, dating as far back as [Report author 1 – name deleted] report in 1900, some examples of these comparisons are extracted above. Many of these historical records record the King of Gulngay country as Joe Kinjun and in fact many of the historical records considered in the [additional material] used Joe Kinjun himself as an informant about the cultural practices of the Gulngay people. I note on this point that Joe Kinjun lived until the early 1980s.

[145] There is a clear connection between Joe Kinjun and the current claim group members. As noted above [Applicant 1 – name deleted] is Joe Kinjun's daughter and [Applicant 2 – name deleted] is Joe Kinjun's grandson. Throughout their affidavits the deponents speak of having been taught about traditional practices, from fishing and preparing food, to Gulngay boundaries and sacred story places and stories by Joe Kinjun himself, along with other older ancestors.

[146] It is clear from the examples extracted above and other information in the application and affidavits that the society to which the claim group belong rely on a very rich and ongoing tradition of oral transmission of cultural information. Each of the deponents speak at length about having learnt about their country, about the creation stories relevant to it, and the sacred sites and cultural practices like collecting bush medicine and hunting and fishing, from older generations, specifically parents, and grandparents including apical ancestor Joe Kinjun. Each of the deponents also speak of transmitting this knowledge to today's younger generations, and in particular they talk of teaching the younger generations about the stories and their places, and the traditional ways of preparing food, sharing food and hunting and fishing. It is clear from the affidavit material that in many instances the people who comprise the applicant have been taught their traditional laws and customs from either the apical ancestor, Joe Kinjun himself, or close descendants of him.

[147] The material demonstrates a factual basis supporting a rich, continuous system of normative rules or laws and customs, which are acknowledged and observed, by the claim group members, in the application area today. I understand the factual basis to say that these laws and customs are rooted in a spiritual belief system which has at its core a series of stories about a time of creation when spiritual beings created the landscape that is Gulngay country. It is asserted that it is from the belief in these creation stories that the claim group's traditional laws and customs originate, and it is asserted that it is these same laws and customs to which the native title claim group continue to abide today. It is asserted that the claim group are descendants of the apical ancestor Joe Kinjun, listed at Schedule A, and that he is in turn a descendant of those people who, bound by the same laws and customs, occupied Gulngay country back to the time of creation.

[148] I am of the view that there is sufficient detail in the factual basis material provided to demonstrate a strong pattern of inter generational transmission of cultural practices and belief systems and rituals unique to a society of people that have been occupying and affiliated with the claim area and beyond for many generations. The factual basis materials supports the assertion

that these laws and customs have been orally transmitted in a substantially unchanged manner since at least the time at which Joe Kinjun was born around the early 1890s.

[149] In *Gudjala [2009]* Dowsett J discussed circumstances where it may be possible to infer continuity of the relevant pre-sovereignty society:

In some cases it will be possible to identify a group's continuous post-sovereignty history in such detail that one can infer that it must have existed at sovereignty simply because it clearly existed shortly thereafter and has continued since. It would similarly be possible, in those circumstances, to infer that the assertion of sovereignty had not significantly affected its laws and customs, so that the laws and customs shortly after sovereignty were probably much the same as pre-sovereignty laws and customs—at [30].

[150] In my view, the factual basis materials are sufficient to support an assertion that there has been strong cultural continuity since the generation of the apical ancestor Joe Kinjun through to the present generations. This, in my view, is sufficient to support an inference that this cultural vitality and continuity is likely to have been transmitted in much the same way in the period between Joe Kinjun's birth in the early 1890s and sovereignty.

[151] The information before me discusses a rich, substantially continuous cultural tradition derived from descent from ancestors and evidencing a longstanding connection with the application area and its surrounding country. Having regard to all of this information I am satisfied that the factual basis provided is sufficient to support an assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group which give rise to the claimed native title rights and interests.

[152] For the above reasons I am satisfied that the application meets the criteria in s 190B(5)(b).

### **Reasons for s 190B(5)(c)**

[153] I am of the view that this requirement is also necessarily referable to the second element of what is meant by 'traditional laws and customs' in *Yorta Yorta*, being that, the native title claim group have continued to hold their native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way—at [47] and also at [87].

[154] *Gudjala [2007]* indicates that this particular assertion may require the following kinds of information:

- that there was a society that existed at sovereignty that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed to the current claim group; and

- that there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement—at [82].

[155] The Full Court in *Gudjala FC* appears to agree that the factual basis must identify the existence of an Indigenous society at European settlement in the application area observing laws and customs—at [96].

[156] In addressing this aspect of the factual basis Dowsett J in *Gudjala [2009]* considered that, should the claimants' factual basis rely on the drawing of inferences, it was necessary that a clear link be provided between the pre-sovereignty society and the claim group:

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].

[157] As discussed above, I am satisfied that there is sufficient information before me to infer that there existed a society, at sovereignty, that observed traditional laws and customs. In particular, it is my view that the factual basis material demonstrates the existence of an identifiable society with traditional laws and customs in the application area around the time that Joe Kinjun was born, being the early 1890s. I understand from the information before me, that this is likely to be a time around first sustained European settlement in the application area, and that much of the information about Joe Kinjun's early life reflects traditional cultural practice uninterrupted by European settlement. This, along with information that demonstrates a strong pattern of intergenerational teaching, provides sufficient information speaking to the continuity of the observance of those same traditional laws and customs from the time since sovereignty to today. Examples of the continuity in the transmission and practice of traditional laws and customs are extracted and considered in some detail at my reasons above for ss 190B(5)(a) and (b).

[158] The information before me links the current claim group, through the people who comprise the applicant, directly to Joe Kinjun, the apical ancestor for the group. It is my view that the strong link between the apical ancestor and the current claim group members and the pattern of intergenerational transmission of key cultural practices, back to a generation present on the application area at the time of first European contact, demonstrates a sufficient factual basis for the assertion that the native title claim group have continued to hold the native title in accordance with their traditional laws and customs.

## **Conclusion**

[159] 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.

[160] The pertinent question at this requirement is whether or not the claimed rights and interests can be prima facie established. Mansfield J, in *Doepel*, discussed what ‘prima facie’ means stating that, ‘if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis’—at [135]. It is accepted that the Registrar may be required to undertake some ‘weighing’ of the material or consideration of ‘controverting evidence’ in order to be satisfied that this condition is met—at [127].

[161] In undertaking this task I am of the view that I must have regard to the relevant law as to what is a native title right and interest as defined in s 223(1) of the Act. I must therefore consider, prima facie, whether the rights and interests claimed:

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

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

[163] The claimed native title rights and interests that I consider can be prima facie established are identified in my reasons below. Where certain rights and interests are similar or rely on similar factual basis material I have grouped them together.

### Consideration

*1. In relation to land where there has been no prior extinguishment of native title or where s 238 (the non-extinguishment principle) applies, the native title rights and interests claimed are the exclusive rights 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*

[164] In *Ward HC* the majority considered that the ‘expression “possession, occupation, use and enjoyment...to the exclusion of all others” is a composite expression directed to describing a



particular measure of control over access to land' and conveys 'the assertion of rights of control over land' –at [89] and [93].

[165] Further, it was held that:

A core concept of traditional law and custom [is] the right to be asked permission and to 'speak for country'. It is the rights under traditional law and custom to be asked permission and to 'speak for country' that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others –at [88].

[166] The Court in *Griffiths v Northern Territory of Australia* [2007] FCAFC 178 (*Griffiths FC*) examined the requirements for proving that the right to exclusive possession is vested in the native title claim group, finding that:

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

[167] There is information in the [additional material] about the unique concept of 'possession' according to Aboriginal culture and custom in the region. It is my view however, that there is insufficient information to establish, prima facie, that the claim group have a right to exclude others from the application area or that they have a right to exclusively possess the area. I note that the [additional material] talks of shared responsibility for country and the long standing negotiated use of Gulngay country and other 'tribal' areas by Dyrirbal dialect speakers part of the greater regional society which the Gulngay people belong.

[168] It is my view that although there is information which supports the assertion that Gulngay people can speak for their country there is insufficient information before me to suggest that this extends to a right to exclusively speak for country, I understand that the concept of speaking for country is better understood as a privileged position rather than exclusive. I therefore understand the concept of speaking for country according to Gulngay traditional law and custom does not extend to the right to exclude others, or to be asked permission to enter Gulngay country by others.

[169] **Outcome:** not established, prima facie.

*2. With regard to all remaining land and waters within the claim area the native title rights and interests claimed are not to the exclusion of all others and are the rights to speak for country, be present on, have access to and use the claim area and its cultural resources, namely to:*

*(a) speak for country in the claim area*

[170] As outlined above the right to speak for country has been found by the Court to be an alternate way of expressing the right of exclusive possession. It is therefore my view that this right is not established, prima facie, as it is not a non-exclusive right rather it is a way of re-phrasing the first right above.

[171] **Outcome:** not established, prima facie.

*(b) traverse and travel across the claim area;*

*(k) use the claim area on behalf of and for the benefit of the native title holders;*

[172] Section 7.3.1 of the [additional material] is headed '[a]ccess, be present on, move about on and travel over the area' and is a section of the report which details the traditional right of the claim group to use and travel across the claim area. Many examples are given both historical and current of claim group members travelling across the claim area in order to undertake activities like hunting and fishing and to visit sacred story places. The affidavit material further provides many similar examples. It is my view that this information is sufficient to establish, prima facie, the existence of these rights.

[173] **Outcome:** established, prima facie.

*(c) conserve and maintain the claim area;*

*(i) protect and maintain the claim area and its natural and cultural resources for the benefit of native title holders;*

*(j) care for the claim area on behalf of and for the benefit of the native title holders;*

*(ff) preserve sites of significance to the native title holders in the claim area;*

*(oo) maintain special and sacred sites in the claim area;*

[174] The [additional material] and the affidavit material discusses the traditional responsibility that claim group members have to conserve the application area, ensuring that it is protected and sufficient for future generations. [Applicant 1 – name deleted] reflects this when she states in her affidavit:

For example, you can take only enough fish to feed your family. You must not take too much of anything. This is to make sure that we look after country and that there will be enough for future generations—at [41]

[175] It is also clear from the information before me that Gulngay people have a right and responsibility to protect places of significance on the claim area. The [additional material] states that they do this by keeping information about important or vulnerable cultural places secret and by engaging in modern protection methods such as participating in heritage surveys and recording sacred places through government registers etc.

[176] The affidavit material also talks of the importance of protecting and maintaining significant places across the application area. [Applicant 2 – name deleted] states:

I also have a right to maintain and protect places of importance on Gulngay country and I exercise this right by caring for Gulngay country. I try to protect our country through wildlife management. I work for revegetation programs with native plants, weed control and creating corridors for the cassowaries—at [38]

[177] It is my view that these and other examples in the material before me establish the existence of these rights, *prima facie*.

[178] **Outcome:** established, *prima facie*.

*(d) hunt on the claim area;*

[179] There is a great deal of information before me about the existence of the traditional right to hunt. It is clear that the claim group members continue to exercise this right and to teach it to younger generations. The [additional material] also discusses the right to hunt in some detail. An example of a claim group member hunting is as follows:

We would hunt for brush turkey [*mungara*] and wallaby. The turkey trap is like a net and made from string from the red leaf fig tree. It was a funnel net. We'd put the net on the brush turkey track and the brush turkey would follow that same track and go into the net—affidavit of [Applicant 2 – name deleted] at [28]

[180] Further, [Applicant 3 – name deleted] talks of how she passes the knowledge of hunting and this right on to her sons in her affidavit:

I have a right to hunt, fish and gather on Gulngay Country. My parents took me hunting when I was young. When I was young, they took me out on country and showed me these things and I have taken my three sons there from a young age—at [27].

[181] It is my view that the information before me is sufficient to establish, *prima facie*, the right to hunt.

[182] **Outcome:** established, *prima facie*.

*(e) fish on the claim area;*

[183] Like hunting, there are many examples in the material before me that demonstrate the existence of this right, *prima facie*. I have extracted examples in my reasons above a s 190B(5) regarding the traditional capture of eels, and other examples relating to fishing on the claim area by the Gulngay people.

[184] Both the [additional material] and the affidavit material speak extensively about the claim group's right to fish. I understand fishing to be a central aspect of Gulngay traditional culture. By way of further example the following are some examples, taken from the affidavit material, of claim group members speaking of fishing:

We went camping and fishing along the Tully River when we were young. There's a big crocodile there now. We would go by boat and catch black bream, eels, barra, mangrove jack and fresh water tortoise. I went with my grandfather on rafts when I was young for fishing and I still know how to construct the rafts. We'd catch fish with fishing line or fish nets and traps – affidavit of [Applicant 2 – name deleted] at [25].

[185] And;

I take the boys, that is, [Grandsons – names deleted], my grandsons fishing; they like fishing for barramundi. In the winter season it's good to catch and eat both seafood and freshwater food because the fish are all fat. I catch seafood and freshwater tortoise. I get tortoise in lagoons. You do not get them in the summer – affidavit of [Applicant 1 – name deleted] at [34].

[186] It is my view that the material before me demonstrates the existence of this right, prima facie.

[187] **Outcome:** established, prima facie.

*(f) gather bush food on the claim area;*

*(g) gather natural resources on the claim area;*

*(h) gather bush medicines on the claim area;*

*(l) use the natural resources of the claim area for social, cultural, economic, religious, spiritual, customary, healing and traditional purposes;*

*(m) use the bush medicines in the claim area for cultural, economic, religious, spiritual, customary, healing and traditional purposes;*

[188] It is my view that the information before me establishes the existence of these rights, prima facie. The subsistence activities of the Gulngay people are discussed at length in the [additional material] and it is these often day-to-day activities that form a great deal of the Gulngay people's asserted connection with Gulngay country.

[189] Further, the affidavit material details several examples of the claim group members, having been taught about traditional bush medicines and plants from older generations continuing to exercise their rights relating to the gathering and use of these foods and medicines. [Applicant 1 – name deleted], speaking about different fruits she gathers and eats on the application area states:

I like to eat fruits that grow wild on country. I like the Alexandra Palm, the tops of the young ones. You eat them like cabbage. And the *Banja Banja* are like raspberries; they grow on river banks. The Davidson plum (*wuray*) and the *murat muray* are orange coloured fruits. What we call ginger (*mugulgay*), it looks like a ginger plant and has a fruit on the bottom of the plant above the ground. I love it but it is rare now. You can look for it along the Tully River. Some wild apples are not safe to eat. The cassowary eats them, but for us, they are poisonous. Our parents taught us this and I teach my grandsons the same thing—affidavit of [Applicant 1 – name deleted] at [38].

[190] There is also a great deal of information in the [additional material] and the affidavits about the claim group collecting natural resources across the application area in order to make tools and devices. The making of baskets, traps for catching food, shields for ceremonial purposes are all discussed. When talking about catching a crocodile [Applicant 2 – name deleted] explains how he uses lawyer cane, stone axes and spears, all natural resources:

For catching crocodile we used a rope with a noose, made out of lawyer cane. We'd dive down into the water and slip the noose around the crocodile. The crocodile cannot open its mouth under water. We'd pull it out onto the bank and hit it with stone axes and spear—at [29].

[191] There is also information about the claim group members using traditional bush medicines to heal ailments and maintain good health. I have extracted an example of [Applicant 2 – name deleted] discussing various bush medicines that he has knowledge of and continues to collect and use today in my reasons above at [142].

[192] It is my view that the material demonstrates that claim group members have been taught about the collecting and use of natural resources, including bush foods and bush medicines from their predecessors such that the collection of these items can be said to be traditional. I understand that bush foods, medicines and other resources are gathered and used for a variety of reasons, being cultural, social, ceremonial, spiritual and other traditional purposes, as detailed particularly in the [additional material]. It is therefore my view that these rights can be established, prima facie.

[193] **Outcome:** established, prima facie.

*(n) reside on the claim area;*

*(o) build permanent and temporary structures on the claim area;*

*(p) camp on the claim area;*

[194] There is ample information before me which speaks to the claim group members camping across the application area. Some references to camping have already been extracted in my reasons above at s 190B(5) as well as in my consideration of other rights and interests.

[195] In relation to both camping and the erecting of shelters [Applicant 2 – name deleted] states:

I have a right to camp in Gulngay country and I exercise my right to camp combined usually with fishing, hunting and gathering. I like to camp and fish at Tully River, Jarra Creek, Echo Creek and Murray River. When I go camping I still knock up a frame for a humpy (*midja*). You put paperbark (*buygu*) as roofing material on the humpy. You can use blady grass and fan palm (*djagurru*). I know how to construct them properly and they can last pretty well permanently — [24].

[196] I understand that each of the applicant persons currently resides on the claim area, and has done for all or most of their life. There is information in the [additional material] about Gulngay people, including Joe Kinjun erecting and living in *Midja*, traditional thatched dwellings. It is my view that the material establishes these rights and interests, prima facie,

[197] **Outcome:** established, prima facie.

*(q) exercise and carry out economic life on the claim area;*

[198] It is my view that there is insufficient information before me to establish this right, prima facie. What is meant by 'economic life' is not particularly clear, nevertheless having considered the material before me it is my view that the material does not speak to any kind of commercial activity, or activity that carries economic value arising in relation to the land and waters of the application area. There is information before me regarding the trade or exchange of various items or natural resources within the claim group and with other groups part of the Dyirbal dialect regional society. It is my view that this information supports the existence, prima facie, of other rights and interests relating to the sharing, exchange and trade of items, as considered below. I do not understand there to be information that supports the existence of a separate and distinct right or interest about the carrying out or exercising of economic life on the claim area.

[199] **Outcome:** not established, prima facie.

*(r) take natural resources in the claim area for sharing, exchange and trade;*

*(s) prepare food in the claim area for sharing, exchange and trade;*

*(t) grow, husband, harvest and produce food in the claim area for sharing, exchange and trade;*

*(u) produce artifacts in the claim area for exchange and trade;*

[200] I understand from the information in the [additional material] that there is a great deal of sharing and exchanging of resources, artifacts such as baskets and weapons, and food, that takes place between different groups that are part of the Dyirbal dialect regional society. These groups often come together for ritual, ceremonial and shared spiritual purposes and exchange and trade goods.

[201] Further, I understand that it is 'the Law' for claim group members to share resources and food with each other especially after hunting or fishing with claim group members unable to go hunting or fishing. The [additional material] states, in relation to sharing in this way:

I also recorded that Gulngay people share the food sources they have obtained with older people, people not present on their hunting and fishing excursions. As [Applicant 2 – name deleted] and [Applicant 1 – name deleted] explained to me:

That's our law, the *Mari* [Aboriginal] code, looking after everyone and share what you got. If we catch extra fish we share it. That's why [Applicant 3 – name deleted] [[Applicant 1 – name deleted] daughter] gave [Person 1 – name deleted] [a Girramay man] fish yesterday. [Person 1 – name deleted] father, [Person 2 – name deleted], used to stay with us at Jones Road – at [785].

[202] It is my view that information like this and other examples included throughout the [additional material] and affidavit material establish the existence of these rights, prima facie.

[203] **Outcome:** established, prima facie.

*(v) use of sand in the claim area;*

[204] There are many references throughout the material before me about the use of ground ovens. Known as *cut-mari*. These ovens are made in the sand and a lot of traditional preparation and cooking of food is asserted to be undertaken using sand and ground ovens. There are not a lot of other examples of the use of sand, however the use of ground ovens in the sand is discussed in some detail and is prevalent throughout the material such that it is my view that this example is sufficient to establish this right, prima facie.

[205] Outcome: established, prima facie.

*(w) use of ochres in the claim area;*

[206] I understand that many tools or implements such as fire making sticks and shields are painted with patterns unique to Gulngay people. These patterns are painted using a variety of different ochres.

[207] The [additional material] states:

The *bagu* is painted with natural ochres, white (*gaba*), yellow (*magirra*), red (*gunggu*) and black (charcoal, *djilin*) (see photograph 39). [Applicant 2 – name deleted] also uses *magirra*, *gunggu*, *gaba*, and *djilin* for painting traditional shields and swords (see photograph 40), and for decorating his body when performing traditional dances. In additions to these used, [Applicant 2 – name deleted] takes and used traditional ochres for his paintings of traditional food species, such as *bangurru*, 'freshwater turtle' (see photograph 41) – at [784].

[208] It is my view that the information in the [additional material], like that above, regarding the use of ochre for painting various traditional implements and other things is sufficient to establish the existence of this right, prima facie.

[209] **Outcome:** established, prima facie.

*(x) use of clays in the claim area;*

*(y) use of gravels in the claim area;*

*(z) use of rocks in the claim area;*

[210] It is my view that there is insufficient information before me to establish the existence of these rights, prima facie.

[211] [Applicant 2 – name deleted] when speaking about bush medicines talks of using clay as a method of treating arsenic poisoning. However, this is the only reference I can find to the use of clays in the material before me and it alone, in my view, does not support, prima facie, this right as a traditional right or interest in the area.

[212] Further, although there may be passing mention to the use of stone axes, it is my view that there is insufficient information to support the existence of these rights. Any information relating to the use of clays, gravels or rocks is scant. The detail provided, which has satisfied me of the existence of other rights and interests prima facie, is noticeably more detailed and comprehensive than that which is before me regarding these three claimed rights and interests.

[213] **Outcome:** not established, prima facie.

*(aa) use of products produced by the exercise of native title rights and interests in the claim area;*

[214] There are many examples throughout the material before me of claim group members making tools and implements from the natural resources on the claim area. Making items such as shields, baskets, fire sticks, eel traps, rafts and many other things is discussed at length in both the affidavit material and [additional material].

[215] I understand that there are different traditional cultural uses for all of these products and items and that the use of them, such as using an eel trap to catch eel, or a fires stick to make fire can be understood as a right or interests in relation to the land and waters of the claim area. In my view there is sufficient information before me to establish the existence of this right, prima facie.

[216] **Outcome:** established, prima facie.



*(bb) discharge cultural rights, duties, obligations and responsibilities on and in relation to the claim area and its welfare;*

*(cc) discharge spiritual rights, duties, obligations and responsibilities on and in relation to the claim area and its welfare;*

*(dd) discharge traditional rights, duties, obligations and responsibilities on and in relation to the claim area and its welfare;*

*(ee) discharge customary rights, duties, obligations and responsibilities on and in relation to the claim area and its welfare;*

[217] It is my view that this group of claimed rights and interests are not readily understandable. In particular I am not able to understand what discharging cultural, spiritual, traditional or customary rights would involve. I note that a set of similar rights and interests that involve undertaking spiritual, cultural and other activities is also claimed. I can understand the undertaking of activities and how that may be a right or interest in relation to land or waters. I am not clear how this group of rights is distinct from the undertaking of activities or how discharging these quite broad and vaguely categorised rights, duties, obligations and responsibilities can be understood as being rights and interests in relation to land or waters.

[218] There is a great deal of information before me about the spiritual beliefs and practices of the claim group and many of the other activities and practices of the group discussed (such as hunting, fishing, camping) could be understood to be cultural activities, however I am not readily able to understand how discharging the broad categories of cultural, spiritual, traditional and customary rights, duties, obligations and responsibilities is distinct from other rights and interests claimed (for example the right to hunt) or how the claim group claim group discharge these categories of rights without more information that addresses what is meant by discharging more specifically.

[219] It is therefore my view that in the absence of greater clarity around how this set of rights relates to land and waters or what is meant by discharging these broadly stated rights, that these rights and interests are not established, prima facie, based on the material before me.

[220] **Outcome:** not established, prima facie.

(gg) *conduct secular activities in the claim area concerning the claim area and its welfare;*

(hh) *conduct ritual activities in the claim area concerning the claim area and its welfare;*

(ii) *conduct spiritual activities in the claim area concerning the claim area and its welfare;*

(jj) *conduct religious activities in the claim area concerning the claim area and its welfare;*

(kk) *conduct cultural activities in the claim area concerning the claim area and its welfare;*

(ll) *conduct ceremonial activities in the claim area concerning the claim area and its welfare;*

[221] The material before me details many activities undertaken in the claim area by the Gulngay people. A lot of the examples extracted above in my reasons at s 190B(5) as well as throughout this condition relating to other more specific rights and interests demonstrate such activities. A lot of subsistence related activities can be understood to be secular and cultural in nature. Activities such as fishing, hunting and camping. Examples of each are detailed above.

[222] I also understand the Gulngay people undertake these secular and cultural activities as a result of their spiritual and religious beliefs. It is asserted that the basis of the native title rights and interests claimed arise as a result in the spiritual elements of Gulngay country, especially the many story places and creation stories. The [additional material] includes a section about the right '[t]o conduct religious and spiritual activities and ceremonies on the area' — at 7.3.7.

[223] This section of the [additional material] details the traditional ritual and ceremonial practices of the Gulngay people, including in particular the *burrun* ceremony which was a traditional dispute resolving ceremony. It is asserted that although the fighting associated with these ceremonies is no longer undertaken many claim group members are familiar with *burrun* grounds and the *burrun* ceremony.

[224] There is also other information about rain making rituals and in more contemporary contexts information about claim group members undertaking 'welcome to country' ceremonies.

[225] The affidavit and [additional material] material talks of claim group members undertaking other spiritual and religious activities, like leaving a share of cooked fish out for spirits to thank them for food and announcing one's presence in some sacred areas or places where spirits are believed to inhabit.

[226] In my view, these and other examples like them are sufficient to establish, *prima facie*, the existence of these rights.

[227] **Outcome:** established, *prima facie*.

(mm) *conduct burials and be buried on the claim area;*

[228] It is clear from the information in the [additional material] that many Gulngay people are buried on the application area. In particular an area known as ‘the Dip’ located on the banks of the Tully River is a significant burial site for the Gulngay people, with at least fifteen (15) named Aboriginal people being buried there – at [821].

[229] I understand there are also other burial grounds on the application area and claim group members can recall attending funerals at them. The [additional material] asserts that burying deceased people is one of the traditional mortuary related customs and appears to be the custom that continues to be practiced by claim group members today.

[230] This and further detailed information provided in the [additional material] regarding death, burials and mortuary related customs, in my view, establishes this right, prima facie.

[231] **Outcome:** established, prima facie.

*(nn) maintain the cosmological relationship between beliefs, practices, customs and institutions through ceremony, custodianship and teaching of the claim area;*

*(pp) inherit and dispose of native title rights and interests in relation to the claim area in accordance with traditional laws and customs;*

[232] I understand that the native title rights and interests asserted to be possessed by the Gulngay people are transmitted to claim group members through earlier generations. The [additional material] states:

...the detailed traditional ecological knowledge that contemporary Gulngay people possess about the natural resources and physical attributes of their ancestral lands and waters, was taught to them by their parents, older siblings, aunts and uncles, as well as by their grandparents. This is also the case regarding the knowledge that Gulngay people today possess of the spiritual attributes of their traditional homelands. I recorded that Gulngay people continue to teach their children and grandchildren about the ecological and cultural values of Gulngay country – at [811].

[233] The affidavit material also talks of claim group members inheriting or possessing their rights and interests in Gulngay country through their parents and grandparents and of having been taught about Gulngay cultural and spiritual practices from their parents and grandparents. Similarly, the deponents speak of teaching their children, nephews and younger generations of the claim group these same practices and activities.

[234] I understand that the intergenerational transmission of cultural knowledge protects the beliefs, practices, customs and institutions of the Gulngay people and provides for the inheritance or continuation of native title rights and interests through time. The teaching of cultural practices takes place in every day settings but also at significant ceremonial times.

[235] In my view the information before me that establishes this pattern of intergenerational transmission of cultural knowledge and teaching is sufficient to establish, prima facie, the existence of these rights.

[236] **Outcome:** established, prima facie.

*(qq) resolve disputes between native title holders and other Aboriginal persons in relation to the claim area;*

[237] There is some information about claim group members resolving disputes with other Aboriginal persons, particularly neighbouring groups. Most of these references are historical, particularly in relation to information concerning ceremonial dispute resolution practices that are no longer undertaken by the claim group as a result of the violent nature of these ceremonies. The [additional material] suggests that in the modern context elders settle disputes with other Aboriginal people through meetings.

[238] In my view there is little to no information regarding dispute settling practices between the native title claim group members themselves.

[239] I also note the comments of Sundberg J in *Neowarra v State of Western Australia* [2003] FCA 1402 that, 'a right to uphold and enforce laws and customs ... is a right in relation to people and not in relation to land or waters' — at [488] and [489]. I consider that this right falls within this category.

[240] Accordingly, even if I considered that there was sufficient factual basis that I was able to draw favourable inferences about this right, I am of the view that it cannot be prima facie established as it is not a right in relation to land or waters.

[241] **Outcome:** not established, prima facie.

*(rr) light fires in the claim area for domestic purposes including cooking but not for the purpose of hunting or clearing vegetation;*

[242] I understand that the Gulngay people believe fire originated with a spiritual being. Gulngay people use a fire stick to make fire in a traditional way and current claim group members, like [Applicant 2 – name deleted] continue to make fire this way. The [additional material] describes this traditional fire making process as follows:

Like water, fire is not regarded as a natural phenomenon. As discussed in chapter five, Gulngay people credit its origins, and the fire sticks they use, with the legendary being known as 'djibugina'. To make fire, Gulngay people (like Girramap and Dyirbal people) use a fire-stick, consisting of two parts, a base, or *bagu*, and the fire drill itself, known as *djiman*. The *bagu* part of the fire-stick is said by Gulngay people to look like *djigubina*. It is usually made from a softwood species such as 'milky

pine, *bubarrila*, while the dirll is made from a harder wood, such as the wood of the *djiman* or *djidu* tree, 'tetra beech' – at [793].

[243] The [additional material] details the use of fire for various cultural activities and similarly the affidavit material provides examples of fires being used in ground ovens to cook fish and smoke eels and other types of food.

[244] It is my view that these and other examples are sufficient to establish, prima facie, the existence of this right.

[245] **Outcome:** established, prima facie.

*(ss) take and use water for domestic, personal, cultural, spiritual, ceremonial and non commercial communal use in the claim area;*

[246] I understand that claim group members spend a great deal of their time undertaking traditional activities around the banks of the river systems on the application area. The rivers are central to the Gulngay way of life and this includes taking and using water. There are many examples of Gulngay people using water from the rivers when they are camping for drinking, cooking, cleaning and bathing, among other things.

[247] It is asserted there are many sacred stories that relate to the waterways on the application area and as stated in the [additional material]:

Water, from the perspective of Gulngay people, acknowledging and observing their traditional laws and customs, is not a natural phenomenon. Its continuing presence and life-giving abilities are linked to the on-going presence of Gulngay people on their traditional lands and their on-going interaction with the supernatural beings associated with these waters—at [787]

[248] There is a great deal of information before me that, in my view, establishes the existence of this right, prima facie.

[249] **Outcome:** established, prima facie.

## **Conclusion**

[250] 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

- (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.

[251] I understand the phrase ‘traditional physical connection’ to mean a physical connection with the application area in accordance with the traditional laws and customs of the group as discussed in the High Court’s decision in *Yorta Yorta—Gudjala* [2007]—at [89].

[252] Mansfield J in *Doepel* considered the Registrar’s task at s 190B(7) and stated that it requires the Registrar ‘to be satisfied of particular facts’, which will necessarily require the consideration of evidentiary material, however, I note that the role is not the same as that of the Court at hearing, and in that sense the focus is a confined one—at [18].

[253] Mansfield J commented:

The focus is upon the relationship of a least one member of the native title claim group with some part of the claim area. It can be seen, as with s 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration—*Doepel* at [18].

[254] As I am required to be satisfied that at least one member of the native title claim group has, or previously had, a traditional physical connection with any part of the land or waters covered by the application, I have chosen to concentrate my attention on the factual basis provided pertaining to one member of the claim group, namely [Applicant 1 – name deleted].

[255] [Applicant 1 – name deleted] affidavit details that [Applicant 1 – name deleted] was born on Gulngay country at the Tully hospital in 1947 and has lived all her life on Gulngay country. She states that she understands her Gulngay identity to arise as a result of her father being a Gulngay man and that he and other older members of the claim group taught her about Gulngay laws and customs, and that they in turn were taught by their ancestors. [Applicant 1 – name deleted] talks of having learnt about Gulngay country boundaries from her father as well as about places like, the *Banday Banday* waterfalls that she can not visit. She also talks about having walked across the application area with her family and other older claim group members, collecting natural resources and making necklaces with beads. [Applicant 1 – name deleted] recalls having attended a big corroboree with other neighbouring Aboriginal groups when she was about 10 years old, she states that she went with her father.

[256] [Applicant 1 – name deleted] explains that she is connected to Gulngay country through her totem, the kingfisher. This, she says, connects her and her family back to their ancestors because

of a Gulngay belief that animals 'came before' humans. [Applicant 1 – name deleted] is also connected to country through her name place, Kings Range behind Munro Hill. She states that her parents had a dream about an eel that went back into a cave, '*Jajanu*' meaning 'moving back' and that is her Aboriginal name. This is a special place for her.

[257] I understand that [Applicant 1 – name deleted] now has responsibility for protecting and maintaining Gulngay country and teaching younger generations about the Gulngay traditional laws and customs like her father and aunties taught her. She talks of passing on her knowledge to her grandchildren, of teaching them how to fish and which wild fruits are safe to eat.

[258] [Applicant 1 – name deleted] discusses many traditional activities that she continues to carry out in the application area today, including basket weaving, making traditional necklaces out of seeds, fishing, collecting scrub hen eggs, gathering and eating wild fruits and other plants, among other things.

[259] It is clear from the information provided in [Applicant 1 – name deleted] affidavit that she has a current physical connection with the application area. I am also satisfied that the material can be said to be 'traditional' as it is clear that the connection [Applicant 1 – name deleted] has with the area and the laws and customs she acknowledges and observes in relation to the area have been taught to her by her father and other older claim group members, and that they are rooted in a belief in the spirit beings and creation stories, from which the claim group, and their predecessors, derive the laws and customs, to which they adhere today. It is these laws and customs, that have been passed through the generations since the creation time that [Applicant 1 – name deleted] understands were taught to her and that she teaches to her grandchildren and other young people in the claim group. For these reasons I am satisfied that the material is sufficient to support an assertion that [Applicant 1 – name deleted] currently has, and previously had, a traditional physical connection with the application area.

[260] 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.

[261] 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)*

[262] 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.

[263] The Geospatial assessment and my own searches of the Tribunal's mapping database, confirm that the application area is not covered by an approved determination of native title.

[264] In my view the application does not offend the provision of s 61A(1)

#### *Section 61A(2)*

[265] 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.

[266] Schedule B of the application lists a series of general exclusions from the application area including a list of tenure all of which are defined in s 23 as exclusive possession acts.

[267] In my view the application does not offend the provision of s 61A(2).

#### *Section 61A(3)*

[268] 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.

[269] Schedule B states 'exclusive possession is not claimed over area subject to valid previous non-exclusive possession acts of the Commonwealth or State as set out in Division 2B of Part 2 of the Act.'

[270] In my view the application does not offend the provision of s 61A(3).

### **Conclusion**

[271] In my view the application does not offend 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.

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

#### *Section 190B(9)(a)*

[273] Schedule Q states '[n]ot applicable as the Applicant claims no ownership of minerals, petroleum or gas wholly owned by the Crown'.

[274] The application does not offend the provision of subsection 190B(9)(a).

#### *Section 190B(9)(b)*

[275] Schedule P states '[n]ot applicable as the application does not claim any offshore places'.

[276] The application does not offend the provision of subsection 190B(9)(b).

#### *Section 190B(9)(c)*

[277] The application does not disclose and I am not otherwise aware that the native title rights and interests have otherwise been extinguished in the application area.

[278] The application does not offend the provision of subsection 190B(9)(c).

## **Conclusion**

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

[End of reasons]