

## Test for Registration

<b>Application name</b>	Gamilaraay People
<b>Name of applicant</b>	Darryl Hippi, Leroy Connors, Gary Saunders, Reginald McGrady, Deidre Flick
<b>Application made</b>	12 June 2017
<b>Federal Court of Australia No.</b>	QUD290/2017
<b>NNTT No.</b>	QC2017/006
<b>Date of Decision</b>	20 November 2017

### **Decision: Claim passes the test**

I have decided that the claim in the Gamilaraay People application satisfies all of the conditions in ss 190B and 190C of the *Native Title Act 1993 (Cth)*<sup>1</sup>. Therefore the claim must be accepted for registration and entered on the Register of Native Title Claims.<sup>2</sup>

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Heidi Evans, Practice Leader

*Delegate of the Native Title Registrar*

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<sup>1</sup> All legislative sections are from the *Native Title Act 1993 (Cth)* (the Act), unless I state otherwise.

<sup>2</sup> Sections 190A(6) and 190(1) of the Act.

### Cases cited:

*Corunna v Native Title Registrar* [2013] FCA 372 ('Corunna')  
*Griffiths v Northern Territory* [2007] FCAFC 178 ('Griffiths')  
*Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 ('Gudjala 2007')  
*Gudjala People #2 v Native Title Registrar* (2008) 171 FCR 317; [2008] FCAFC 157; ('Gudjala 2008')  
*Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 ('Gudjala 2009')  
*Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 ('Yorta Yorta')  
*Northern Territory v Doepel* (2003) 133 FCR 112; (2003) 203 ALR 385; [2003] FCA 1384 ('Doepel')  
*Sampi v State of Western Australia* [2005] FCA 777 ('Sampi')  
*Strickland v Native Title Registrar* (1999) 168 ALR 242; [1999] FCA 1530 ('Strickland')  
*Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 ('Wakaman')  
*Western Australia v Native Title Registrar* [1999] FCA 1591 ('WA v NTR')  
*Western Australia v Strickland* [2000] FCA 652 ('Western Australia v Strickland')  
*Western Australia v Ward* [2002] HCA 28 ('Ward')

### BACKGROUND

- [1] The application has been made on behalf of the Gamilaraay People and covers an area of land and waters in Queensland, bordered on the southern edge by the New South Wales-Queensland border. It is west of Bungunya, and south of St George. The Carnarvon Highway runs north to south roughly through the centre of the application area.
- [2] The Deputy Registrar of the Court gave a copy of the application and accompanying affidavits to the Native Title Registrar (Registrar) on 21 June 2017 pursuant to s 63. Given that the application was made on 12 June 2017 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.
- [3] If the claim in the application satisfies all the registration test conditions in ss 190B and 190C, then the Registrar must accept the claim for registration.<sup>3</sup> If it does not satisfy all the conditions, the Registrar must not accept the claim for registration.<sup>4</sup>
- [4] I have decided that the claim satisfies all of the registration test conditions and my reasons on each condition follow below.

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<sup>3</sup> See s 190A(6).

<sup>4</sup> See s 190A(6B).

## Registration Conditions about merits of the claim (s 190B)

### SECTION 190B – CONDITIONS MET

[5] I am satisfied the application meets the requirements of ss 190B(2)-(9).

### Identification of area subject to native title – s 190B(2): condition met

#### **Decision**

[6] For the reasons I outline below, I am satisfied the claim meets the requirements of s 190B(2). The information provided about the external boundary and internally excluded areas is sufficient to identify with reasonable certainty the particular land or waters over which native title rights and interests are claimed.

#### **What is needed to meet this condition?**

[7] To meet s 190B(2), the Registrar must be satisfied that the information and map contained in the application identify with reasonable certainty the ‘particular land and waters’ where native title rights and interests are claimed. The two questions for this condition are whether the information and map provides certainty about:

- (a) the external boundary of the area where native title rights and interests are claimed;<sup>5</sup> and
- (b) any areas within the external boundary over which no claim is made.<sup>6</sup>

#### **Does the information about the external boundary meet this condition?**

[8] Schedule B of the application refers to Attachment B as containing a description of the land and waters covered by the application. Attachment B is a metes and bounds description of the external boundary of the application area, referencing the Queensland-New South Wales border, rivers and creeks and coordinate points. The description specifically excludes three islands that are landward of the high water mark. It also specifically excludes the areas covered by the Bigambul People Part A determination (QUD101/2009), and the area covered by the Yuwaalaraay/Euahlayi People (QUD32/2017) and Gomeroi People (NSD2308/2011) native title determination applications.

[9] The map at Attachment C has been prepared by Queensland South Native Title Services and is dated February 2017. It includes:

- the application area depicted by a bold blue outline and stippled fill;
- a commencement point;
- topographic background with major towns labelled;
- scalebar, northpoint and coordinate grid; and
- notes relating to the source, currency and datum of data used to prepare the map.

[10] The National Native Title Tribunal’s (Tribunal) Geospatial Services prepared a geospatial assessment and overlap analysis (dated 26 June 2017) (geospatial assessment) analysing the information in Attachments B and C, and concluding that the written description and map are

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<sup>5</sup> See s 62(2)(a)(i).

<sup>6</sup> See s 62(2)(a)(ii); *Doepel* at [122].

consistent and identify the application area with reasonable certainty. Having considered that information before me, I agree with the assessment, that it allows for the boundary of the application area to be identified on the earth's surface, so that the 'particular land and waters' subject of the application can be known.

***Does the information about excluded areas meet this condition?***

[11] Schedule B contains a list of general categorised areas within the external boundary that are not covered by the application. That is, areas subject to types of interests in relation to the land that are excluded, such as areas subject to previous exclusive possession acts or areas where native title has otherwise been wholly extinguished.

[12] My view is that the general and categorical exclusion clauses set out in Schedule B provide reasonable certainty for the purposes of this condition.<sup>7</sup> It will be possible to work out any internally excluded areas affected by a previous exclusive possession act or other extinguishment once historical and current tenure searches are completed.<sup>8</sup>

**Identification of the native title claim group - s 190B(3): condition met**

***Decision***

[13] For the reasons below, I am satisfied that the claim meets the requirements of s 190B(3). The information within the application allows for the persons comprising the native title claim group to be identified with sufficient clarity.

***What is needed to meet this condition?***

[14] To meet s 190B(3), 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.

[15] The only question for this condition is 'whether the application enables the reliable identification of persons in the native title claim group': whether the claim has been made on behalf of the correct native title claim group is not relevant.<sup>9</sup>

***Does the description of the persons in the native title claim group meet this condition?***

[16] A description of the persons comprising the native title claim group appears at Schedule A of the application. From that description, it is my understanding that there are two criteria, both of which must be satisfied, in order for an individual to be accepted as a member of the Gamilaraay native title claim group. Firstly, the person must be a descendant of one of the 25 named apical ancestors or ancestor couples in Schedule A. Secondly, the person must 'identify and [be] recognised under the traditional laws and customs of the native title claim group as Gamilaraay'.

[17] The fact that ascertaining the persons who at any one point in time are members of the claim group would involve some research, or 'factual inquiry', in my view, does not prevent the

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<sup>7</sup> See *Strickland* at [50]-[55].

<sup>8</sup> See *Strickland* at [51]-[52].

<sup>9</sup> See *Doepel* at [51] and [37]; *Gudjala 2007* at [33].

description from being sufficiently clear for the purposes of this condition.<sup>10</sup> Application of the criteria to a particular individual would undoubtedly require gathering genealogical information, and information about the laws and customs of the group around group membership. I note that the description does not specify whether descent is restricted to biological descent, or whether adoption is included as a means of descent. However, again, in my view, I am satisfied that this information could be obtained through the appropriate research into the group's laws and customs. Having carried out this factual inquiry process, with the required information at hand, and by starting with one individual and applying the criteria, I am satisfied that the members of the group could be identified with sufficient clarity.

### Identification of claimed native title - s 190B(4): condition met

#### **Decision**

[18] I am satisfied the description in Schedule E is sufficient for me to clearly understand and identify the claimed rights as 'native title rights and interests.'

#### **What is needed to meet this condition?**

[19] To meet s 190B(4), the Registrar must be satisfied that the application's description of the claimed native title rights and interests is sufficient to allow the rights and interests to be readily identified. The question for this condition is whether the claimed rights are described clearly, comprehensively and in a way that is meaningful and understandable, having regard to the definition of the term 'native title rights and interests' in s 223(1) of the Act.<sup>11</sup>

[20] I have not undertaken an assessment of whether each individual right or interest satisfies that description, as it is my view that is a more appropriate task at the corresponding merit condition at s 190B(6), regarding whether the rights and interests can be established on a prima facie basis.

#### **Does the description of the native title rights and interests meet this condition?**

[21] The description that is the focus of this condition appears at Schedule E of the Form 1. The first paragraph describes a claim to a right of exclusive possession. That is, a claim to a right of possession, occupation, use and enjoyment of the application area 'to the exclusion of all others'. In my view, this broadly-termed right does not prevent the description satisfying this condition of the registration test.<sup>12</sup>

[22] Paragraph two of Schedule E includes a list of 16 non-exclusive rights and interests claimed in relation to those areas where an exclusive right cannot be recognised. Having read the contents of the description together, it is my view that the rights and interests claimed are clear and understandable as 'native title rights and interests'.

### Factual basis for claimed native title – s 190B(5): condition met

#### **Decision**

[23] For the reasons I outline below, I am satisfied the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support the assertion. In

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<sup>10</sup> See *WA v NTR* at [67].

<sup>11</sup> See *Doepel* at [99] and [123].

<sup>12</sup> See *Strickland* at [60].

particular, there is a sufficient factual basis for the three assertions of subsections 190B(5)(a), (b) and (c).

***What is needed to meet this condition?***

[24] To meet s 190B(5), the Registrar must be satisfied there is a sufficient factual basis to support the assertion that the claimed native title rights and interests exist. 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;
- (b) that there exist traditional law acknowledged by, and traditional customs observed by, the native title claim group that give rise to native title rights and interests; and
- (c) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[25] The question for this condition is whether the factual basis is sufficient to support these assertions. To answer that question, I must assess whether the asserted facts can support the existence of the claimed native title rights and interests, rather than determine whether there is ‘evidence that proves directly or by inference the facts necessary to establish the claim.’<sup>13</sup>

[26] Section 62(2)(e) requires only a ‘general description’ of the factual basis. However, where the facts provided are not at a sufficient level of detail to enable a genuine assessment of the application by the Registrar, the application may not be able to satisfy the condition. The material must comprise ‘more than assertions at a high level of generality.’<sup>14</sup>

[27] To satisfy the condition, the material must contain sufficient details addressing the particular native title, claimed by the particular native title claim group, over the particular land and waters of the application area.<sup>15</sup>

[28] Through reliance on the statements contained in the affidavits sworn by the applicant persons pursuant to s 62(1)(a) that accompany the application, that each deponent believes the statements contained in the application to be true, I have accepted the asserted facts as true.<sup>16</sup>

[29] The factual basis material appears in Attachment F and in an affidavit sworn by claim group member [name removed] at Attachment M.

***What is needed to provide a sufficient factual basis for s 190B(5)(a)?***

[30] To meet s 190B(5)(a), the factual basis must support the assertion that ‘the native title claim group have, and the predecessors of those persons had, an association with the area’. Generally on what is needed for the ‘association’ assertion:

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<sup>13</sup> *Doepel* at [16]-[17]; *Gudjala 2008* at [83] and [92].

<sup>14</sup> *Gudjala 2008* at [92].

<sup>15</sup> *Gudjala 2007* at [39].

<sup>16</sup> *Gudjala 2008* at [91] to [92].

- (a) it is not necessary for the factual basis to support an assertion that all members of the native title claim group have an association with the area at all times;<sup>17</sup>
- (b) it is necessary that the material is sufficient to support that the group as a whole presently has an association with the area and to also support an association with the area by the predecessors of the whole group over the period since sovereignty, or at least since European settlement;<sup>18</sup> and
- (c) the materials must support that the association both presently and by the group's predecessors relates to the area as a whole.<sup>19</sup>

***Is the factual basis sufficient for the assertion of s 190B(5)(a)?***

- [31] The condition is met. I am satisfied the factual basis is sufficient to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the application area. There is information of a sufficient level of detail and substance addressing the present association of members of the claim group with the area, and of the claim group's predecessors with the area over the period since sovereignty. This information is geographically particular to the land and waters of the claim area.
- [32] At s 190B(5)(a), the material must speak to an association of the predecessors of the group with the area over the period since sovereignty or European settlement.<sup>20</sup> Attachment F states that the application area has been occupied by the ancestors of the native title claim group from before 1788, including during European exploration and settlement of the area.<sup>21</sup> It's explained that the area was first explored in the 1830s, and settlement occurred during the 1840s to 1860s, with the establishment of pastoral stations in the region.<sup>22</sup>
- [33] Attachment F refers to historical and ethnographic sources which record the presence of Aboriginal people in the application area at the time of exploration and settlement. For example, it tells of Surveyor-General Sir Thomas Mitchell who travelled north along the Barwon River, and camped on the river north of Mungindi in 1831 to 1832.<sup>23</sup> Attachment F explains that one of Mitchell's party gathered a vocabulary list from a group of Aboriginal people who visited the camp, and that the language came to be called Gamilaraay.<sup>24</sup> Attachment F goes on to describe another trip taken by Mitchell, north up the Narran River to St George (just north of the border of the application area), and south through the application area via the Moonie River. During this expedition in 1845 to 1846, Attachment F states that Mitchell recorded a number of encounters with Aboriginal people, observing camps comprising huts made of branches, and smoke from camp fires.<sup>25</sup>
- [34] From the information contained in Attachment F, it is my understanding that the apical ancestors named in Schedule A, were persons who were present in the application area

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<sup>17</sup> *Gudjala 2007* at [52].

<sup>18</sup> *Gudjala 2007* at [51] and [52].

<sup>19</sup> *Corunna* at [35]-[39] and [42]-[44].

<sup>20</sup> *Gudjala 2007* at [51] and [52].

<sup>21</sup> At [2].

<sup>22</sup> At [2] and [9].

<sup>23</sup> At [5].

<sup>24</sup> At [5].

<sup>25</sup> At [6].

around the time of settlement in the area. Information about each ancestor, including their approximate date of birth, and their birthplace and/or places with which they were associated, is provided.<sup>26</sup> These birthdates range from the 1830s to the 1870s. The places with which these persons are said to have been associated include Mungindi, Boomi, Nindigully, Whalan Creek, Barwon River, Gil Gil Creek, Garah, Welbondonga Station, Tallwood, Thallon, Euraba, Boggabilla, St George and Kunopia. Using the Tribunal's iSpatial database, I have identified Mungindi, Nindigully, Thallon, the Barwon River and Tallwood as places within the external boundary of the application area. The remaining places are all within the vicinity of the application area, and many are adjacent to the boundaries of the area.

- [35] From this information, and noting above that the material provides settlement to have taken place in the 1840s to 1860s, it is my understanding the material asserts the apical ancestors as being persons who were physically present in the application area around the time of settlement. It follows that I consider the factual basis sufficient in supporting an association of the predecessors of the native title claim group with the area at settlement. Further, noting the information set out above from Attachment F regarding the Aboriginal persons speaking Gamilaraay in the application area recorded by early explorers, I am also satisfied the factual basis addresses an association of the predecessors with the area prior to settlement.
- [36] Regarding an association of the predecessors of the group with the area since settlement, Attachment F states that generations of Gamilaraay People have been born on, grown up on and worked on or in close proximity to, the application area.<sup>27</sup> It explains that by the late 1860s, many Aboriginal people in the application area had joined the pastoral station workforce as stockmen, shepherds and domestics, at various stations including Bullamon Plains Station, Talwood Station and Gradule Station.<sup>28</sup> It's my understanding that these stations were all within the application area, or in the vicinity of the area. Attachment F further states that this involvement of the predecessors of the claim group in the pastoral industry continued well into the second half of the twentieth century.<sup>29</sup>
- [37] Attachment F also provides that an Aboriginal reserve where Gamilaraay people were sent was established in 1912 at Euraba (slightly south of the application area). In 1927, it's explained that the reserve was moved to 'Old' Toomelah, and then again, it was relocated, to Gamilaraay country (in the locality of Boggabilla, on the Macintyre River, south east of the application area).<sup>30</sup>
- [38] Again, from this information, I understand the material to assert that the descendants of the apical ancestors, over the period since settlement, had a physical association with the application area, through their employment on the area and though living in reserves within the area. Specific examples of this association are given in the table within Attachment F, entitled 'Comparative table of instances of the exercise of native title rights and interests' (Comparative table). It states that Gamilaraay elder [name removed], great granddaughter of

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<sup>26</sup> At [24].

<sup>27</sup> At [33].

<sup>28</sup> At [36].

<sup>29</sup> At [34] and [36].

<sup>30</sup> At [37].

apical ancestors Eliza Weatherall and James McGowan, grew up in places within the application area, such as Nindigully, Ballangarry and Westharen Station on the Moonie River. It explains that her parents and grandmother [name removed] lived at Thallon, within the application area, and she would visit them regularly following her relocation to Brisbane as an adult.<sup>31</sup> In my view, this information supports a physical association of the predecessors of the group with the area across the generations since settlement.

[39] The Comparative table also includes information regarding an association of the members of the claim group today with the area. For example, it states that claimant [name removed] has lived and worked much of his life in and around Mungindi, Thallon (both within the application area) and St George (just north of the application area).<sup>32</sup> It also states that claimant, [name removed] takes people to see scar trees along the river at Nindigully.<sup>33</sup> In his affidavit, at Attachment M, [name removed] gives further information about time he spends on the application area today, including that he regularly travels to Nindigully to go fishing, and takes his grandson with him.<sup>34</sup> He also names various stations in, and in the vicinity of, the application area where he has worked throughout his life.<sup>35</sup>

[40] From this information, and that contained in Attachment F, I am satisfied the factual basis supports an association of the claim group today with the application area. In his affidavit, [name removed] explains that he knows where there are sacred places within the application area, and that there are certain behaviours and practices that must be observed in relation to these places to avoid any harm from spiritual forces in the landscape.<sup>36</sup> In this way, I understand the material to assert that this association is both physical and spiritual.

[41] In light of the above, I am satisfied the factual basis is sufficient to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the area.

***What is needed to provide a sufficient factual basis for s 190B(5)(b)?***

[42] To meet s 190B(5)(b), the factual basis must support the assertion ‘that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests’.

[43] The case law indicates the following is required of the material at s 190B(5)(b):

- information supporting the existence of a society of people living in the area at sovereignty, or at least European settlement, acknowledging laws and customs of a normative character;<sup>37</sup>

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<sup>31</sup> At pp. 30-31.

<sup>32</sup> At p. 31.

<sup>33</sup> At p. 36.

<sup>34</sup> At [14].

<sup>35</sup> At [10].

<sup>36</sup> At [25] to [31].

<sup>37</sup> *Gudjala 2007* at [63].

- an explanation of how the laws and customs of the claim group are ‘traditional’, that is, how they have been passed down through the generations to the claim group and how they are rooted in the laws and customs of a society at sovereignty;<sup>38</sup>
- an explanation of the link between the claim group described in the application and the area covered by the application, which may require identification of a link between the apical ancestors named in Schedule A, and the society at sovereignty;<sup>39</sup>
- evidence of the claim group’s acknowledgement and observance of laws and customs in relation to the claim area.<sup>40</sup>

***Is the factual basis sufficient for the assertion of s 190B(5)(b)?***

[44] I am satisfied the factual basis is sufficient to support the assertion at s 190B(5)(b). The material in support of the assertion contains information that speaks of a society in the area at settlement acknowledging and observing shared laws and customs, and of laws and customs of the native title claim group today that are rooted in those of the society at settlement. The information explains the link between the apical ancestors and the relevant society.

[45] The starting point at this condition must be the identification of an Indigenous society in the area at European settlement acknowledging and observing normative laws and customs.<sup>41</sup> Attachment F explains that the individuals comprising this society identified themselves through the language they spoke, Gamilaraay, however the language group was not itself a political entity. That is, rights and interests in the area were held at a local estate level, where each localised group enforced strict boundaries around its territory and hunting grounds.<sup>42</sup> Attachment F further explains that the Gamilaraay people at settlement were part of a broader regional society that spanned over a large part of New South Wales, and a lesser part of southwest Queensland.<sup>43</sup> A common system of laws and customs was shared by the neighbouring groups within this broader regional society, however, according to those laws and customs, only the Gamilaraay people held rights and interests in the application area.<sup>44</sup>

[46] In addition to this information about the society in the area at settlement, the factual basis material also contains information about the particular laws and customs acknowledged and observed by the Gamilaraay People at settlement. As explained in my reasons above at s 190B(5)(a), the material asserts settlement to have taken place over the period from the late 1840s to the 1860s. The Comparative table contains information taken from sources dated around this time, which in my view speak to normative laws and customs acknowledged and observed by the Gamilaraay People at settlement.

[47] For example, in the Comparative table, it’s stated that early explorer, Thomas Mitchell, in his travels through the area, was confronted by local Aboriginal people seeking to defend their boundaries from intrusion by Mitchell and his party. The Comparative table provides that at

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<sup>38</sup> *Yorta Yorta* at [46]; *Gudjala 2009* at [72].

<sup>39</sup> *Gudjala 2007* at [66] and [81].

<sup>40</sup> *Gudjala 2009* at [74].

<sup>41</sup> *Gudjala 2007* at [65] and [66].

<sup>42</sup> Attachment F at [11].

<sup>43</sup> Attachment F at [26].

<sup>44</sup> Attachment F at [27].

each new camp, Mitchell was required to acquire new guides who would take him to the edge of their own country and not further.<sup>45</sup> I consider this information to speak to laws and customs around rights and interests being held at a local level, and a requirement that permission be sought to enter another local group's area.

[48] As set out in the Comparative table, during his travels of the area in 1845 to 1846, Mitchell also recorded methods and techniques used by the local Indigenous people in accessing and using natural resources of the area. This includes methods associated with hunting for food, using plants as shelter when camping, and making fires for cooking while camping.<sup>46</sup>

[49] I consider the factual basis material supports a system of laws and customs acknowledged and observed by the Gamilaraay People at settlement in the area which also encompasses the following aspects:

- participation in ceremonies, including bora or initiation ceremonies;<sup>47</sup>
- practices around death and avoidance of places where someone has recently passed away;<sup>48</sup>
- decision-making structures, where senior men have significant authority in making decisions about country;<sup>49</sup>
- gatherings with neighbouring groups, including for fishing seasons, and for trade;<sup>50</sup>
- entitlement to the natural resources within one's localised landholding area;<sup>51</sup>
- respect and reverence for ceremonial or important sites.<sup>52</sup>

[50] In addition to this, Attachment F sets out a list of further aspects of the system of laws and customs of the society at settlement.<sup>53</sup> While not explicitly stated, it is my understanding that these aspects have been drawn from ethnographic sources relevant to the application area and/or the Gamilaraay People at settlement.

[51] In light of this information before me, I am satisfied the factual basis addresses an Indigenous society in the area at settlement, acknowledging and observing normative laws and customs. I consider these laws and customs 'normative', on the basis that the information details the practices or behaviours associated with those laws and customs.

[52] At s 190B(5)(b), it is necessary that the factual basis address the link between the apical ancestors from whom the claim group are descended, and the society at settlement in the area. In my view, the material is sufficient in explaining this link. Attachment F states that the Gamilaraay apical ancestors 'were born on or firmly associated with the application area around the time of practical sovereignty (late 1840s) and the decades that followed.'<sup>54</sup> As I

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<sup>45</sup> At p. 30.

<sup>46</sup> At p. 33.

<sup>47</sup> Attachment F at [24].

<sup>48</sup> See Comparative table, p. 33.

<sup>49</sup> See Comparative table, p. 34.

<sup>50</sup> See Comparative table, pp. 34, 36-37.

<sup>51</sup> Comparative table, pp. 31-32.

<sup>52</sup> Attachment F at [24].

<sup>53</sup> At [30].

<sup>54</sup> At [21].

have explained above in my reasons at s 190B(5)(a), from the information about each apical ancestor, it is my understanding that these persons were present in the area around the time of settlement. It follows that I accept the material to assert the apical ancestors were members of the society in the area at settlement, acknowledging and observing the normative laws and customs discussed above.

[53] The laws and customs acknowledged and observed by the members of the native title claim group presently are listed at [43] of Attachment F. Further detail regarding these laws and customs is given in the Comparative table, and in the affidavit of claim group member [name removed]. The question for me to consider is whether the material is sufficient in supporting *traditional* laws and customs acknowledged and observed by the claim group. That is, does the material speak to laws and customs that are rooted in those of the society at settlement?

[54] Traditional laws and customs are those that have been passed down through the generations by word of mouth and common practice.<sup>55</sup> In my view, the material speaks to the way in which this transfer of knowledge has occurred. For example, in his affidavit, claimant [name removed] explains:

My dad used to make fish traps and when the river would flood, the traps would fill up. Dad taught me how to make the traps. He was taught to do it by his old people. I've taught my son how to make them too.<sup>56</sup>

[55] The Comparative table also provides that elder [name removed] recalls her grandmother [name removed] teaching the kids, including herself, Gamilaraay language at the Sunday School at Thallon. A statement from [name removed] explains that once those kids got older, they taught their own children the language.<sup>57</sup> These examples are further supported by the information in Attachment F, which provides that the laws and customs of the Gamilaraay People have been 'passed down by traditional teaching through generations that precede the present generation of persons who comprise the claim group.'<sup>58</sup>

[56] In addition to this information addressing how laws and customs have been passed down through the generations, there are a number of examples in the material of a certain aspect of the laws and customs acknowledged and observed by the Gamilaraay society at settlement, being reflected in the laws and customs of the claim group today. In my view, these examples support an assertion of laws and customs that are rooted in those of the society at settlement.

[57] One example is in the material addressing how laws and customs have been passed down through the generations to the members of the claim group. Attachment F explains that one aspect of the laws and customs of the society at settlement was '[t]eaching of laws, spirituality and customs, usually by experienced and knowledgeable elders.'<sup>59</sup>

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<sup>55</sup> *Yorta Yorta* at [46].

<sup>56</sup> At [17].

<sup>57</sup> Comparative table, p. 37.

<sup>58</sup> Attachment F, p. 25.

<sup>59</sup> Attachment F, p. 26.

[58] A further example of the material I consider speaks to laws and customs rooted in those of the society at settlement is the information that relates to laws and customs about authority and decision-making structures. Attachment F provides that one aspect of the laws and customs of the society at settlement was ‘a system of decision-making whereby authority and decision-making power rested primarily with senior members of the Gamilaraay ... who attained those positions from a combination of age and seniority, ritual participation and knowledge, force of character and sometimes physical prowess.’<sup>60</sup> The information about each of the apical ancestors in the area at settlement also suggests there were authority structures in place within the Gamilaraay society. Attachment F provides that both apical ancestor Charles Cubby and his son [name removed] were described by Tindale as ‘King of Boomi’, and another apical ancestor, William (Billy) Wightman, was described by researcher in the area Mathews, as ‘King of Kunopia’.<sup>61</sup> Further, the Comparative table states that at settlement, ‘[d]ecision-making about a particular part of the research area was the prerogative of those individuals who had the right to speak for that country’.<sup>62</sup>

[59] The affidavit of [name removed] contains statements that I consider explain the operation of these laws and customs around decision-making today. [name removed] states:

A man called [name removed] came to see me just recently about a scar tree at Thallon. Apparently they want to build a bridge there and they need to cut the scar tree down so they can put in the bridge. [name removed] was doing a walk over country to look for artefacts for the people putting the bridge in. [name removed] told me about the tree because I have authority to speak for that country. It is important to me to protect our heritage. I told [name removed] that they couldn’t knock that tree down and they would have to move the bridge somewhere else.<sup>63</sup>

[60] From this statement, it is my understanding that [name removed] holds some particular authority when it comes to decisions by the group about what happens on their traditional country. It is further my understanding that other members of the claim group defer to [name removed] where decisions about country arise, and that this practice stems from a recognition and acknowledgement of [name removed]’s seniority. In my view, this practice reflects the aspect of the laws and customs of the society at settlement regarding the role of senior members of the Gamilaraay.

[61] Another example from the material of an aspect of the laws and customs of the society at settlement being reflected in the laws and customs of the claim group today is in the information about the knowledge of, and respect for, sacred and important sites. Attachment F explains that one of the apical ancestors, Billy Wightman, showed R. H. Mathews, a researcher in the area, a bora ground at Kunopia in 1901. Billy is described in Attachment F as a senior Gamilaraay man, who was one of the main organisers of the bora ceremony held near Gnoura Gnoura Creek (just outside the application area).<sup>64</sup> From this information, I understand that knowledge about country included knowledge of important sites and places within Gamilaraay country. These sites and places include those used by Gamilaraay people presently

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<sup>60</sup> At [30].

<sup>61</sup> At [24].

<sup>62</sup> At p. 34.

<sup>63</sup> At [25].

<sup>64</sup> At [24].

and those used in the past for ceremonial and other purposes. I further understand that maintenance of this knowledge rests with senior Gamilaraay people. I have inferred that maintenance and transmission of knowledge about important sites occurred pursuant to the laws and customs of the Gamilaraay ancestors at settlement.

[62] This aspect of the laws and customs of the society at settlement, in my view, is reflected in the information before me from members of the claim group today about normative practices within the group. For example, in his affidavit, claimant [name removed] states: ‘People come to me for knowledge about Gamilaraay and ask me to show them where the special places on country are’.<sup>65</sup> Elsewhere, he describes important sites he has knowledge of, including a sacred burial place, a women’s bora ring, a place where birthing trees are located, and the locations of scar trees.<sup>66</sup> [name removed] explains that his father showed him these places, and that he has shown his son some of these places.<sup>67</sup> From this information, I understand that this practice of senior Gamilaraay people maintaining and transmitting knowledge of important sites within the application area continues in the same way it did at settlement. Therefore, as above, I consider this supports an assertion of laws and customs that are rooted in those of the Gamilaraay society at settlement.

[63] In light of the examples provided above, therefore, I am satisfied that the factual basis is sufficient in supporting an assertion of traditional laws and customs. That is, laws and customs acknowledged and observed by the claim group today that are rooted in those of the society at settlement.

***What is needed to provide a sufficient factual basis for s 190B(5)(c)?***

[64] To meet s 190B(5)(c), the factual basis must support the assertion ‘that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.’

[65] The case law indicates the following matters must be addressed by the factual basis at this condition of the registration test:

- that there was a society at settlement that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed to the claim group;
- that there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement.<sup>68</sup>

***Is the factual basis sufficient for the assertion at s 190B(5)(c)?***

[66] I am satisfied the factual basis is sufficient to support the assertion at s 190B(5)(c).

[67] I have already set out above at s 190B(5)(b), the reasons for which I am satisfied the factual basis is sufficient to support an assertion of a society at settlement in the application area,

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<sup>65</sup> At [4].

<sup>66</sup> At [23], [27], [30].

<sup>67</sup> At [24].

<sup>68</sup> *Gudjala 2007* at [82].

acknowledging and observing laws and customs from which the laws and customs of the claim group today are derived. I have also set out at s 190B(5)(b), the material that speaks to the way in which these laws and customs have been passed down through the generations from settlement to the members of the claim group today.

- [68] Regarding continuity in the observance of Gamilaraay traditional laws and customs, Attachment F states, '[d]espite colonisation, which began in the 1830s, the Gamilaraay People (including their ancestors) have continued to acknowledge and observe their traditional laws and customs and maintain a traditional physical connection to the Application Area.'<sup>69</sup>
- [69] Attachment F goes on to provide facts in support of this statement. In particular, it's explained that generations of Gamilaraay people have been born on, have grown up on, and have worked on, or in close vicinity to, the application area.<sup>70</sup> The material provides that by the late 1860s many predecessors of the claim group were incorporated into the pastoral station workforce as stockmen, shepherds and domestics.<sup>71</sup> Particular stations located in and in the vicinity of the application area are identified, including Bullamon Station. It's explained that the predecessors of the claim group were able to live on their traditional lands within Aboriginal camps on the fringes of these stations or towns in the area.<sup>72</sup> Attachment F provides further information about an Aboriginal reserve where Gamilaraay predecessors were removed, located firstly at 'Old' Toomelah, and then within the locality of Boggabilla, in Gamilaraay country.<sup>73</sup>
- [70] From this information, it's my understanding that the members of the claim group and their predecessors, over the period since settlement, have maintained a physical presence on the application area. I consider there to be various examples of this physical presence on the area involving activities associated with acknowledging and observing traditional laws and customs.
- [71] For instance, I explain above in my reasons at s 190B(5)(b), the way in which the transmission of knowledge about country and laws and customs by Gamilaraay elders to younger generations is a key aspect of the system of traditional laws and customs. In the Comparative table, an elderly claimant explains how her grandmother taught Gamilaraay language to the kids (including herself) at the Sunday School at Thallon, and how those kids grew up to teach their own children the language.<sup>74</sup>
- [72] Another aspect of the traditional laws and customs discussed in my reasons at s 190B(5)(b) is the role of elders and decision-making structures. In his affidavit, claimant [name removed] explains the way his father and uncles – 'the old people' – passed knowledge to him about scar trees, including how to spot them, and where they were located.<sup>75</sup> [name removed]

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<sup>69</sup> At [32].

<sup>70</sup> At [33].

<sup>71</sup> At [34].

<sup>72</sup> At [36].

<sup>73</sup> At [37].

<sup>74</sup> At p. 37.

<sup>75</sup> At [24], [29].

explains that today, other members of the claim group come to him for knowledge about Gamilaraay and to ask him to show them the special places on country.<sup>76</sup>

[73] In my view, both these examples demonstrate how these practices and activities involved in the acknowledgment and observance of traditional laws and customs have been carried out across multiple generations, in an uninterrupted pattern. It follows that I am satisfied the factual basis supports an assertion of a system of laws and customs that has had a continuous existence and vitality since settlement, and one that has been acknowledged and observed by the group and its predecessors since settlement without substantial interruption.

### Prima facie case – s 190B(6): condition met

#### **Summary of findings for the ‘prima facie case’ condition**

[74] I consider that all of the claimed rights and interests have been established on a prima facie basis. Therefore, the claim satisfies the condition of s 190B(6).

#### **What is needed to meet this condition?**

[75] To meet s 190B(6), the Registrar ‘must consider that, prima facie, at least some of the native title rights and interests claimed can be established.’ I note the following comments by Mansfield J in relation to this condition:

- (a) it requires some measure of the material available in support of the claim;<sup>77</sup>
- (b) although s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed, this does not itself require some weighing of that factual assertion as that is the task required by s 190B(6);<sup>78</sup>
- (c) s 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed.<sup>79</sup>

[76] Mansfield J found that the use of the words ‘prima facie’ in s 190B(6) means that ‘if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis.’<sup>80</sup>

[77] Noting the definition of ‘native title rights and interests’ in s 223(1) of the Act, in order for me to consider a right or interest prima facie established, it must be shown to be a right or interest that is:

- (a) possessed under the traditional laws and customs of the native title claim group;<sup>81</sup>
- (b) a right or interest in relation to the land or waters of the application area;<sup>82</sup> and
- (c) not extinguished in relation to the entirety of the application area.<sup>83</sup>

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<sup>76</sup> At [4].

<sup>77</sup> *Doepel* at [126].

<sup>78</sup> *Doepel* at [127].

<sup>79</sup> *Doepel* at [132].

<sup>80</sup> At [135].

<sup>81</sup> Section 223(1)(a).

<sup>82</sup> Section 223(1)(b).

<sup>83</sup> Section 223(1)(c).

[78] Schedule E includes a claim to a right of exclusive possession, and a claim to 16 non-exclusive rights. Having considered the list of non-exclusive rights, it is my view that some of those rights are very similar in substance. That is, they involve the members of the claim group carrying out similar activities in relation to the land and waters of the application area. For that reason, I have grouped those similar rights together in my reasons below and considered the material in support of them collectively.

***Can a right of exclusive possession be established on a prima facie basis?***

[79] I consider the right, prima facie, established. I have before me information that speaks to the right of members of the group to speak for their traditional country, and to be asked permission by others for access to that country. This information is sufficient for me to consider the right established on a prima facie basis.

[80] To allow me to consider a right of exclusive possession established on a prima facie basis, as indicated by the case law, the material may need to address how, pursuant to their traditional laws and customs, the members of the claim group:

- speak for the area subject of the application;<sup>84</sup>
- are entitled to be asked permission when others seek to access the area subject of the application;<sup>85</sup>
- make decisions about the access to and use of the land by others;<sup>86</sup>
- are able to exclude from their country people not of their community;<sup>87</sup>
- act as gatekeepers for the purposes of preventing harm and avoiding injury to country.<sup>88</sup>

[81] The existence of the right depends on what the material reveals about its content under the laws and customs of the group. The material is not required to provide evidence in support of a right equivalent to a proprietary right.<sup>89</sup>

[82] Attachment F speaks to a right of this nature when it refers to ethno-historic sources that record observations of the practices and customs of the Gamilaraay People around the time of settlement. It provides that one author, Parker, ‘reported that the Gamilaraay had rules about permission to access resources in someone else’s local hunting ground,’<sup>90</sup> while the anthropologist Howitt, ‘recorded that local subdivisions of each tribe occupied separate portions of the tribal territory and disputes would occur if trespasses [took place] without permission.’<sup>91</sup>

[83] Reference is also made to the observations of the explorer Mitchell, travelling through the application area in 1845 to 1846. He noted that the Aboriginal people he came across

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<sup>84</sup> See *Ward* at [88].

<sup>85</sup> See *Ward* at [88].

<sup>86</sup> See *Sampi* at [1072].

<sup>87</sup> See *Griffiths* at [127].

<sup>88</sup> See *Griffiths* at [127].

<sup>89</sup> See *Griffiths* at [71].

<sup>90</sup> Attachment F at [12].

<sup>91</sup> Attachment F at [12].

'forcefully conveyed to him their ownership of the country,'<sup>92</sup> and that at each new camp, he was required to engage new guides, as the guides would only take his party as far as their traditional boundary.<sup>93</sup>

- [84] The various aspects of the laws and customs of the Gamilaraay People at settlement listed in Attachment F include '[a] permission system whereby under certain circumstances permission must be sought (from spirits and/or the living) to access country and its resources.'<sup>94</sup> This same aspect is described as part of the system of laws and customs acknowledged and observed by the claim group today, described in Attachment F.<sup>95</sup> A further aspect of the traditional laws and customs of the Gamilaraay is said to be punishment for transgressions of normative rules, served by both spiritual forces and/or fellow group members.<sup>96</sup>
- [85] The material contains information from claimants about the operation today of this permission system. One elderly claimant, [name removed], is said to assert that pursuant to Gamilaraay laws and customs, 'non-Gamilaraay people should ask permission to enter Gamilaraay land.'<sup>97</sup>
- [86] In his affidavit, claimant [name removed] explains that he has authority to speak for Gamilaraay country, and describes the way he implements his decision-making power in relation to cultural heritage within the application area.<sup>98</sup> His statements suggest that he adheres to these customs and practices due to a belief that wrong treatment of, or interference with, things from Gamilaraay ancestors on country (such as sacred sites or scar trees), is 'interfering with the spirits.'<sup>99</sup> From the material, I understand there to be a belief that punishment, brought by spiritual forces, will flow from such interference.<sup>100</sup>
- [87] From this information before me, I consider it clear that the members of the claim group and their predecessors, acknowledged and observed laws and customs that required those persons' permission to be sought before non-Gamilaraay people could access Gamilaraay country. It is also clear, in my view, that claimants and their predecessors considered punishment would flow from a failure to adhere to these laws and customs, including punishment served by spiritual forces within the application area. In this way, I consider the material speaks to how members of the group act as gatekeepers for the purposes of preventing harm and avoiding injury to country. Finally, the material addresses the way in which claim group members exercise a right to speak for the application area, including a right to make decisions about use of the area by others.
- [88] It follows that I consider the right to exclusive possession, prima facie, established.

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<sup>92</sup> Comparative table, p. 30.

<sup>93</sup> Comparative table, p. 30.

<sup>94</sup> Attachment F at [30].

<sup>95</sup> At [43].

<sup>96</sup> Attachment F at [30].

<sup>97</sup> Comparative table, p. 30.

<sup>98</sup> At [25].

<sup>99</sup> At [26].

<sup>100</sup> See affidavit of [name removed] at [27] to [28].

***Can non-exclusive rights to access, use and enjoy, move about, and enter and remain on, the area be established on a prima facie basis?***

[89] I consider these rights established on a prima facie basis. Being satisfied that there is sufficient material before me to support a right of exclusive possession, it follows that I also consider these non-exclusive rights prima facie established as they involve claim group members carrying out activities that are incidental to a right of exclusive possession. Notwithstanding this, the material contains sufficient information to allow me to consider the rights, prima facie, established.

[90] Attachment F explains the way in which the claim group and the group's predecessors, throughout the period since settlement, were able to maintain a physical presence on the application area, including by engaging in employment in the area.<sup>101</sup> It is clear that many claim group members continue to live within and spend time on the application area.<sup>102</sup>

[91] The Comparative table contains various examples of information that speaks to these rights, exercised by the Gamilaraay at settlement, and by the claim group today. For example, it provides that Mitchell encountered Gamilaraay predecessors in the area in his travels in 1845 to 1846. He observed these people camping in the area, travelling through the area, and using the resources of the area.<sup>103</sup> Regarding the exercise of these rights since that time, the table provides that Gamilaraay elder [name removed] grew up in and around the application area, at places such as Nindigully, Ballangarry and Westharen Station on the Moonie River. It explains how she continued to visit the application area even once she relocated to Brisbane as an adult, returning to see her parents and her grandmother who lived at Thallon.<sup>104</sup>

[92] In light of this material before me, I consider these rights established on a prima facie basis.

***Can non-exclusive rights to camp and erect shelters on be established on a prima facie basis?***

[93] I consider these rights established on a prima facie basis. The material before me speaks to these rights being exercised by the claimants' predecessors and by the members of the claim group today, such that I consider the material to support these rights as possessed pursuant to traditional laws and customs.

[94] An example of the material before me that speaks to these rights is in Attachment F, where, as above, it's explained that Mitchell observed the Gamilaraay predecessors camping in the application area. An example of the material addressing the exercise of this right today is in the affidavit of [name removed], where [name removed] explains that he would go camping as a child with his father and uncles, and how he was taught 'a lot of things about how to live out in the bush', including how to build shelters out of tree branches.<sup>105</sup>

[95] In light of this information before me, I consider these rights, prima facie, established.

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<sup>101</sup> Attachment F at [33] to [36].

<sup>102</sup> Attachment F at [38] to [39].

<sup>103</sup> See at pp. 30, 33.

<sup>104</sup> At pp. 30-31.

<sup>105</sup> At [21] to [22].

***Can non-exclusive rights to hold meetings, participate in cultural and spiritual activities, and conduct ceremonies and rituals on the area be established on a prima facie basis?***

[96] I consider these rights established on a prima facie basis. The material speaks to each of these rights and the way the claimants and their predecessors have exercised the rights pursuant to the traditional laws and customs of the group.

[97] The Comparative table contains information taken from ethno-historical sources that record gatherings of the predecessors of the claim group around the time of settlement, including for bora ceremonies and corroborees.<sup>106</sup> It also contains information that speaks to cultural and spiritual activities carried out on the application area by the claim group today. For example, in the table, this statement from senior claimant [name removed] appears: ‘We still smoke country.. to let the spirits know we’re friends. Just to be respectful. If they are restless. If you are going to camp, let them know not to be alarmed. And we feel settled.’<sup>107</sup>

[98] Therefore, I consider that there is information before me regarding the exercise of these rights by the predecessors of the group at settlement, and by the claim group presently. I understand, therefore, that these rights have been passed down through the preceding generations to the claim group, pursuant to traditional patterns of transmitting knowledge.

[99] The rights are prima facie established.

***Can non-exclusive rights to hunt and fish on the area be established on a prima facie basis?***

[100] I consider these rights established on a prima facie basis. The material contains information that speaks to the existence of each of these rights, and indicates that claimants today exercise the rights in the same way their predecessors did before them. I consider, therefore, the material to address the rights as rights held pursuant to the traditional laws and customs of the group.

[101] The Comparative table refers to historical sources that speak about the Gamilaraay predecessors hunting and fishing in the application area. These sources explain that there were strict rules around trespassing onto another local group’s hunting grounds.<sup>108</sup>

[102] The Comparative table also contains information about the way members of the claim group today exercise these rights, and exercised these rights as children, accompanied and instructed by their elders. For example, it states that claimant [name removed] recalls fishing and hunting with his grandmother while growing up on the application area, and hunting traditional game such as goanna and porcupine with his uncle.<sup>109</sup>

[103] In light of this information before me, I consider these rights, prima facie, established.

***Can a non-exclusive right to gather and use natural resources of the application area be established on a prima facie basis?***

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<sup>106</sup> See at pp. 36-37.

<sup>107</sup> At p. 37.

<sup>108</sup> At pp. 31-32.

<sup>109</sup> At p. 31.

[104] I consider this right established on a prima facie basis. The material speaks to the exercise of this right by the claimants' predecessors around the time of settlement, and by members of the claim group today.

[105] The Comparative table contains an excerpt from Mitchell, who recorded the Gamilaraay predecessors' use of various resources of the application area, including the seeds of a particular grass to make a paste or bread.<sup>110</sup> The table also describes how claimants gather juice from the quinine tree. One claimant explains that he would drink the juice frequently to assist with cramps he suffered while working as a shearer.<sup>111</sup> In my view, the material clearly asserts both the Gamilaraay predecessors and the claimants consider themselves to possess a right to access and use the natural resources within their traditional country.

[106] In light of this information before me, therefore, I consider the right, prima facie, established.

***Can a non-exclusive right to have access to and use the natural water resources of the application area be established on a prima facie basis?***

[107] I consider this right, prima facie, established. The material contains information which explains the exercise of this right by the claim group and its predecessors. From this, I accept that the right is held pursuant to the traditional laws and customs passed down to the claimants by their predecessors.

[108] The Comparative table refers to a historical source that recorded a large gathering of Gamilaraay for a bora ceremony on Redband Creek. The source explains that the participants camped by the creek, and refers to the need for water as influencing the location of the ceremony.<sup>112</sup> Elsewhere, the table explains one Gamilaraay elder's recollection of a flooding event when she was living at Thallon as a child. The claimant is said to recall her grandmother going to the weir down on the Moonie River and carrying water back to their home on a yoke.<sup>113</sup>

[109] In light of this information before me, I consider the right prima facie, established.

***Can a non-exclusive right to share and exchange resources derived from the land and waters within the area be established on a prima facie basis?***

[110] I consider the right established on a prima facie basis. The material speaks to this right being exercised by the predecessors of the claim group pursuant to the laws and customs of the group, and indicates that patterns of sharing and trading continue today.

[111] The Comparative table refers to a historical source that documents trade routes across the region that includes the application area. The table also refers to E. M. Curr who recorded his observations in 1886 of the Gamilaraay possessing and utilising shell ornaments they had obtained through trade with northern and north-western neighbouring groups. The table

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<sup>110</sup> At pp. 33-34.

<sup>111</sup> At p. 35.

<sup>112</sup> At pp. 32-33.

<sup>113</sup> At p. 32.

further explains that one of the resources most frequently shared and traded by the members of the claim group is the leaves of the quinine tree, known as Gumbi Gumbi.<sup>114</sup>

[112] In light of this information, I consider the right, prima facie, established.

***Can a non-exclusive right to maintain and protect places of importance in the area be established on a prima facie basis?***

[113] I consider the right established on a prima facie basis. The material gives an example of how the right is exercised by members of the claim group today and indicates that the right has been passed down to members of the claim group by their predecessors in accordance with traditional laws and customs.

[114] In his affidavit, claimant [name removed] states:

The scar trees are used for cutting shields, coolamons (to carry the babies in) and for carrying food. You can see where they would cut the bark off. You can tell a scar tree because you can see where the bark has been chopped off years ago and the bark has grown over it. My Dad showed me that when I was younger. I have showed my son too but he is always up me for telling people because we need to keep that information protected.<sup>115</sup>

[115] In a further statement, [name removed] explains how he sought to prevent a scar tree from being cut down due to proposed development.<sup>116</sup> From these statements, I understand that the right to protect and maintain important places is one that has been passed down through the generations pursuant to traditional patterns of transmitting knowledge. It follows that I consider the right, prima facie, established.

***Can a non-exclusive right to transmit traditional knowledge to members of the claim group on the area be established on a prima facie basis?***

[116] I consider the right, prima facie, established. The material speaks to the way claimants and their predecessors have spent time on country, teaching younger generations about places and objects within the application area, among other aspects of traditional knowledge.

[117] The Comparative table provides that an elder of the claim group recalls her grandmother teaching the kids at the Sunday School in Thallon (within the application area), Gamilaraay language. The table quotes the claimant: ‘...As we got older we naturally taught our own children and I hope that their kids will learn language as they go along.’<sup>117</sup> [name removed] in his affidavit explains that he has been taught certain things about country and how to relate to it by ‘all the old people’.<sup>118</sup> He states that ‘[t]hey taught me how to find the rub marks where the old people used to rub their axes on the trees along the Moonie River.’<sup>119</sup>

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<sup>114</sup> At pp. 34-35.

<sup>115</sup> At [24].

<sup>116</sup> At [25].

<sup>117</sup> At p. 37.

<sup>118</sup> At [27] to [29].

<sup>119</sup> At [29].

[118] From this information, I understand that this teaching technique is one that has been repeated throughout the generations preceding the claim group, and that the right to transmit knowledge is therefore a right possessed under the traditional laws and customs of the group. I consider it prima facie established.

### Physical connection – s 190B(7): condition met

#### **Decision**

[119] The condition is met. I am satisfied that at least one member of the native title claim group currently has or previously had, a traditional physical connection with some part of the claim area.

#### **What is needed to meet this condition?**

[120] To meet s 190B(7), the Registrar ‘must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application.’<sup>120</sup>

[121] The following principles have emerged from the case law about what is required at s 190B(7):

- The material must satisfy the delegate of particular facts;
- Evidentiary material is, therefore, required; and
- The focus is confined to the relationship of at least one member of the native title claim group with some part of the claim area;<sup>121</sup>
- The physical connection must be shown to be in accordance with the traditional laws and customs of the claim group;<sup>122</sup>
- The material may need to address an actual presence on the area.<sup>123</sup>

[122] Noting the wording of s 190B(7), I have focused my attention at this condition on the material relating to one particular claim group member. That claim group member is [name removed].

[123] The affidavit sworn by [name removed] on 26 May 2017 contains the following information about the deponent:

- he was born at St George (just north of the application area);<sup>124</sup>
- he is a descendant of apical ancestors William Hilbert Saunders and William (Billy) Wightman;<sup>125</sup>
- he knows where the special places on country are and people come to him for this information;<sup>126</sup>
- throughout his life he has worked, fencing and shearing, on stations within the application area, including Talwood Station and Bullamon Plains Station;<sup>127</sup>

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<sup>120</sup> See s 190B(7)(a).

<sup>121</sup> *Doepel* at [17].

<sup>122</sup> *Gudjala 2007* at [89].

<sup>123</sup> *Yorta Yorta* at [184].

<sup>124</sup> Affidavit of [name removed] at [1].

<sup>125</sup> At [2].

<sup>126</sup> At [4].

- he travels regularly to go fishing at Nindigully (within the application area);<sup>128</sup>
- he used to go ‘roo shooting’, hunting and fishing all along the Moonie River (within the application area);<sup>129</sup>
- he was taught how to make fish traps by his father, who was taught by ‘his old people’;<sup>130</sup>
- he has passed on knowledge about the location of scar trees to his son;<sup>131</sup>
- he was taught by particular ‘old people’ things about Gamilaraay country, including the location of sacred places and places where Gamilaraay ancestors spent time, how to respect ancestor spirits in the area, and ways to access and use resources in the area;<sup>132</sup>
- he has taken action to prevent damage to important sites and objects within the application area.<sup>133</sup>

[124] From this information, it is clear that [name removed] is a member of the native title claim group, as a descendant of two of the Gamilaraay apical ancestors named in the description of the group in Schedule A. It is also clear that he has spent considerable time within the application area, throughout his life, working and camping, fishing and hunting within the area. It follows that I am satisfied he has a physical connection with some part of the application area.

[125] From the information, I am also satisfied that this connection is pursuant to the traditional laws and customs of the Gamilaraay. In my reasons above at s 190B(5)(b), I explain the way in which the factual basis supports an assertion of the role of elders in decision-making about country as an aspect of the system of traditional laws and customs of the Gamilaraay.<sup>134</sup> In my view, this aspect can be seen in the information about [name removed] and his connection with the application area. In his affidavit he provides a specific example of how another member of the claim group deferred to [name removed]’s authority regarding a proposal to knock down a scar tree on Gamilaraay country to make way for a bridge development. [name removed] explains that he speaks for that country and describes the way he exercised his decision-making power in that context.<sup>135</sup>

[126] I consider, therefore, that the material supports [name removed]’s connection with the application area as one that is pursuant to the traditional laws and customs of the Gamilaraay. It follows that I am satisfied that at least one member of the claim group has a traditional physical connection with some part of the application area.

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<sup>127</sup> At [10].

<sup>128</sup> At [12].

<sup>129</sup> At [13].

<sup>130</sup> At [17].

<sup>131</sup> At [24].

<sup>132</sup> At [27] to [29].

<sup>133</sup> At [25].

<sup>134</sup> See at [58] to [60].

<sup>135</sup> At [25].

## No failure to comply with s 61A – s 190B(8): condition met

### Decision

[127] Based on the information referred to in the table below, I have formed the view that the application satisfies the requirement at s 190B(8) as there is nothing before me to indicate that the application should not have been made because of s 61A.

Requirement	Information addressing requirement	Met/ Not met
s 61A(1) no native title determination application if approved determination of native title	Geospatial assessment dated 26 June 2017, GeoTrack: 2017/0948	Met. There is no approved determination of native title for the application area.
s 61A(2) claimant application not to be made covering previous exclusive possession over areas	Schedule B, paragraphs 2 and 3	Met. Schedule B expressly excludes any areas subject to interests listed in the definition of 'previous exclusive possession act' in s 23B.
s 61A(3) claimant applications not to claim certain rights and interest in previous non-exclusive possession act areas	Schedule E, paragraph 1	Met. Schedule E states exclusive possession is claimed only where it can be recognised, being areas where there is no prior extinguishment.

### What is needed to meet this condition?

[128] To meet s 190B(8), 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.'

[129] This section provides that applications must not be made:

- (a) over areas already covered by an approved determination of native title;<sup>136</sup>
- (b) over areas where a previous exclusive possession act attributable to the Commonwealth or a State or Territory was done;<sup>137</sup>
- (c) which claim exclusive possession, occupation, use and enjoyment in relation to areas where a previous non-exclusive possession act was done and is attributable to the Commonwealth or a State or Territory.<sup>138</sup>

<sup>136</sup> See s 61A(1).

<sup>137</sup> See s 61A(2).

## No extinguishment etc. of claimed native title – s 190B(9): condition met

### Decision

[130] Based on the information referred to in the table below, I am satisfied that the application meets the requirement at s 190B(9).

Requirement	Information addressing requirement	Met / Not met
(a) no claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q	Met. Schedule Q states the application does not claim ownership of these things wholly owned by the Crown.
(b) exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P	Met. Schedule P states the application does not include an exclusive claim to an offshore place.
(c) native title rights and/or interests in the application area have otherwise been extinguished	Schedule B, paragraph 2 b.	Met. Schedule B excludes areas in relation to which native title rights and interests have been wholly extinguished.

### What is needed to meet this condition?

[131] To meet s 190B(9), ‘the application and accompanying documents must not disclose and the Registrar must not otherwise be aware, that:

- (a) to the extent that the native title rights and interests claimed consist of or include ownership of minerals, petroleum or gas—the Crown in right of the Commonwealth, a State or Territory wholly owns the minerals, petroleum or gas; or
- (b) to the extent that the native title rights and interests claimed relate to waters in an offshore place—those rights and interests purport to exclude all other rights and interests in relation to the whole or part of the offshore place; 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(2), 47A(2) or 47B(2)).’

## Registration conditions about procedural requirements of the claim (s 190C)

### SECTION 190C – CONDITION MET

[132] I am satisfied the application meets the requirements of ss 190C(2)-(4).

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<sup>138</sup> See s 61A(3).

## Information etc. required by sections 61 and 62 – s 190C(2): condition met

### **Decision**

[133] I have examined the application and I am satisfied that it contains the prescribed information and is accompanied by the prescribed documents, as noted in the table below.

<b>Condition</b>	<b>Location of information in application</b>	<b>Met/Not met</b>
s 61(1) Native title claim group	Schedule A	Met
s 61(3) Name and address for service	Part B	Met
s 61(4) Native title claim group named/described	Schedule A	Met
s 62(1)(a) Affidavits in prescribed form	Annexure to the application	Met
s 62(2)(a) Information about the boundaries of the area	Schedule B, Attachment B	Met
s 62(2)(b) Map of external boundaries of the area	Attachment C	Met
s 62(2)(c) Searches	Schedule D	Met
s 62(2)(d) Description of native title rights and interests	Schedule E	Met
s 62(2)(e) Description of factual basis:	Attachment F	Met
s 62(2)(f) Activities	Schedule G	Met
s 62(2)(g) Other applications	Schedule H	Met
s 62(2)(ga) Notices under s 24MD(6B)(c)	Schedule HA	Met
s 62(2)(h) Notices under s 29	Schedule I	Met

### **What is needed to meet this condition?**

[134] To meet s 190C(2), the Registrar must be satisfied that the application contains all of the details and other information, and is accompanied by any affidavit or other document, required by ss 61 and 62.

### **Does the application contain the prescribed information and is it accompanied by prescribed documents?**

[135] The application meets this condition because it contains the prescribed details and other information, as set out in the following reasons.

***Applications that may be made: s 61(1)***

[136] This section provides that a native title determination application may be made by ‘a person or persons authorised by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group’.

[137] It is only where, on the face of the application, it appears that the group described is a sub-group, or part only, of the actual native title claim group that the application will fail to meet this condition.<sup>139</sup>

[138] A description of the persons comprising the native title claim group appears at Schedule A. Having considered that description, on its face, there is nothing to indicate that it seeks to exclude persons, or that it describes only a sub-group of the actual native title claim group.

***Applicant’s name and address for service: s 61(3)***

[139] This information is provided at Part B of the Form 1.

***Applications authorised by persons: s 61(4)***

[140] This section provides that a ‘native title determination application that persons in a native title claim group authorise the applicant to make must: (a) name the persons; or (b) otherwise describe the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons’.

[141] The task here is merely to determine that the persons are named or a description provided. The question of whether those details are sufficient is the task of the corresponding merit condition in s 190B(3).<sup>140</sup> I am not to consider the correctness of the information provided.<sup>141</sup>

[142] As above, Schedule A contains a description of the persons in the native title claim group.

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

[143] This section requires the application to be accompanied by an affidavit in the prescribed form sworn by the applicant addressing the five matters in s 62(1)(a)(i)-(v).

[144] Five affidavits, one sworn by each of the five persons who comprise the applicant, accompany the application. The affidavits are all signed and dated and have been competently witnessed. The affidavits contain identical statements addressing the matters prescribed by ss 62(1)(a)(i)-(v).

***Information about the boundaries of the area covered by the application and any areas within those boundaries not covered and map showing the boundaries: s 62(2)(a) & (b)***

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<sup>139</sup> *Doepel* at [36].

<sup>140</sup> *Gudjala 2007* at [31] – [32].

<sup>141</sup> *Wakaman* at [34].

[145] Section 62(2)(a) requires firstly, that there be information to identify the boundary of the application area; and secondly, information to identify any areas within those boundaries that are not covered by the application.

[146] Information about the boundaries of the area covered by the application is at Attachment B. Information about any areas within those boundaries not covered by the application is at Schedule B. A map showing the external boundary of the application area is at Attachment C.

***Searches of any non-native title rights and interests carried out: s 62(2)(c)***

[147] This section requires the details of all searches of non-native title rights and interests carried out by or on behalf of the native title claim group.

[148] Schedule D states that no searches have been carried out.

***Description of native title rights and interests claimed in relation to particular land or waters: s 62(2)(d)***

[149] This section requires a description of the claimed native title rights and interests and it cannot merely be a general statement that the rights and interests are all those that might exist, or those that have not been extinguished at law.

[150] Schedule E contains a description of the claimed native title rights and interests. The description does not merely consist 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.

***General description of factual basis for assertion that native title exists: s 62(2)(e)***

[151] Section 62(2)(e) requires a general description of the factual basis for the three assertions in ss 62(2)(e)(i)-(iii) (which broadly speaking, relate to association, traditional laws and customs and continuing to hold native title).

[152] The description is contained in Attachments F and M.

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

[153] Section 62(2)(f) requires details of any activities currently carried out by the native title claim group in relation to the application area.

[154] Schedule G contains this information.

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

[155] This section requires details of any other applications (to the High Court, Federal Court or a recognised State/Territory body) that seek a determination of native title or compensation in relation to the whole or part of the claim area, of which the Applicant is aware.

[156] Schedule H contains this information.

***Future act notices: ss 62(2)(ga) and (h)***

[157] Section 62(2)(ga) requires details of any s 24MD(6B)(c) notifications relating to the whole or part of the claimed area of which the applicant is aware. Schedule HA contains this information.

[158] Section 62(2)(h) requires details of any section 29 notifications relating to the whole or part of the claimed area of which the Applicant is aware. Schedule I contains this information.

### No previous overlapping claim group - s 190C(3): condition met

#### **Decision**

[159] For the reasons below, my conclusion is that the requirement is met. I am satisfied that no person included in the native title claim group for the current application was a member of the claim group for a previous application.

#### **What is needed to meet this condition?**

[160] To meet s 190C(3), the Registrar ‘must be satisfied that no person included in the native title claim group for the application (the **current application**<sup>142</sup>) was a member of a native title claim group for any previous application’. To be a ‘previous application’:

- (a) the application must overlap the current application in whole or part;
- (b) there must be an entry for the claim in the previous application on the Register of Native Title Claims when the current application was made; and
- (c) the entry must have been made or not removed as a result of the previous application being considered for registration under s 190A.

[161] It is only where there is an application meeting all three criteria at s 190C(3), that is, a ‘previous application’, that the requirement for me to consider the possibility of common claimants is triggered.<sup>143</sup>

[162] The geospatial assessment provides that there are no applications that overlap any part of the current application area. As the first criterion is not satisfied, there is no need for me to consider the remaining criteria. The requirement is met.

### Certification or authorisation - s 190C(4): condition met

#### **Decision**

[163] The claim satisfies the requirement at s 190C(4)(a), as it has been certified by each representative body that can certify the application.

#### **What is needed to meet this condition?**

[164] To meet s 190C(4), the Registrar must be satisfied that either of the following is the case:

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<sup>142</sup> Emphasis in original.

<sup>143</sup> See *Western Australia v Strickland* at [9].

- (a) the application has been certified by all representative Aboriginal/Torres Strait Islander bodies that could certify the application in performing its functions;<sup>144</sup> 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.<sup>145</sup>

[165] Schedule R provides that the application is certified. Therefore, it is the requirement at s 190C(4)(a) of which I must be satisfied.

[166] The requirement is that I am satisfied of the fact of certification by an appropriate representative body.<sup>146</sup> This is a two-pronged test. Firstly, does the representative body who certified the application have the appropriate powers to certify? And secondly, does the certification comply with s 203BE(4)?

***Does the representative body have the power to certify?***

[167] The geospatial assessment confirms that there is only one representative body in relation to the application area, namely, Queensland South Native Title Services (QSNTS). A copy of a certificate titled 'Certification of Native Title Determination Application Gamilaraay People', signed by the Chief Executive Officer of QSNTS and dated 11 April 2017 accompanies the application at Attachment R.

[168] The certificate states that QSNTS is a body funded under s 203FE(1) for the purpose of performing the functions of a representative body. The certificate also provides that the CEO is a duly appointed executive officer of QSNTS who has been delegated the function to certify the application. From this information, I understand the certificate to assert QSNTS to be a body funded to perform the functions of a representative body, including the function to certify native title determination applications.

[169] The Tribunal's national 'Representative Aboriginal and Torres Strait Islander Body Areas' map, on the Tribunal's website, confirms the status of QSNTS as a body funded pursuant to s 203FE(1) to perform the functions of a representative body. From this information, and that contained in the certificate, I am satisfied that QSNTS is an appropriate body who can certify the application.

***Does the certificate comply with s 203BE(4)?***

[170] The certificate complies with s 203BE(4).

[171] The second element of the requirement at s 190C(4)(a) is that the certificate must comply with s 203BE(4). That provision requires that the certificate:

- (a) include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs (2)(a) and (b) have been met;<sup>147</sup> and

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<sup>144</sup> See s 190C(4)(a).

<sup>145</sup> See s 190C(4)(b).

<sup>146</sup> *Doepel* at [78].

<sup>147</sup> See s 203BE(4)(a).

- (b) briefly set out the body's reasons for being of that opinion;<sup>148</sup> and
- (c) where applicable, briefly set out what the representative body has done to meet the requirements of subsection (3).<sup>149</sup>

[172] The certificate contains the statement required by s 203BE(4)(a). It appears in paragraphs 2-4 of the certificate.

[173] Following the required statement, the certificate sets out seven paragraphs identified as the 'reasons' for which QSNTS is of the opinion stated, as required by s 203BE(4)(b). While these paragraphs address in some detail the process involved in ensuring 'all the persons in the native title claim group have authorised the applicant to make the application' (as per s 203BE(2)(a)), the certificate does not address the process involved in QSNTS making 'all reasonable efforts... to ensure that the application describes or otherwise identifies all the other persons in the native title claim group' (as per s 203BE(2)(b)).

[174] The certificate does, however, provide some information which allows me to infer what may have been involved in this process. Paragraph 4. a) provides that an information session was held in March in Goondiwindi (in the vicinity of the application area) 'to assist the members of the proposed native title claim group prepare for the Authorisation Meeting'. Noting the use of the word 'proposed', it is my understanding that at that point in time, a final decision regarding the persons comprising the native title claim group, and how those persons should be described for the purposes of the claim, was yet to be made.

[175] I have inferred, therefore, that the composition of the claim group was one of the topics of discussion at the information session. I have also inferred that QSNTS, as the representative body for the area, would have presented information to the attendees on this topic. This may have included anthropological research, and research and oral history obtained from persons asserting to hold native title rights and interests in relation to the application area.

[176] The certificate also provides that the information session was widely advertised, with public notices placed in four newspapers circulating in, or relevant to, the application area. From this, I accept that persons who claimed to hold native title in the application area would have contacted QSNTS in response to that notice.

[177] Consequently, while not stated and explained in the certificate, from the information included in the certificate about the lead up to the filing of the application, I have inferred that certain actions were taken by QSNTS in 'making all reasonable efforts to ensure the application describes or otherwise identifies all the other persons in the native title claim group'. As stated in paragraph 4. g) of the certificate, as the officer appointed to certify applications, the CEO is 'satisfied, 'having regard to the steps and processes followed both leading up to and at the Authorisation meeting', that this requirement was met.

[178] In my view, while not ideal, this is sufficient for the purposes of s 203BE(4)(b). At s 190C(4)(a) it is not my role to look behind the certificate, or to assess the authorisation process set out in

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<sup>148</sup> See s 203BE(4)(b).

<sup>149</sup> See s 203BE(4)(c).

the certificate.<sup>150</sup> It is merely to ensure the certificate complies with s 203BE(4). I am, therefore, satisfied that the information contained in the certificate is sufficient in 'briefly setting out' the reasons for the view of QSNTS stated.

[179] The certificate does not speak to the matter dealt with in s 203BE(4)(c). I note, however, as per the wording of that subsection, the certificate is only required to address the requirements of subsection (3) of s 203BE 'where applicable'. Section 203BE(3) relates to overlapping applications. Where there is an overlapping application or proposed application of which the representative body is aware, the body must make all reasonable efforts to achieve agreement between overlapping claimants and minimise the number of overlapping applications.

[180] The geospatial assessment provides that there are no applications overlapping any part of the current application area. Noting this, I accept the certificate's silence on the requirement at s 203BE(4)(c) to mean that QSNTS are not aware of any overlapping applications and consequently, do not consider the requirement 'applicable' in the circumstances. It follows that the failure of the certificate to address the requirement at s 203BE(4)(c) is not, in my view, fatal to the validity of the certificate. It is, therefore, my view that the certificate complies with s 203BE(4).

*End of reasons*

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<sup>150</sup> *Doepel* at [80]-[81]; approved by Kiefel J in *Wakaman* at [32] and [34].

## Attachment A

### Information to be included on the Register of Native Title Claims

Application name	Gamilaraay People
NNTT No.	QC2017/006
Federal Court of Australia No.	QUD290/2017

#### Section 186(1): Mandatory information

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.

#### Application filed/lodged with:

Federal Court of Australia

#### Date application filed/lodged:

12 June 2017

#### Date application entered on Register:

20 November 2017

#### Applicant:

[as per the Schedule]

#### Applicant's address for service:

[as per the Schedule]

#### Area covered by application:

[as per the Schedule]

#### Persons claiming to hold native title:

[as per the Schedule]

#### Registered native title rights and interests:

[as per the Schedule – all native title rights and interests claimed to be registered]

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Heidi Evans

20 November 2017

*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 23 August 2017 and made pursuant to s 99 of the Act.*