National Native Title Tribunal

Registration test decision

Application name	Girramay People #2
Name of applicant	Abraham Muriata and Claude Frank Beeron
NNTT file no.	QC2015/010
Federal Court of Australia file no.	QUD741/2015
Date application made	21 August 2015

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

Date of decision: 3 November 2015

Radhika Prasad

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 4 May 2015 and made pursuant to s 99 of the Act.

Reasons for decision

Introduction

[1] This document sets out my reasons, as the delegate of the Native Title Registrar (Registrar), for the decision to accept the native title determination application made on behalf of the Girramay People (the application) for registration pursuant to s 190A of the Act.

[2] Note: 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

[3] On 21 August 2015, the application was filed with the Federal Court of Australia (the Court). The Registrar of the Court gave a copy of the application to the Registrar, on 24 August 2015, 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 21 August 2015 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

[5] Therefore, in accordance with s 190A(6), I must accept the claim for registration if it satisfies all of the conditions in ss 190B and 190C of the Act. If those conditions are not satisfied then, pursuant to s 190A(6B), I must not accept the claim for registration. 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 contain certain specified information and documents. In my reasons below, I consider the requirements of s 190C 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] As discussed in my reasons below, I consider that the claim in the application does satisfy all of the conditions in ss 190B and 190C and therefore, pursuant to s 190A(6), it must be accepted for registration. Attachment A contains information that will be included in the Register of Native Title Claims (the Register).

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 understand s 190A(3) to stipulate that the application and information in any other document provided by the applicant is the primary source of information for the decision I make. Accordingly, I have taken into account the following material in coming to my decision:

- the information contained in the application and accompanying documents;
- the Geospatial Assessment and Overlap Analysis (GeoTrack: 2015/1658) prepared by the Tribunal's geospatial services on 4 September 2015 (geospatial assessment); and
- the results of my own searches using the Tribunal's mapping database.

[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. 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 claimant application.

Procedural fairness steps

[12] 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. Those rules seek to ensure that decisions are made in a fair, just and unbiased way. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication — *Hazelbane v Doepel* [2008] FCA 290 at [23] to [31]. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

- On 25 August 2015, the case manager for this matter sent a letter to the State of Queensland (the State) enclosing a copy of the application and accompanying documents. That letter informed the State that any submission in relation to the registration of this claim should be provided by 9 September 2015. The State has not made any submission.
- The case manager, on 26 August 2015, wrote to inform the applicant that any additional information should be provided by 8 September 2015. The applicant has not provided any additional material.

Procedural and other conditions: s 190C

Subsection 190C(2)
Information etc. required by ss 61 and 62

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

[13] 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.

[14] In coming to this conclusion, I understand that the condition in s 190C(2) 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). As explained by Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112; [2003] FCA 1384 (*Doepel*):

> 37 [Section 190C(2)] does not involve the Registrar going beyond the application, and in particular does not require the Registrar to undertake some form of merit assessment of the material …
>
> 39 [F]or the purposes of the requirements of s 190C(2), the Registrar may not go beyond the information in the application itself — see also [16], [35] and [36].

[15] Accordingly, the application must contain the prescribed details and other information in order to satisfy the requirements of s 190C(2).

[16] 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. I do not consider they require any separate consideration by the Registrar. Paragraph 61(5)(c), which requires the application contain such information as is prescribed, does not need to be considered by me separately under s 190C(2), as I already test these 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.

[17] I now turn to each of the particular parts of ss 61 and 62:

Native title claim group: s 61(1)

[18] Schedule A of the application provides a description of the native title claim group, an extract of which can be seen in my reasons below at s 190B(3). The application indicates that the persons comprising the applicant are included in the native title claim group — see s 62(1)(a)

affidavits of the persons comprising the applicant at [12]. There is nothing on the face of the application that causes me to conclude that the requirements of this provision, under s 190C(2), have not been met.

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

Name and address for service: s 61(3)

[20] Part B of the application contains the name and address for service of the applicant's representative.

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

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

[22] I consider that Schedule A of the application contains a description of the persons in the native title claim group that appears to meet the requirements of the Act.

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

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

[24] The application is accompanied by affidavits sworn by each of the persons who comprise the applicant. The affidavits contain the statements required by s 62(1)(a)(i) to (v) including stating the basis on which the applicant is authorised as mentioned in subsection (iv) — at [3] – [13].

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

Details required by s 62(1)(b)

[26] Subsection 62(2)(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)

[27] Attachment B contains information that allows for the identification of the boundaries of the area covered by the application. Schedule B and Attachment B contain information of areas within those boundaries that are not covered by the application.

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

[28] Attachment C contains a map showing the external boundary of the application area.

Searches: s 62(2)(c)

[29] Schedule D provides that no searches have been conducted for or on behalf of the applicant to determine the existence of non-native title rights and interests in relation to the application area.

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

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

does not consist only of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

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

[31] Schedule F contains information pertaining to the factual basis on which it is asserted that the rights and interests claimed exist. I note there may also be other information within the application that is relevant to the factual basis.

Activities: s 62(2)(f)

[32] Schedule G contains details of the activities currently carried out by members of the native title claim group on the land and waters of the application area.

Other applications: s 62(2)(g)

[33] Schedule H provides that the applicant is not aware of any other application that has been made in relation to the whole or a part of the area covered by the application.

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

[34] Schedule HA provides that the applicant is not aware of any notifications given under s 24MD(6B)(c).

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

[35] Attachment I provides details of two notices issued under s 29 of the Act, of which the applicant is aware, that has been given and that relates to the whole or part of the application area.

Conclusion

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

Subsection 190C(3) No common claimants in previous overlapping applications

The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:

(a) the previous application covered the whole or part of the area covered by the current application, and

(b) the previous application was on the Register of Native Title Claims when the current application was made, and

(c) the entry was made, or not removed, as a result of the previous application being considered for registration under s 190A.

[37] In my view, the requirement that the Registrar be satisfied that there are no common claimants arise where there is a previous application which comes within the terms of subsections (a) to (c) — *State of Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

[38] I note that the text of this provision reads in the past tense, however I consider the proper approach would be to interpret s 190C(3) in the present tense as to do otherwise would be contrary to its purpose. The explanatory memorandum that accompanied the Native Title Amendment Bill 1997 relevantly provides that:

> 29.25 The Registrar must be satisfied that no member of the claim group for the application … *is* a member of the claim group for a registered claim which was made before the claim under consideration, which *is* overlapped by the claim under consideration and which itself has passed the registration test [emphasis added].
>
> …
>
> 35.38 The Bill generally discourages overlapping claims by members of the same native title claim group, and encourages consolidation of such multiple claims into one application.

[39] I understand from the above that s 190C(3) was enacted to prevent overlapping claims by members of the same native title claim group from being on the Register at the same time. That purpose is achieved by preventing a claim from being registered where it has members in common with an overlapping claim that is on the Register *when* the registration test is applied. I consider that this approach, rather than a literal approach, more accurately reflects the intention of the legislature.

[40] I also note that in assessing this requirement, I am able to address information which does not form part of the application — *Doepel* at [16].

[41] The geospatial assessment does not identify any previous application that covered the whole or part of the area covered by the current application. I have also undertaken a search of the Tribunal's mapping database and am of the view that there is no previous application that covered the whole or part of the area covered by the current application.

[42] I am therefore satisfied that there is no previous application to which ss 190C(3)(a) to (c) apply. Accordingly, I do not need to consider the requirements of s 190C(3) further.

[43] 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.

[44] 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.

[45] Schedule R indicates that a copy of the certificate of the representative Aboriginal body accompanies the application at Attachment R1. Accordingly, I am of the view that it is necessary to consider whether the requirements of s 190C(4)(a) are met.

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

[46] Section 190C(4)(a) imposes upon the Registrar conditions which, according to Mansfield J, are straightforward — *Doepel* at [72]. His Honour noted that the Registrar is to be 'satisfied about the fact of certification by an appropriate representative body', but is not to 'go beyond that point' and 'revisit the certification of the representative body' — at [78], [80] and [81]; see also *Wakaman People #2 v Native Title Registrar* [2006] FCA 1198 at [32]. I therefore consider that my task here is to identify the appropriate representative body and be satisfied that the application is certified under s 203BE.

[47] Once satisfied that the requirements of s 190C(4)(a) have been met, I am not required to 'address the condition imposed by s 190C(4)(b)' — *Doepel* at [80].

Identification of the representative body and its power to certify

[48] Attachment R1 is titled 'Certificate of an Application for a Determination of Native Title under Section 203BE of the [Act] – Girramay People' (certification). It is dated 14 August 2015 and signed by the Deputy Chair of the Board of North Queensland Land Council (NQLC).

[49] The certificate states that the areas of land and waters covered by the application are in the NQLC's representative body area and that NQLC is the representative body recognised under s 203AD of the Act for the region from the Daintree and Bloomfield Rivers in the north, to Sarina in the south and west beyond Croydon and Richmond. The certificate also provides that the application has been certified by NQLC pursuant to s 203BE of the Act — see note to s 190C(4)(a) which allows an application to be certified under s 203BE.

[50] The geospatial assessment identifies NQLC to be the only representative body for the area covered by the application.

[51] Having regard to the above information, I am satisfied that NQLC was the relevant representative body for the application area and that it was within its power to issue the certification.

The requirements of s 203BE

[52] As mentioned above, I consider that I am only required to be satisfied of 'the fact of certification' and am not permitted 'to consider the correctness of the certification by the representative body' — *Doepel* at [78] and [82].

[53] Accordingly, I must consider whether the certification meets the requirements of s 203BE, the relevant subsection being (4).

Subsection 203BE(4)(a)

[54] This provision requires a statement from the representative body confirming that they hold the opinion that the conditions at subsections (2)(a) and (2)(b) have been met.

[55] Subsection 203BE(2) sets out that a representative body must not certify an application for a determination of native title unless it is of the opinion that:

(a) all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and

(b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

[56] The certification contains the statement required by s 203BE(4)(a).

Subsection 203BE(4)(b)

[57] Pursuant to s 203BE(4)(b), the certification must also briefly set out the body's reasons for making the required statements under s 203BE(4)(a).

[58] In that regard, the certification sets out details pertaining to the authorisation of the applicant, including that:

- The identification of the native title claim group involved engagement of a consultant anthropologist who undertook extensive research in the region, including in relation to the land and waters of the application area and the native title holders connected to those land and waters.
- The authorisation meeting was advertised in the Cairns Post and the Townsville Bulletin on 25 April 2015 and the Tully Times on 30 April 2015.
- The description of the native title claim group has been the subject of consideration by members of the native title claim group.
- An anthropological report has been completed in relation to the application which concludes that the native title claim group as described in the application is properly constituted.
- Members of the native title claim group were extensively consulted at information meetings held on 4 February 2015 and 1 April 2015 and at the authorisation meeting, which was held at Jumbun on 21 May 2015, prior to any decisions being made at the meeting.
- In accordance with traditional laws and customs, the claim group's decision-making process for native title issues relating to land and waters involves senior male elders making decision. Pursuant to this decision-making process, at the authorisation meeting, the eldest male from each of the families that were present made decisions in respect of the items on the agenda. The decisions were then announced to the claim group along with advice by the senior male elders that all items on the agenda requiring authorisation had been authorised.

[59] I am of the opinion that the certificate meets the requirement of s 203BE(4)(b).

Subsection 203BE(4)(c)

[60] This subsection applies where the application area is covered by an overlapping application for determination of native title.

[61] The certificate provides that NQLC has checked the Tribunal's registers to see whether the application is not covered in part or wholly by any other application and states that NQLC does not intend to lodge any overlapping claims nor is it aware that any other persons intend to do so.

[62] I note that I do not consider that any application currently overlaps the application area — see my reasons at s 190C(3). In my view, the requirements of s 203BE(3) are therefore not applicable to the area covered by this application.

[63] I am of the view that the requirements of s 203BE(4) of the Act have been satisfied and therefore find that the criteria under s 190C(4)(a) have been met.

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

Merit conditions: s 190B

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

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

[65] Attachment B describes the application area as a metes and bounds description referencing the high water mark, watercourses, river basins and coordinate points. The description specifically excludes all the land and waters subject to Girramay People (QUD6240/1998; QCD2009/004) determination of native title. Schedule B lists general exclusions.

[66] Attachment C is a colour copy of a map titled 'Mulga Guyurru (Murrary Falls)' prepared by the Tribunal's geospatial services on 19 August 2015. The map includes:

- the application area depicted by a bold outline;
- native title determinations and Gulngay People (QUD308/2014; QC2014/002) native title determination application;
- topographic background;
- scalebar, coordinate grid and legend; and
- notes relating to the source, currency and datum of data used to prepare the map.

Consideration

[67] The geospatial assessment concludes that the description and map of the application area are consistent and identify the application area with reasonable certainty. I agree with this assessment.

[68] I note that Schedule B contains some general exclusions to categories of land and waters, which in my view provides a sufficiently certain and objective mechanism to identify areas that are not covered by the application and fall within the categories described — see *Daniels for the Ngaluma People and Ors v State of Western Australia* [1999] FCA 686 at [29] – [38].

[69] In light of the above information, I am satisfied that the description and the map of the application area, as required by ss 62(2)(a) and (b), are sufficient for it to be said with reasonable certainty that the native title rights and interests are claimed in relation to particular land or waters.

[70] 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.

[71] Schedule A contains the following description of the native title claim group:

The Girramay People Native Title Claim Group is comprised of people descended from the following:

(a) Charles Williams;

(b) Bella Williams (Yurbil);

(c) Rosie Williams (Djarrmay)(aka Rosie Runaway);

(d) Clara Williams (aka Clara Boogal);

(e) Clarke Kennedy (Blencoe);

(f) Jimmy Beeron (Yalbiri);

(g) Jimmy Bugal (Nganygurru);

(h) Jimmy Henry (Manidjunayi);

(i) Jimmy Wallaby ('Billycan') and his wife Maggie (Ridjar);

(j) Walter Cardwell (aka Simpson)(aka Blackman) (Djubarriny);

(k) Tommy Dickman (Dubulmanu)(aka Tommy Digman);

(I) Lucy, the wife of Tommy Dickman (Dubulamanu) aka Tommy Digman;

(m) One Arm Jack (Manguburur);

(n) Cissy (Ganabulan);

(o) Claire (mother of Lily Murray nee Wade);

(p) Billy and his wife Jenny (including Charlie Clark Kennedy);

(q) Polly Wyle(s);

(r) Tommy Djingadjinga (Budalayiny);

(s) Charlie Nolan (lbirri)

(t) Charlie Nolan's mother's sister Ngawu (Marnie);

(u) Jimmy Jacobs (Rindin);

(v) Toby McAvoy;

(w) Johnny Dallachy;

(x) Billy Murray (Walguy aka Walguyi) and Nellie Murray (Mudjunin);

(y) Frank McLean (aka Frank Barry)(Gandigurrungu) and his wife Nellie;

(z) Mailman.

[72] It follows from the description above that the condition of s 190B(3)(b) is applicable to this assessment. Therefore, I am required to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Nature of the task at s 190B(3)(b)

[73] When assessing the requirements of this provision, I understand that I must determine whether the material contained in the application 'enables the reliable identification of persons in the native title claim group' — *Doepel* at [51].

[74] In *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*), Dowsett J commented that s 190B(3) 'requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification' — at [33]. His Honour expressed the view that where a claim group description contained a number of paragraphs, 'consistent with traditional canons of construction', the paragraphs should be read 'as part of one discrete passage, and in such a way as to secure consistency between them, if such an approach is reasonably open' — at [34]. His Honour also confirmed that s 190B(3) required the Registrar to address only the content of the application — at [30].

[75] In *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*), Carr J commented that to determine whether the conditions (or rules) specified in the application has a sufficiently clear description of the native title claim group:

> [i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently. It is more likely to result from the effects of the passage of time and the movement of people from one place to another. The Act is clearly remedial in character and should be construed beneficially — at [67].

Consideration

[76] I note that I am confined, in my view, to the material contained in the application for the purposes of s 190B(3) and I have therefore been informed by the applicant's factual basis material contained in Attachment F that accompanied the application in reaching my view about this condition.

[77] The description of the native title claim group is such that it comprises those persons who are the biological descendants of the named apical ancestors.

[78] Describing a claim group in reference to named ancestors is one method that has been accepted by the Court as satisfying the requirements of s 190B(3)(b) — see *WA v NTR* at [67].

[79] I consider that requiring a member to show biological descent from an ancestor identified in Schedule A provides a clear starting or external reference point to commence an inquiry about whether a person is a member of the native title claim group.

[80] In my view, as indicated by the factual basis contained in Attachment F, descent from a named ancestor provides one of the fundamental basis for membership to the native title claim group — at [5] – [6].

[81] I consider that with some factual inquiry it will be possible to identify the persons who fit the description of the native title claim group.

[82] In my view, the description of the native title claim group contained in the application is such that, on a practical level, it can be ascertained whether any particular person is a member of the group. Accordingly, focusing only upon the adequacy of the description of the native title claim group, I am satisfied of its sufficiency for the purpose of s 190B(3)(b).

[83] 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.

[84] The task at s 190B(4) is to assess whether the description of the native title rights and interests claimed is sufficient to allow the rights and interests to be readily identified. In my opinion, that description must be understandable and have meaning — *Doepel* at [91], [92], [95], [98] – [101] and [123]. I understand that in order to assess the requirements of this provision, I am confined to the material contained in the application itself — at [16].

[85] I note that the description referred to in s 190B(4), and as required by s 62(2)(d) to be contained in the application, is:

> a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law …

[86] I will consider whether the claimed rights and interests can be prima facie established as native title rights and interests, as defined in s 223, when considering the claim under s 190B(6) of the Act. For the purposes of s 190B(4), I will focus only on whether the rights and interests as claimed are 'readily identifiable'. Whilst undertaking this task, I consider that a description of a native title right and interest that is broadly asserted 'does not mean that the rights broadly described cannot readily be identified within the meaning of s 190B(4)' — *Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*) at [60]; see also *Strickland FC* at [80] – [87], where the Full Court cited the observations of French J in *Strickland* with approval.

[87] Schedule E provides the following description of the claimed native title rights and interests:

> 1. In relation to land where there has been no prior extinguishment of native title or where s238 (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 the right to:

   (a) occupy the claim area;

   (b) use the claim area;

   (c) access the claim area;

   (d) traverse the claim area;

   (e) enjoy the claim area;

   (f) speak for the claim area;

   (g) speak to the claim area;

   (h) camp on the claim area;

   (i) erect structures on the claim area including those that are both temporary and permanent;

   (j) hunt on the claim area;

   (k) fish on the claim area;

   (l) gather on the claim area;

   (m) light fires on the claim area for domestic purposes, including but not restricted to, cooking and warmth;

   (n) light fires on the claim area for hunting purposes;

   (o) light fires on the claim area for clearing vegetation and regenerating growth of natural resources;

   (p) conduct religious activities on the claim area;

   (q) conduct religious ceremonies on the claim area;

   (r) conduct spiritual activities on the claim area;

   (s) conduct spiritual ceremonies on the claim area;

   (t) conduct secular activities on the claim area;

   (u) conduct secular ceremonies on the claim area;

   (v) interact with the spirits and ancestral beings on the claim area;

   (w) maintain places of importance under traditional laws and customs on the claim area;

   (x) protect places of importance under traditional laws and customs on the claim area from physical harm;

   (y) teach on the claim area the physical and spiritual attributes of the claim area;

   (z) consume natural resources on the claim area;

   (aa) share natural resources on the claim area;

   (bb) exchange natural resources on the claim area;

(cc) harvest natural resources on the claim area;

(dd) construct material items from natural resources on the claim area including but not restricted to shields, baskets, bagu, and items of adornment;

(ee) trade on the claim area;

(ff) carry out commercial activities on the claim area;

(gg) practice traditional bush medicine on the claim area;

(hh) produce traditional bush medicines in the claim area;

(ii) consume traditional bush medicines in the claim area;

(jj) inherit native title rights and interests in the claim area in accordance with traditional laws and customs;

(kk) dispose of native title rights and interests in the claim area in accordance with traditional laws and customs;

(ll) bury claim group members on the claim area;

(mm) be buried on 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 off shore place (if applicable), and will not apply if they have been extinguished in accordance with valid State or Commonwealth laws

Note: Natural resources includes but is not limited to ochres, clays, stones, sand, plants, fruits, grasses, bark and waters

Consideration

[88] For the purposes of s 190B(4), I am satisfied that the rights and interests identified are understandable and have meaning. I note that although the claim to exclusive possession is broadly asserted, I am of the view that it does not offend the requirements of this provision — *Strickland* at [60].

[89] I find that the description of the native title rights and interests claimed is sufficient to allow the rights and interests to be readily identified and therefore the application satisfies the condition of s 190B(4).

[90] 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.

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

The requirements of s 190B(5) generally

[92] Whilst assessing the requirements of this provision, I understand that I must treat the asserted facts as true and consider whether those facts can support the existence of the native title rights and interests that have been identified — *Doepel* at [17] and *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [57], [83] and [91].

[93] Although the facts asserted are not required to be proven by the applicant, I consider the factual basis must provide sufficient detail to enable a 'genuine assessment' of whether the particularised assertions outlined in subsections (a), (b) and (c) are supported by the claimant's factual basis material — see *Gudjala FC* at [92].

[94] I also understand that the applicant's material must be 'more than assertions at a high level of generality' and must not merely restate or be an alternate way of expressing the claim — *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*) at [28] and [29] and *Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal* [2012] FCA 1215 at [43] and [48].

[95] I am therefore of the opinion that the test at s 190B(5) requires adequate specificity of particular and relevant facts within the claimants' factual basis material going to each of the assertions before the Registrar can be satisfied of its sufficiency for the purpose of s 190B(5).

[96] The factual basis material is contained in Schedules F, G and M and Attachment F. The affidavits of two elders of the native title claim group, at Attachment R2 and Attachment R3, that accompany the application, also form part of the factual basis.

[97] I proceed with my assessment of the sufficiency of this material by addressing each assertion set out in s 190B(5) below.

Reasons for s 190B(5)(a)

The requirements of s 190B(5)(a)

[98] I understand that s 190B(5)(a) requires sufficient factual material to support the assertion that:

- there is 'an association between the whole group and the area', although not 'all members must have such association at all times' — *Gudjala 2007* at [52];
- the predecessors of the group were associated with the area over the period since sovereignty — at [52]; and
- there is an association with the entire claim area, rather than an association with part of it or 'very broad statements', which for instance have no 'geographical particularity' — *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) at [26]; see also *Corunna v Native Title Registrar* [2013] FCA 372 at [39] and [45] where Siopis J cited the observations of French J in *Martin* with approval.

Information provided in support of the assertion at s 190B(5)(a)

[99] The factual basis contains the following relevant information about the native title claim group's association with the application area:

- At the time of sovereignty, the predecessors of the native title claim group were associated with the application area and were united in observance of a system of laws and customs — Attachment F at [1].
- The term Girramay, to the native title claim group and their neighbours, denotes three elements of social and cultural identity, namely language, an identifiable group of people who claim kinship to Girramay-speaking predecessors, and a defined area of land — at [5].
- Archaeological evidence indicates continued usage and occupation by Indigenous people of the coastal flood plains, which are also located within the application area, for the past 1700 to 2000 years. The archaeological reports record Aboriginal occupation and use of the upland rainforest area from about 700 years ago. Archaeological evidence from about 2000 years ago demonstrates that those persons used technically sophisticated methods of processing highly toxic food resources. These processes continue to be practiced by current claimants — at [2].
- Records from the early 1900s indicate that the Girramay territory extended south to Ripple Creek (located near the southern end of Cardwell Range which forms the southern boundary), west over the Cardwell range and Kirrama range (north-western region) including Cardwell itself (southeastern region of the application area). Genealogies prepared in 1938 refer to the predecessors being from Cardwell, Upper Murray River (northern/mid-northern region), Cashmere Station (I understand this to be located in or proximate to the western boundary), Hinchinbrook Island (proximate to the eastern boundary) and Kirrama Station (along the mid-western boundary). A map prepared in 1974 by an anthropologist also indicates the traditional lands of the Girramay-speaking people as Upper Murray, Cashmere Station, Kirrama Station and up to the Herbert River (along the mid-western to southwestern boundary) — at [3].
- Aboriginal oral evidence of Girramay country and story places indicates that Girramay traditional country extends from the Murray River in the north, the Cardwell Range in the south, west to Kirrama Creek and Blencoe Creek, and east into the Coral Sea — at [4].

- The Girramay People are associated with story places and are given *guwal* (language) names that connect them to country — at [8].
- Many predecessors of the claim group were not removed to missions and remained on country, such as at Murray Upper. Those who remained on country were able to practice their traditional way of life, maintaining their physical and spiritual connection to country and each other, through each successive generation to the current claimants — at [10].
- Of relevance to the association of the apical ancestors identified in Schedule A and their descendants, the factual basis includes the following information:
  - Anthropological evidence shows that apical ancestors Charlie, Bella, Rosie and Clara Williams were siblings and they were never removed to missions but remained in the claim area their entire lives, where they married, raised families and passed on traditional laws and customs to their descendants — at [11].
  - Charlie Williams had two sons. Charlie was born around 1860 prior to the establishment of Cardwell in 1864 and died within the claim area. One of his sons was born around 1886 and partnered the daughter of ancestors Frank McLean and Nellie, with whom he had several children, including a daughter who was born on Girramay country in 1922. Her children were born on Girramay country or nearby regional towns, and one of her daughters continues to live in the central region of the application area. Ancestor Nellie is buried near the mid-eastern boundary of the claim area — at [16].
  - Rosie Williams was born at Murray Upper around 1871. She died proximate to the northern boundary in 1986 and is buried within the claim area. Her descendants remember her teaching them Girramay laws and customs while living on Girramay country. It is likely that her parents were part of the claim group and had rights and interests in the application area prior to effective sovereignty — at [12].
  - Bella Williams was born around 1900 and was the partner of apical ancestor Jimmy Beeron who was the brother of ancestor Jimmy Bugal. Bella died in 1943 within the claim area. They had two sons, one of whom was born around 1921 and was buried at a significant burial ground within the claim area in 1964. He lived in the claim area for most of his life. His children were also raised in the application area, one of whom has also remained on the application area most of his life and has passed on Girramay culture and knowledge to his children and grandchildren — at [15].
  - Clara Williams was the partner of apical ancestor Jimmy Bugal who was born on the Murray River in the claim area around 1870. He is buried within the central or mid-eastern region of the application area — at [13]. Clara and Jimmy had two daughters, one of whom was born between 1900 and 1910 and was the partner of the son of apical ancestor Mailman — at [13]. The other daughter died in the claim area in 1928 — at [14]. She had a son who was born in the northern/northeastern region of the claim area around 1923. He was grown up in the bush until he was 12 years old. He raised his children on Girramay country. He was known and respected as a senior Girramay teacher of traditions and culture.

- Ancestor Mailman was born around 1865 in the forest country around Cardwell. His son was also born in Cardwell around 1895 and was removed from the claim area for a period before returning to Murray Upper where he lived for the rest of his life and where he died in 1961 — at [13].
- Billy Wolger (Billy Murray) was born before the establishment of Cardwell in 1864. His immediate predecessors were in the Cardwell area around the time the first explorers were in the area in 1848. His son was born in this area around 1888 and had several children who were also born in and around Cardwell. One of Billy Wolger's grandsons, who was born in Cardwell in 1930, married a Girramay woman who was born near the mid-western boundary of the application area in 1941. Her mother was born in the northern region around 1917 and is the daughter of apical ancestor Claire — at [17].

- The current members of the claim group are biological descendants of the apical ancestors identified in Schedule A. The elders are acknowledged as those who have authority to speak for and make decisions about country. Records of 1900 note that tribal matters were dealt with by elders and that the elders were associated with specific places and made decisions about those places — at [19] – [21]. In addition, different Girramay families are associated with different parts of Girramay country and are interconnected with the country through *guwal* (language) naming practices, after sites and features in the area, and long ancestral associations with these areas — at [25].
- The Girramay People have a spiritual connection to their country. In particular, they share a belief of supernatural (or dreaming) beings which inhabit and guard Girramay country. One dreaming being and other spiritual beings are said to occupy many of the waterholes and lagoons on Girramay country — at [32]. They believe Girramay country encompasses story places and story beings which are emplaced in the landscape in the form of geographic features. The Girramay People are also linked to a particular creation story which is unique to their identity. Elders play a specific role in mediating the spirits within Girramay country through, for instance, ceremonies related to their specific story — at [18] and [20]. Girramay People also engage with the spirits of their ancestors when on country, by talking to country and leaving behind food to appease those spirits — at [26].
- A claim group elder speaks of being born in the bush within the northern region of the application area and says he has lived there all his life — Attachment R2 at [14]. His parents taught him about being a Girramay person from a young age. He would go fishing and camping with his dad, uncles and aunts, along the Murray River and the mountain ranges, through the central, northeastern and southeastern region of the application area — at [15]. They would build shelters and campfires while hunting — at [16]. They continue to hunt and camp on the weekends — at [20]. He says that his parents taught him about story places on country and, while growing up, he was taken to these places in the northern region — at [27].
- A Girramay elder says he was born in the northern region of the application area and has lived there most of his life — Attachment R3 at [14]. He has worked at various farms and stations including doing cattle station work at a station along the western boundary in 1969 — at [14]. He has also lived in the mid-eastern region of the application area. His

father told him he was Girramay when he was young and would take him camping, hunting and fishing on country, such as within the northern and mid-eastern regions of the application area — at [15] – [17]. They would cook fish in a traditional manner and he continues to teach his grandchildren how to fish — at [19] – [20]. He speaks of important places on country that need to be protected, such as where the spirits of their ancestors live, and of the sacred lagoons and waterholes, such as where a dreaming being lives — at [25] and [32] – [33]. He says the old people are buried on country and he wishes to be buried on his country as well — at [36].

- Many claimants continue to live on, travel, camp, hunt, fish, gather and manage resources and bury deceased members in the application area — Attachment F at [35] and Schedule M.

Consideration

[100] In *Gudjala 2007*, Dowsett J noted the necessity for the Registrar 'to address the relationship which all members claim to have in common in connection with the relevant land' — at [40]. In my view, this criterion should be considered in conjunction with his Honour's statement that the 'alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)' — at [39]. I consider that these principles are relevant in assessing the sufficiency of the claimant's factual basis for the purpose of the assertion at s 190B(5)(a) as they elicit the need for the factual basis material to provide information pertaining to the identity of the native title claim group, the predecessors of the group and the nature of the association with the area covered by the application. In that regard, I consider that the factual basis material clearly identifies the native title claim group and acknowledges the relationship the Girramay People have with their country, being both of a physical and spiritual nature. The factual basis reflects the knowledge claim group members have of traditional Girramay land and waters including about sacred sites.

[101] There is also, in my view, a factual basis that goes to showing the history of the association that members of the claim group have, and that their predecessors had, with the application area — see *Gudjala 2007* at [51]. The factual basis contains references to the presence of some apical ancestors and the predecessors of the apical ancestors within the application area prior to the date of sustained European contact, which I understand from the factual basis to have occurred around the mid-1860s. For instance, the factual basis indicates that ancestors Charlie William and Billy Murray were born prior to settlement in the area and ancestors Jimmy Bugal and Mailman were born within the application area shortly after settlement. One of Charlie William's grandchildren was born on Girramay country and his great grandchildren were born either on country or at nearby towns. His great granddaughter continues to live within the application area. Ancestor Rosie Williams was also born in the application area shortly after settlement. She died around the mid-1980s and is buried within the application area. She taught her descendants Girramay laws and customs while living on country. Her sister Bella William was born around 1900 and died within the claim area. One of her sons lived in the application area most of his life and raised his children there. Apical ancestor Frank Maclean's wife Nellie is buried within the application area. Ancestors Clara Williams and Jimmy Bugal had a daughter who died within the claim area in the late 1920s and their grandson was born in the early 1920s and was grown up in the bush until he was 12 years. Their great grandchildren were also raised on Girramay country. The asserted facts also state that ancestors Charlie, Bella, Rosie and Clara were siblings and

remained in the claim area their entire lives, where they married, raised families and passed on traditional laws and customs to their descendants. Current claim members speak of being born, living and raising their families within the application area. They have continued to reside, visit sacred sites, camp, gather resources, hunt, fish and bury deceased members on the application area.

[102] The factual basis is also sufficient to support the assertion that the Girramay People have a spiritual association with the application area and is sufficient to show the history of that association. The Girramay People have knowledge of the creation stories, story places and story beings, ceremonial and burial grounds and sacred lagoons and waterholes. The asserted facts indicate that they believe that country is imbued with spiritual presence of supernatural beings that guard Girramay country and their ancestors. The claimants learn about creation stories and traditional practices from their elders and immediate predecessors so that the younger generations continue to have a spiritual association with their country. In my view, this transfer of knowledge and belief system demonstrates the history of the spiritual association the Girramay People have with the application area.

[103] For the purposes of s 190B(5)(a), I must also be satisfied that there is sufficient factual material to support the assertion of an association between the group and the whole area. Aboriginal oral evidence indicates that Girramay traditional country and story places within it extend across the application area. Genealogies and mapping by an anthropologist record the predecessors of the claim group being from areas located in or proximate to the northern, southeastern and western regions of the application area. The factual basis material refers to the ancestors being born around the northern/mid-northern and south-eastern regions and their children were also born around these regions. Some of the apical ancestors died or are buried within the central and mid-eastern regions. Current claim members speak of travelling across the application area, along the Murray River and the mountain ranges, through the northern, northeastern, central and southeastern regions. One claimant speaks of working in the western region of the application area. There are also references to a dreaming being and other spiritual being occupying many of the waterholes and lagoons in the application area.

[104] From the above information, I consider that the factual basis is sufficient to support the assertion of an association, both physical and spiritual, 'between the whole group and the area' — see *Gudjala 2007* at [52]. In my view, the factual basis material provides sufficient examples and facts of the necessary geographical particularity to support the assertion of an association between the whole group and the whole area.

[105] Given the information before me, I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s 190B(5)(a).

Reasons for s 190B(5)(b)

The requirements of s 190B(5)(b)

[106] The definition of 'native title rights and interests' in s 223(1) provides, at subsection (a), that those rights and interests must be 'possessed under the traditional laws acknowledged, and traditional customs observed,' by the native title holders. Noting the similar wording between this provision and the assertion at s 190B(5)(b), I consider that it is appropriate to apply s 190B(5)(b) in light of the case law regarding the definition of 'native title rights and interests' in s

223(1). In that regard, I have taken into consideration the observations of the High Court in *Yorta Yorta* about the meaning of the word 'traditional' — see *Gudjala 2007* at [26] and [62] – [66].

[107] In light of *Yorta Yorta*, I consider that a law or custom is 'traditional' where:

- 'the origins of the content of the law or custom concerned are to be found in the normative rules' of a society that existed prior to sovereignty, where the society consists of a body of persons united in and by its acknowledgement and observance of a body of law and customs — at [46] and [49];
- the 'normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty' — at [47];
- the law or custom has been passed from generation to generation of a society, but not merely by word of mouth — at [46] and [79];
- those laws and customs have been acknowledged and observed without substantial interruption since sovereignty, having been passed down the generations to the claim group — at [87].

[108] I note that in *Gudjala 2009,* Dowsett J also discussed some of the factors that may guide the Registrar, or his delegate, in assessing the asserted factual basis, including that:

- the factual basis demonstrate the existence of a pre-sovereignty society and identify the persons who acknowledged and observed the laws and customs of the pre-sovereignty society — at [37] and [52];
- if descent from named ancestors is the basis of membership to the group, the factual basis demonstrate some relationship between those ancestral persons and the pre-sovereignty society from which the laws and customs are derived — at [40]; and
- the factual basis contain an explanation as to how the current laws and customs of the claim group are traditional (that is laws and customs of a pre-sovereignty society relating to rights and interests in land and waters). Further, the mere assertion that current laws and customs of a native title claim group are traditional because they derive from a pre-sovereignty society from which the claim group is said to be descended, is not a sufficient factual basis for the purposes of s 190B(5)(b) — at [29], [54] and [69].

Society

[109] The identification of a pre-sovereignty society or a society that existed prior to European contact of the application area is relevant to my assessment of the assertion at s 190B(5)(b). In particular, I am of the view that identification of such a society is necessary to support the assertion of a connection between that society and the apical ancestors as well as a connection with the current native title claim group. I consider the following asserted facts to be relevant to my consideration of whether the factual basis is sufficient to support the existence of such a society:

- The Girramay People are a part of the Southern Rainforest group. The groups within this society have social and cultural similarities, such as a traditional naming practice based on section affiliations — Attachment F at [7] and [18].

- The Southern Rainforest groups share a belief in the ability of spirits and ancestral beings on country to cause harm to people who have not sought permission in accordance with traditional laws and customs of the area, which are similar to neighbouring groups — at [28].
- The Girramay People are distinct from neighbouring groups through a number of social and cultural elements including:
    - speaking a recognised dialect of Dyirbal language;
    - belief in supernatural beings that inhabit and guard Girramay country;
    - belief in story places and story beings on Girramay country which are unique to Girramay land and waters;
    - observing a customary system of personal (*guwal*) language names linked to totemic story places;
    - belief in traditional forms of sorcery and ritual cannibalism;
    - observing a system of kinship and kinship terms, including avoidance relationships and preferential marriage partners;
    - connection to a creation story which is unique to the identity of the claim group;
    - unique ceremonial wearing of cockatoo feathers, which is the group's totem — at [18].
- Elders in the Southern Rainforest region know tribal country and places, are able to talk about and for country, know tribal customs, teach laws and customs and ensure the proper observation of those laws and customs, mediate spirits on country, have the right to authorise tribal punishment, have authority to make decisions about people and country and are recognised by the group as having authority to speak on these matters — at [20].
- The elders of the Girramay People are acknowledged by neighbouring groups as those with the authority to speak on matters in relation to Girramay country — at [19].

Traditional laws and customs

[110] The factual basis contains the following relevant information about the traditional laws and customs of the native title claim group.

[111] The members of the native title claim group have a biological connection with at least one apical ancestor who is likely to have held or been descended from people who at the time of sovereignty held, traditional rights in some or all of the claim area — Attachment F at [9].

[112] The Girramay People acknowledge and observe a system of laws and customs which give rise to the claimed native title rights and interests in the application. They are defined as Girramay by having a combination of the following attributes:

- a language (*guwal*) name;
- a totemic affiliation;
- a section affiliation or skin name;

- a kinship relation to Girramay ancestors;
- a degree of fluency in Girramay language;
- an acknowledgement and observation of Girramay traditional laws and customs;
- having been born, grown up, died and buried on country;
- genealogical and biographical knowledge of Girramay People;
- a social recognition and acceptance by other Girramay People; and
- self-identification as Girramay.

[113] Girramay People continue to follow a traditional naming practice where individuals are given names based on their section affiliations — at [7].

[114] Girramay People are embedded in the country through their association with story places and having language (*guwal*) names that connect them to story places and Girramay country — at [8]; see also Attachment R2 at [27]. Girramay families are associated with different parts of Girramay country and are interconnected with the country through *guwal* naming practices after sites and features in the area and long ancestral associations with those areas — Attachment F at [25]. When individuals are given *guwal* names, they are then associated with the stories those sites hold and have the duty and responsibility to protect the physical site as well as protect others from the spirits at these sites — at [27]. One Girramay elder says he has given his grandchildren *guwal* names that connect them to country — Attachment R3 at [34].

[115] Many Girramay people have remained on the application area since European contact and were able to live freely, speak language and practice their traditional way of life — Attachment F at [10].

[116] Girramay elders are acknowledged as those with authority to speak on matters in relation to Girramay country and to deal with tribal matters. They are clearly associated with specific places and make decisions about those areas — at [19]. Some current claim members are recognised as Girramay elders as their parents, grandparents and great grandparents were in the past. They sit on a board of a corporation in the Southern Rainforest region as they have authority to speak about and for Girramay country — at [21]. The elders hold authority to determine who can use Girramay country and how they use it. They also provide permission to access or restrict both Girramay People and outsiders from using country — at [22]. For instance, they continue to enact 'welcome to country' rituals and negotiate with elders from neighbouring groups and others about rights to access country.

[117] The Girramay People believe their country is imbued by a spiritual presence. Claimants are taught by their predecessors that welcome to country rituals are performed to prevent harm coming to guests by seeking permission from the ancestral spirits on country — at [23]. Sites with spiritual beings are also protected so that those spiritual beings do not cause harm — at [24] and [27].

[118] The claim members acknowledge the spirits when on country, by talking to country and leaving food behind to appease the spirits. They acknowledge and greet their own ancestral spirits in order to be protected while gathering, hunting, residing and traversing those places — at [26].

[119] Claim members continue to talk about and demonstrate practices that were performed by their predecessors during ceremonies. Many current senior claimants recall attending these ceremonies when they were young, and continue to teach their children and grandchildren the importance of these gatherings — at [31].

[120] The claim group members have knowledge of creation stories and practices, and perform different ceremonies across different locations on country. Many claimants are given names associated with the stories, which emplaces them at the sites of those stories and embeds them in the country and narrative — at [33]; see also Attachment R2 at [28].

[121] The claimants also have knowledge of a dreaming being who was responsible for making rain and controlling other aspects of nature. They continue to hold this as a core belief in their system of traditional laws and customs. Many of the waterholes and lagoons are known to be occupied by this dreaming being as well as other spiritual beings. There are associated food taboos and other restrictions on access and use of these waterholes that regulate and restrict the claim group members — Attachment F at [32]. For instance, a claim group elder speaks of the dangers of taking pregnant women to sacred waters where the dreaming being lives and the dangers if they ate certain foods — Attachment R3 at [25] – [26].

[122] Current claim group members continue to follow a system of skinship and marriage. Members are given skin names that connect individuals to others and thereby regulate the way a person can marry. These skin names connect people across tribes as well — at [29].

[123] The Girramay People continue to harvest, use and manage the resources of Girramay country — Attachment F at [35]. For instance, the claimants continue to make goods such as baskets. The predecessors would exchange goods such as baskets and turtle eggs for hooks and fishing lines. The current claimants still make baskets which they sell on the claim area — at [34]; see also Attachment R2 at [22] and Attachment R3 at [28] – [29]. They also continue to share resources that they have hunted or gathered with family and neighbours — Attachment R3 at [21].

[124] Many current claimants still reside on the claim area and therefore travel across, camp, hunt, fish and gather resources and medicine from their traditional country on a regular and reoccurring basis — Attachment F at [35] and Attachment R2 at [15] – [20] and [25]. They also continue to bury their deceased on country, including at a sacred burial ground in the application area — Attachment at [15]; see also Attachment R3 at [36].

[125] Traditional laws and customs are passed on to claim members by elders and their immediate predecessors — at [15]. Apical ancestors Charlie, Bella, Rosie and Clara Williams are said to have passed on traditional laws and customs to their descendants — at [11]. One current elder speaks of teaching his sons what his father taught him, such as how to hunt and fish — Attachment R3 at [17], [20] and [34]. He also says that his parents and grandparents taught him language and now he teaches his own children and grandchildren — at [35].

[126] I note that the information extracted at s 190B(5)(a) is also relevant to my consideration of the assertions at s 190B(5)(b).

Consideration

[127] In order to support the assertion that the relevant laws and customs are 'traditional' in the *Yorta Yorta* sense, I consider that the factual basis must include details of:

- the connection between the pre-sovereignty society and the existing claim group; and
- the connection between the laws and customs acknowledged and observed by the pre-sovereignty society and the existing claim group.

[128] I also consider that the factual basis must include assertions that do not merely restate the claim but provide an adequate general description of the factual basis — see *Gudjala 2007* at [62] and [66] and *Gudjala 2009* at [27] and [29].

[129] My understanding of the factual basis material is that the pre-sovereignty society, being the Southern Rainforest society, encompasses a wide area of land which is held at a localised level by various groups, including the Girramay People. I understand these landholding groups hold distinct territories but share common spiritual beliefs, have common laws and customs and interact for cultural and social purposes.

[130] In my view, the factual basis indicates that the Girramay country is situated within this society and the traditional laws and customs of the Girramay people are derived from it. Within this society, the rights and interests in land that are asserted to be held by the Girramay People are based on regionally held and practiced laws and customs. Relevant to this proposition, I note the observations of Lindgren J in *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 5)* [2003] FCA 218 that:

> [i]t is conceivable that the traditional laws and customs under which the rights and interests claimed are held might, in whole or in part, be also traditional laws and customs of a wider population, *without that wider population being a part of the claim group* [emphasis added] — at [53].

[131] The factual basis reveals that the laws and customs currently observed and acknowledged by the Girramay People are based on common principles of marriage and kinship and include observance of laws relating to land tenure and traditional usage of the resources of their land and waters. The content of the traditional laws and customs is said to have been passed down to the current members of the native title claim group through the preceding generations.

[132] In my view, the factual basis indicates that the apical ancestors were either living or were amongst the generation born to those who were living within Girramay country at the time of European settlement of the region. For instance, apical ancestor Jimmy Bugal was born around 1865 in the southeastern region of the application area and Charlie Williams was born around 1860 and was associated with the application area. In this sense, I understand that the information supports the assertion that at least one of the apical ancestors was born into the Girramay claim group of the society that existed at and prior to European settlement — see *Gudjala 2009* at [55] and also my reasons at s 190B(5)(a) above. From the factual basis, I understand the current claim members are descendants of these ancestor as well as the other ancestors identified in Schedule A.

[133] I am also of the view that there is information contained within the factual basis material from which the current laws and customs can be compared with those that are asserted to have existed at first contact. The Girramay People observe a landholding system in which rights, responsibilities and interests are exercised by the descendants of the named ancestors. Family groups are associated with different parts of Girramay country and are interconnected with country through *guwal* naming practices after sites and features in the area and long ancestral associations with those areas. When individuals are given *guwal* names, they become associated

with the stories those sites hold and have the duty and responsibility to protect the physical site as well as protect others from the spirits at these sites. The factual basis demonstrates that the descendants continue to have knowledge of their ancestral country and have knowledge of sacred sites on country, including ceremonial grounds, burial grounds, lagoons and waterholes. In my view, there is sufficient information to support the assertion that the present landholding system whereby members of the Girramay People gain rights to country on the basis of descent, and the spiritual relationship to country, is one that is founded upon a normative system that is likely to have been present at or before settlement. I consider that there is a sufficient factual basis that the landholding system held by the current claimants is derived from and rooted in customary laws and practices.

[134] The factual basis contains information which speaks to the way the claim group continues to speak Girramay language, visit and camp on country and perform traditional customs such as naming practices, performing ceremonies and burials, hunting, fishing and gathering natural resources for various purposes such as to make baskets or for medicine. They also observe traditional rules about kinship, skin and marriage. This, in my view, is sufficient to support the assertion that the laws and customs currently observed are relatively unchanged from those acknowledged and observed at the time of settlement, and that they have been passed down the generations to the claimants today.

[135] The factual basis also contains references to current observance and acknowledgement of laws and customs of a spiritual nature. The claimants have knowledge of creation stories and the supernatural being on Girramay country. The claimants have knowledge of myths and the ancestral beings. They have knowledge of story places, avoidance places and sites, such as sacred lagoons and waterholes, that are inhabited by the dreaming being on country. The claim members speak to the spirits on country in language and leave food to appease the spirits. There are also references to the claimants practicing traditional ceremonies, such as those relating to the unique Girramay creation story.

[136] The factual basis, in my view, is sufficient to support the assertion that the relevant laws and customs, acknowledged and observed by the pre-sovereignty society, have been passed down through the generations, by word of mouth and traditional teaching, to the current members of the claim group, and have been acknowledged by them without substantial interruption. There are references to the current claimants being taught about myths and the creation story, how to hunt, fish and use resources for traditional purposes, practices relating to naming conventions, and rules regarding kinship, skinship and marriage and are shown sacred sites on country, which in my view reveals a continuing practice of teaching laws and customs to the younger generation. This, in my opinion, is sufficient to support the assertion that these laws and customs will continue to be passed to future generations, ensuring a vitality and continuity of the traditional laws and customs. The factual basis also indicates that apical ancestors Charlie, Bella, Rosie and Clara Williams passed on traditional laws and customs to their descendants. I infer that, given the level of detail in the continued acknowledgement and observance of the group's cultural traditions and that the laws and customs have been passed between a few generations from the apical ancestors to the current claimants, the apical ancestors would have also practiced these modes of teachings. It follows, in my view, that the laws and customs currently observed and acknowledged are 'traditional' in the *Yorta Yorta* sense as they derive from a society that existed at least at the time of settlement.

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

Reasons for s 190B(5)(c)

[138] This condition is concerned with whether the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the native title rights and interests claimed in accordance with their traditional laws and customs.

[139] In *Martin*, French J held that:

> [u]nder s 190B(5)(c) the delegate had to be satisfied that there was a factual basis supporting the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs. This is plainly a reference to the traditional laws and customs which answer the description set out in par (b) of s 190B(5) — at [29].

[140] Accordingly, meeting the requirements of this condition relies on whether there is a sufficient factual basis to support the assertion at s 190B(5)(b) that there exist traditional laws and customs which give rise to the claimed native title rights and interests. In my view, this assertion relates to the continued holding of native title through the continued observance of the traditional laws and customs of the group.

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

> [c]lear 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].

Consideration

[142] There is, in my view, information within the factual basis material that goes to explaining the transmission and continuity of the native title rights and interests held in the application area in accordance with relevant traditional laws and customs.

[143] A Girramay elder says that he learnt how to hunt and fish by watching his father and that they would cook fish in a traditional manner — Attachment R3 at [17] and [19]. His parents showed him which plants were good for medicine — at [31]. He has taught all his boys everything his father taught him — at [34]. He says that his parents and grandparents taught him language and he is now teaching his children and grandchildren — at [35].

[144] In reaching my view in relation to this requirement, I have also considered my reasons in relation to s 190B(5)(b) and in particular that:

- the relevant pre-sovereignty society has been clearly identified and some facts in relation to that society have been set out;
- there is some information pertaining to the acknowledgement and observance of laws and customs by previous generations of Girramay People in relation to the application area;
- examples of the claim group's current acknowledgement and observance of laws and customs in relation to the application area have been provided.

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

[146] 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.

[147] The claimed native title rights and interests that I consider can be prima facie established is identified in my reasons below.

The requirements of s 190B(6)

[148] The requirements of this section are concerned with whether the native title rights and interests, identified and claimed in this application, can be *prima facie* established. Thus, 'if on its face a claim is arguable**,** whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis' — *Doepel* at [135]. Nonetheless, it does involve some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed' — at [126], [127] and [132].

[149] I note that this section is one that permits consideration of material that is beyond the parameters of the application — at [16].

[150] I understand that the requirements of s 190B(6) are to be considered in light of the definition of 'native title rights and interests' at s 223(1) — *Gudjala 2007* at [85]. I must, therefore, consider whether, prima facie, the individual rights and interests claimed:

- exist under traditional laws and customs in relation to any of the land or waters in the application area;
- are native title rights and interests in relation to land or waters; and
- have not been extinguished over the whole of the application area.

[151] I also understand that the claimed native title rights and interests:

> must nonetheless be rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the peoples in question. Further, the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs. For the reasons given earlier, "traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty — *Yorta Yorta* at [86], cited in *Gudjala 2007* at [86].

[152] I am therefore of the view that a claimed native title right and interest can be prima facie established if the factual basis is sufficient to demonstrate that they are possessed pursuant to the traditional laws and customs of the native title claim group.

[153] I note that the 'critical threshold question' for recognition of a native title right or interest under the Act 'is whether it is a right or interest "in relation to" land or waters' — *Western Australia v Ward* [2002] HCA 28 (*Ward HC*) per Kirby J at [577]. I also note that the phrase 'in relation to' is 'of wide import' — *Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [93]. Having examined the native title rights and interests set out in Schedule E of the application, I am of the opinion that they are, prima facie, rights or interests 'in relation to land or waters.'

[154] I also note that I consider that Schedules B and E of the application sufficiently address any issue of extinguishment, for the purpose of the test at s 190B(6).

[155] Before I consider the rights and interests claimed, I note that my reasons at s 190B(6) should be considered in conjunction with, and in addition to, my reasons and the material outlined at s 190B(5).

Rights prima facie established

1. In relation to land where there has been no prior extinguishment of native title or where s238 (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

[156] The majority of the High Court in *Ward HC* considered that '[t]he expression "possession, occupation, use and enjoyment … to the exclusion of all others" is a composite expression directed to describing a particular measure of *control over access to land* [emphasis added]' — at [89]. The High Court further noted that the expression, collectively, conveys 'the assertion of rights of control over the land', which necessarily flow 'from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country' — at [93].

[157] In *Griffiths v Northern Territory of Australia* [2007] FCAFC 178, the Full Court, whilst exploring the relevant requirements to proving that such exclusive rights are vested in a native title claim group, stated 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 the consideration of what the evidence discloses about their content under traditional law and custom* [emphasis added] — at [71].

[158] I also note the Full Court's observations in relation to control of access to country that:

> [i]f control of access to country flows from spiritual necessity because of the harm that "the country" will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive. The relationship to country is essentially a "spiritual affair". It is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people. The question of exclusivity depends upon the ability of the [native title holders] effectively to exclude from their country people not of their community. If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry and if they

> are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have … an exclusive right of possession, use and occupation — at [127].

[159] The above paragraphs point to the nature of this right in land and waters. In examining whether the claimants' material prima facie establishes its existence, I am of the view that this right materialises from traditional laws and customs that permit the native title claim group to exhibit control over all others in relation to access to the land and waters.

[160] The factual basis is such that it is asserted that at the time of settlement, there existed an association between the Girramay People and its land and waters — see my reasons at s 190B(5)(a).

[161] The factual basis provides that the Girramay People maintain the traditional right to exclude all others from the application area.

[162] Girramay elders are acknowledged as having the authority to speak on matters in relation to Girramay country and to deal with tribal matters — Attachment F at [19]. The elders determine who can use country, how they use it, and provide permission to access or restrict both Girramay People and outsiders — at [22]. The elders continue to enact 'welcome to country' rituals and negotiate with elders from neighbouring groups and others about rights to access country.

[163] The Girramay People believe that their country is imbued by a spiritual presence. The ancestral spirits have the power to cause physical injury and sickness to those they do not recognise or who do not seek permission to enter country. Welcome to country rituals are therefore necessary to prevent harm coming to the guest by seeking permission from the ancestral spirits on country — at [23]. Sites with spiritual beings are also protected so that those spirits do not cause harm — at [24]. The claim members acknowledge the spirits when on country, by talking to country and leaving food behind to appease the spirits. They acknowledge and greet their own ancestral spirits in order to be protected while gathering, hunting, residing and traversing that place — at [26].

[164] The factual basis also indicates that the claim group continue to follow a landholding system where country is inherited on the basis of cognatic descent. Different families are associated with different parts of Girramay country and are interconnected with the country through *guwal* naming practices after sites and features in the area and long ancestral associations with those areas — at [25]. When individuals are given *guwal* names, they become associated with the stories those sites hold and have the duty and responsibility to protect the physical site as well as protect others from the spirits at these sites — at [27].

[165] I am of the view that the factual basis material asserts that current members of the native title group maintain knowledge of their country. The knowledge of the laws and customs of the current members, as owners of their traditional land and waters, elicit that they have a 'spiritual affair' with their country, where spiritual sanctions are imposed on those who enter country without permission, and have the right to exclude other people from it. In my view, such control flows from a right to speak for country and a spiritual necessity to protect country from harm and injury. The Girramay elders make the final decision about matters concerning country, with senior elders having more of a right to speak for country generally. In addition, family groups have an association with and have the responsibility to make decisions and care for a particular area within their country through *guwal* naming practices and long ancestral associations with

those areas. I understand this symbolic ownership encompasses the right to speak for country and the right to exclude.

[166] I consider that this right is prima facie established.

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 the right to:

(a) occupy the claim area;

(b) use the claim area;

(c) access the claim area;

(d) traverse the claim area;

(e) enjoy the claim area;

(h) camp on the claim area;

(i) erect structures on the claim area including those that are both temporary and permanent;

[167] The factual basis indicates that the predecessors resided on country, accessed and used country for various traditional purposes. The current claim group members speak of their use of country, visiting sacred sites, camping, and travelling over the application area for cultural purposes and many claim members have lived within the application area. They also speak of building shelters when they were out hunting — see for instance Attachment R2 at [16] and Attachment R3 at [30].

[168] It is my view that the factual basis material prima facie establishes that these rights are possessed pursuant to the traditional laws and customs of the native title claim group.

(j) hunt on the claim area;

(k) fish on the claim area;

(l) gather on the claim area;

(z) consume natural resources on the claim area;

(cc) harvest natural resources on the claim area;

(dd) construct material items from natural resources on the claim area including but not restricted to shields, baskets, bagu, and items of adornment;

(gg) practice traditional bush medicine on the claim area;

(hh) produce traditional bush medicines in the claim area;

(ii) consume traditional bush medicines in the claim area;

[169] Current claimants continue to hunt, fish and gather and use the natural resources in a traditional way. For instance, they hunt for wallabies, bush turkey, scrub hen eggs and pigeons and fish for black bream, eels, catfish, freshwater mussels and crabs — Attachment R2 at [17] – [18]. An elder says that when he and his children catch fish, they sit and eat them and thank the river for the fish — at [31]. They continue to make baskets using the natural resources and use

certain plants for medicinal purposes as was shown to them by their parents — Attachment R3 at [28] – [29] and [31].

[170] In my view, these rights are prima facie established under Girramay traditional laws and customs.

(m) light fires on the claim area for domestic purposes, including but not restricted to, cooking and warmth;

(n) light fires on the claim area for hunting purposes;

(o) light fires on the claim area for clearing vegetation and regenerating growth of natural resources;

[171] The factual basis refers to the claimants using fire in a traditional manner such as whilst camping to keep warm as well as for cooking fish and game — Attachment R2 at [16] and Attachment R3 at [22]. Fire is also used by the claimants to take the scales off fish, which they learnt from the 'old people' — Attachment R3 at [20].

[172] I consider that the factual basis material prima facie establishes that these rights are possessed pursuant to the traditional laws and customs of the Girramay People.

(p) conduct religious activities on the claim area;

(q) conduct religious ceremonies on the claim area;

(r) conduct spiritual activities on the claim area;

(s) conduct spiritual ceremonies on the claim area;

(t) conduct secular activities on the claim area;

(u) conduct secular ceremonies on the claim area;

(v) interact with the spirits and ancestral beings on the claim area;

(w) maintain places of importance under traditional laws and customs on the claim area;

(x) protect places of importance under traditional laws and customs on the claim area from physical harm;

(y) teach on the claim area the physical and spiritual attributes of the claim area;

[173] The factual basis indicates that claim members continue to talk about and demonstrate practices that were conducted during ceremonies by their predecessors. The importance of these gatherings are still taught to their children and grandchildren — Attachment F at [31]. The claimants continue to conduct ceremonies associated with the creation stories across different locations on country — at [33]. They believe their country is imbued with spiritual presence and they continue to acknowledge and speak to the spirits, conduct 'welcome to country' rituals and leave behind food to appease the spirits — at [22] and [26]. The claim members maintain and protect sites of importance so the spirits do not cause any harm — at [24] and [27]. The claimants learn about sites of significance and their spiritual connection to their traditional land from their elders and immediate predecessors.

[174] I am of the view that these rights are prima facie established pursuant to the traditional laws and customs of the native title claim group.

(aa) share natural resources on the claim area;

(bb) exchange natural resources on the claim area;

(ee) trade on the claim area;

(ff) carry out commercial activities on the claim area;

[175] The predecessors of the claim group would use the natural resources of country to make items such as baskets and they would exchange these with other local people for hooks and fishing lines. The current claimants continue to make baskets and they sell these on the claim area. The factual basis also refers to the claimants sharing food with family or other aboriginal people — Attachment R3 at [21].

[176] I consider that these rights are prima facie traditionally based.

(ll) bury claim group members on the claim area;

(mm) be buried on the claim area.

[177] The claimants have knowledge of sacred burial sites on the application area and speak of burying their predecessors on country and they themselves wish to also be buried on country — Attachment F at [15] and Attachment R3 at [36].

[178] In my view, this right is prima facie established pursuant to Girramay traditional laws and customs.

Rights prima facie not established

[179] I note that the provisions of s 190(3A) of the Act are available to the applicant if there is further information which would support a decision under that section to include rights that are not prima facie established on the Register.

(f) speak for the claim area;

(g) speak to the claim area;

[180] In *Ward HC*, the High Court was of the view that it may be accepted 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 term as a right to possess, occupy, use and enjoy land to the exclusion of all others — at [88].

[181] Justice Sundberg, in *Neowarra v State of Western Australia* [2003] FCA 1402, was of the view that 'the right to speak for country involves a claim to ownership' and can *only* be recognised in relation to areas of exclusive native title rights and interests — at [494]. I also note French J's comments in *Sampi v State of Western Australia* [2005] FCA 777, that the right to possess and occupy as against the whole world carries with it the right to speak for the land — at [1072].

[182] I note, however, that the Federal Court in n *Wandarang, Alawa, Marra & Ngalakan Peoples v Northern Territory* [2000] FCA 923 allowed by *consent* 'the right to speak for' in areas of non-excusive possession — at [3(b)]. In other determinations, the court has shown a willingness to uphold non-exclusive rights that exert a degree of exclusivity and control in situations where those rights are qualified to be against persons who are bound by the laws and customs of the

native title holders — see for instance *De Rose v South Australia* [2002] FCA 1342 at [553] and *Mundraby v Queensland* [2006] FCA 436 at [3(c)(ii)].

[183] I consider that the right to speak for country can usually be claimed in relation to areas where exclusive native title rights and interests can be exercised. I note, however, that the way this right has been framed also does not qualify it to be against other Aboriginal people. I am therefore of the view that these rights are not prima facie established pursuant to the claim group's traditional laws and customs.

(jj) inherit native title rights and interests in the claim area in accordance with traditional laws and customs;

(kk) dispose of native title rights and interests in the claim area in accordance with traditional laws and customs;

[184] I consider that the factual basis provides insufficient examples of observance of these rights by both the predecessors of the native title claim group and current members.

[185] In my view, the factual basis material is not sufficient to indicate that these rights are held under the laws and customs passed down through the generations to the claimants. I am therefore unable to be satisfied that these rights are prima facie established.

Conclusion

[186] As I am satisfied that at least one of the native title rights and interests claimed has been prima facie established, 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.

[187] The High Court's decision in *Yorta Yorta* and the Federal Court's decision in *Gudjala 2009* are of primary relevance in interpreting the requirements of s 190B(7). In the latter case, Dowsett J observed that it 'seems likely that [the traditional physical] connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs' — at [84]. In interpreting connection in the 'traditional' sense as required by s 223 of the Act, the members of the joint judgment in *Yorta Yorta* felt that:

> the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs … "traditional" in this context must be

understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty — at [86].

[188] I consider that for the purposes of s 190B(7), I must be satisfied of a particular fact or facts, from the material provided, that at least one member of the claim group has or had the necessary traditional *physical* association with the application area — *Doepel* at [18].

[189] I refer to the information above in relation to s 190B(5) of these reasons, which provide a sufficient factual basis supporting the assertion that the Girramay People acknowledge and observe the traditional laws and customs of the pre-sovereignty society.

[190] I note that the factual basis contains relevant information that describe a traditional physical association of the Girramay People with the application area, such as:

> Claimants today continue to harvest, use and manage the resources of Girramay country. Many Girramay people still live on the claim area and, therefore traverse it through, camping, hunting, fishing and gathering bush food, animals and medicine from their traditional country on a regular, reoccurring basis — Attachment F at [35].

[191] I consider further details can be found in the affidavit material from the two Girramay elders, as outlined in my reasons at s 190B(5) above.

[192] Given the above, and considering all of the information provided with the application, I am satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with the land or waters within the application area.

[193] 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, and

(b) either:

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

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

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

(3) If:

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

(b) either:

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

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

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

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

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

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

[194] 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.

Reasons for s 61A(1)

[195] The geospatial assessment states that no determinations of native title fall within the external boundaries of the application area. The results of my own search of the Tribunal's mapping database confirm that there is no actual overlap with any native title determination. It follows that the application is not made in relation to an area for which there is an approved determination of native title.

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

Reasons for s 61A(2)

[197] Schedule B states that the application does not cover any area where a previous exclusive possession act was done.

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

Reasons for s 61A(3)

[199] I am satisfied that the application does not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area that is, or has been, subject of a previous non-exclusive possession act, except to the extent that ss 47, 47A or 47B of the Act may apply — see Schedule B.

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

Conclusion

[201] In my view the application **does not** offend any of the provisions of ss 61A(1), (2) and (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.

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

Reasons for s 190B(9)(a)

[203] Schedule Q provides that the applicant claims no ownership of minerals, petroleum or gas wholly owned by the Crown.

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

Reasons for s 190B(9)(b)

[205] Schedule P indicates that the native title claim group does not claim exclusive possession of all or part of an offshore place.

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

Reasons for s 190B(9)(c)

[207] Schedule B provides that the application does not cover any area where native title has been otherwise extinguished, except to the extent that the extinguishment is required to be disregarded under ss 47, 47A and 47B.

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

Conclusion

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

[End of reasons]

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Girramay People #2
NNTT file no.	QC2015/010
Federal Court of Australia file no.	QUD741/2015

In accordance with ss 190(1) and 186 of the *Native Title Act 1993* (Cth), the following is to be entered on the Register of Native Title Claims for the above application.

Section 186(1): Mandatory information

Application filed/lodged with:

Federal Court of Australia

Date application filed/lodged:

21 August 2015

Date application entered on Register:

3 November 2015

Applicant:

As appears on the extract from the Schedule of Native Title Applications

Applicant's address for service:

As appears on the extract from the Schedule of Native Title Applications

Area covered by application:

As appears on the extract from the Schedule of Native Title Applications

Persons claiming to hold native title:

As appears on the extract from the Schedule of Native Title Applications

Registered native title rights and interests:

As follows:

1. In relation to land where there has been no prior extinguishment of native title or where s238 (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 the right to:
    (a) occupy the claim area;
    (b) use the claim area;
    (c) access the claim area;
    (d) traverse the claim area;
    (e) enjoy the claim area;
    (h) camp on the claim area;
    (i) erect structures on the claim area including those that are both temporary and permanent;
    (j) hunt on the claim area;
    (k) fish on the claim area;
    (l) gather on the claim area;
    (m) light fires on the claim area for domestic purposes, including but not restricted to, cooking and warmth;
    (n) light fires on the claim area for hunting purposes;
    (o) light fires on the claim area for clearing vegetation and regenerating growth of natural resources;
    (p) conduct religious activities on the claim area;
    (q) conduct religious ceremonies on the claim area;
    (r) conduct spiritual activities on the claim area;
    (s) conduct spiritual ceremonies on the claim area;
    (t) conduct secular activities on the claim area;
    (u) conduct secular ceremonies on the claim area;
    (v) interact with the spirits and ancestral beings on the claim area;

(w) maintain places of importance under traditional laws and customs on the claim area;

(x) protect places of importance under traditional laws and customs on the claim area from physical harm;

(y) teach on the claim area the physical and spiritual attributes of the claim area;

(z) consume natural resources on the claim area;

(aa) share natural resources on the claim area;

(bb) exchange natural resources on the claim area;

(cc) harvest natural resources on the claim area;

(dd) construct material items from natural resources on the claim area including but not restricted to shields, baskets, bagu, and items of adornment;

(ee) trade on the claim area;

(ff) carry out commercial activities on the claim area;

(gg) practice traditional bush medicine on the claim area;

(hh) produce traditional bush medicines in the claim area;

(ii) consume traditional bush medicines in the claim area;

(ll) bury claim group members on the claim area;

(mm) be buried on 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

Note: Natural resources includes but is not limited to ochres, clays, stones, sand, plants, fruits, grasses, bark and waters

[End of document]