

## Registration Decision

<b>Application name</b>	Tanya Kum Sing & Ors on behalf of the Mitakoodi and Mayi People and State of Queensland & Ors
<b>Name of applicant</b>	Tanya Kum Sing, Pearl Connelly, Kay Douglas, Norman Douglas, Ronald Major, Sharn Fogarty, Clyde Fogarty, Justin Asse and Kristal Chapman
<b>Federal Court of Australia No.</b>	QUD556/2015
<b>NNTT No.</b>	QC2015/009
<b>Date of Decision</b>	15 December 2023

### Claim accepted for registration

I have decided that the claim in the Mitakoodi and Mayi People application satisfies all of the conditions in ss 190B–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.

Michael Raine

Delegate of the Native Title Registrar pursuant to ss 190–190D of the Act under an instrument of delegation dated 19 May 2021 and made pursuant to s 99 of the Act.

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<sup>1</sup> A section reference is to the *Native Title Act 1993* (Cth) (the Act), unless otherwise specified.

# Reasons for Decision

## CASES CITED

*Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal* [2012] FCA 1215 (2012) 297 ALR 660 ('Anderson')

*Burrabungba on behalf of the Wangan and Jagalingou People v Queensland* [2017] FCA 373 ('Burrabungba')

*Corunna v Native Title Registrar* [2013] FCA 372 ('Corunna')

*Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People* [2019] FCAFC 177; (2019) 273 FCR 350 ('Warrie')

*Griffiths v Northern Territory of Australia* [2007] FCAFC 178; (2007) 165 FCR 391 ('Griffiths')

*Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 ('Gudjala 2007')

*Gudjala People # 2 v Native Title Registrar* [2008] FCAFC 157; (2008) 171 FCR 317 ('Gudjala FC')

*Gudjala People #2 v Native Title Registrar* [2009] FCA 1572; (2009) 182 FCR 63 ('Gudjala 2009')

*Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9)* [2007] FCA 31; (2007) 238 ALR 1 ('Harrington-Smith')

*Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales* [2002] FCA 1517 ('Lawson')

*Martin v Native Title Registrar* [2001] FCA 16 ('Martin')

*Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; (2002) 214 CLR 422 ('Yorta Yorta')

*North Ganalanja Aboriginal Corporation v Queensland* [1996] HCA 2; (1996) 185 CLR 595 ('Waanyi')

*Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group* [2005] FCAFC 135; (2005) 145 FCR 442 ('Alyawarr')

*Northern Territory of Australia v Doepel* [2003] FCA 1384; (2003) 133 FCR 112 ('Doepel')

*Sampi v Western Australia* [2005] FCA 777 ('Sampi')

*State of Western Australia v Strickland* [2000] FCA 652; (2000) 99 FCR 33 ('Strickland FC')

*Strickland v Native Title Registrar* [1999] FCA 1530; (1999) 168 ALR 242 ('Strickland')

*Ward v Northern Territory* [2002] FCA 171 ('Ward')

*Weribone on behalf of the Mandandanji People v Queensland* [2013] FCA 255 ('Weribone')

*Western Australia v Native Title Registrar* [1999] FCA 1591; (1999) 95 FCR 93 ('WA v NTR')

*Western Australia v Ward* [2002] HCA 28; (2002) 213 CLR 1 ('Ward HC')

*Wiri People v Native Title Registrar* [2008] FCA 574; (2008) 168 FCR 187 ('Wiri People')

## Background

- [1] This is an amended application filed on behalf of the Mitakoodi and Mayi People native title claim group ('claim group'). It covers land and waters of approximately 25,717 square kilometres to the east of Mt Isa and includes Cloncurry, McKinlay and surrounding areas and extending north past the Flinders River to south of Stokes.
- [2] The application was first made on 8 July 2015 and was initially entered on the Register of Native Title Claims on 25 September 2015. The application has been amended twice previously and, having been removed from the Register on 8 November 2019, was entered on the Register again on 21 February 2020. The version the subject of this decision is the third additional further amended application ('amended application'). The amended application was filed on 20 October 2023 following orders made by the Federal Court of Australia ('Court') on 9 October 2023 granting leave to amend. The orders made on 9 October 2023 also replaced the named applicant under s 66B to those persons as set out in the amended application.
- [3] The Registrar of the Court gave a copy of the amended application and accompanying affidavits to the Native Title Registrar ('Registrar') on 24 October 2023 pursuant to s 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A.<sup>2</sup>

## Registration conditions

- [4] Sections 190A(1A), (6), (6A) and (6B) set out the decisions available to the Registrar under s 190A. Section 190A(1A) provides for exemption from the registration test for certain amended applications and s 190A(6A) provides that the Registrar must accept a claim (in an amended application) when it meets certain conditions. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (which the Act refers to as conditions about the merits of the claim) and s 190C (which the Act refers to as conditions about procedural and other matters). Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B–190C.
- [5] I am satisfied that neither s 190A(1A) nor s 190A(6A) apply to the amended application. The granting of leave by the Court to amend the application was not made pursuant to s 87A, and so the circumstance described in s 190A(1A) does not arise. In addition to the replacement of the persons comprising the applicant, the amendments to the application include a new claim group description to include an additional apical ancestor, updates to reflect the authorisation of the applicant and changes throughout the application to reflect the inclusion of the Mayi People. These changes are not of a type contemplated in s 190A(6A)(d) and therefore do not meet the requirements of that condition.
- [6] I have decided that the claim in the application must be accepted for registration and this document sets out my reasons for that decision.

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<sup>2</sup> Section 190A(1).

## Procedural fairness

- [7] On 25 October 2023, a Senior Officer of the National Native Title Tribunal ('Tribunal') wrote to the representative of the applicant advising that any additional material or submissions which the applicant wished the delegate to consider should be provided by 8 November 2023.
- [8] A Senior Officer of the Tribunal also wrote to the State of Queensland ('State') on 25 October 2023, advising that if the State wished to make any submissions in relation to the registration test, they should do so by 8 November 2023.
- [9] No submissions nor additional material was received from either the applicant or the State. This concluded the steps necessary to ensure that procedural fairness was afforded.

## Information considered

- [10] Section 190A(3) sets out the information to which the Registrar must have regard in considering a claim under s 190A and also provides that the Registrar 'may have regard to such other information as he or she considers appropriate'.
- [11] I note there is no information before me obtained as a result of any searches conducted by the Registrar of State or Commonwealth interest registers under s 190A(3)(b).
- [12] As noted above, the applicant and the State did not provide any additional material or submissions in relation to the application of the registration test.
- [13] I may also have regard to such other information as I consider appropriate.<sup>3</sup> I have also considered information contained in a geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services in relation to the area covered by the application, dated 30 October 2023 ('geospatial assessment').

## Procedural and other matters (s 190C)—Conditions met

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

- [14] I have examined the application and I am satisfied that it contains the prescribed information and is accompanied by the prescribed documents.

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

- [15] To meet s 190C(2), the Registrar must be satisfied that the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61–2. This condition does not require any merit or qualitative assessment of the material to be undertaken.<sup>4</sup>
- [16] In my view, s 190C(2) relates only to those parts of ss 61 and 62 that impose requirements relating to documents and information to be included in the application and accompanying documents. I note that s 61(2) provides that the persons authorised to make the application

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<sup>3</sup> Section 190A(3).

<sup>4</sup> *Doepele* [35]–[39].

are jointly the applicant. I consider that this subsection does not impose any requirement for documents and information to be contained in the application or accompanying documents within the meaning of s 190C(2).

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

- [17] The application meets this condition because it contains the prescribed information and is accompanied by the prescribed documents, as set out below.

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

- [18] In accordance with s 61(1), an application for determination of native title may be made by persons authorised by the native title claim group, provided those persons are also members of the native title claim group.
- [19] Schedule A of the amended application contains a description of the native title claim group and the affidavits accompanying the application for the purpose of s 62 indicate that the persons comprising the applicant are all members of the native title claim group and have been authorised by the claim group to make the application.

- [20] I am satisfied that the amended application has been made in accordance with s 61(1).

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

- [21] Section 61(3) requires an application to state the name and address for service of the applicant. I am satisfied that the amended application meets this requirement as the names of the persons comprising the applicant are included in the amended application and Part B of the application contains the address for service.

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

- [22] Section 61(4) requires an application to name or otherwise describe the persons comprising the native title claim group who authorised the applicant. I consider that Schedule A contains a description of the native title claim group that is sufficient to meet this requirement.

***Prescribed form filed in the Federal Court: s 61(5)***

- [23] Section 61(5) provides that the application must be filed in the Court in a manner as prescribed and be accompanied by any prescribed fee. I consider this to be a matter for the Court, but note that the amended application is made on a completed Form 1 (the prescribed form) and was accepted for filing in the Court.

***Affidavits containing specified details: s 62(1)(a) and (1A)***

- [24] Section 62(1)(a) requires an application to be accompanied by affidavits that state the matters contained in sub-s (1A). This requirement is met as the amended application is accompanied by affidavits that contain the necessary statements.

*Section 47C agreement: s 62(1)(d)*

- [25] Section 62(1)(d) applies where an agreement has been entered into under s 47C and requires a copy of any relevant agreement to accompany the application. Part 2 of Schedule L of the amended application indicates that there is no agreement under s 47C. As such s 62(1)(d) has no application.

*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) and (b)*

- [26] Sections 62(2)(a) and (b) provide that an application must contain a description and map of the area covered by the application. Schedule B and Attachment B of the amended application contain a written description of the boundaries of the area covered by the amended application, as well as those areas not covered by the application. Attachment C comprises a map showing the external boundaries. As such, the amended application includes the details and information required by s 62(2)(a) and (b).

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

- [27] Section 62(2)(c) requires an application to include details and results of any searches relating to non-native title interests. The amended application complies with this requirement as Schedule D indicates that the applicant has not conducted any searches to determine the existence of any non-native title rights and interests in relation to the land or waters in the area covered by the amended application.

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

- [28] Section 62(2)(d) requires an application to contain a description of the native title rights claimed that does not consist merely of a statement that the native title rights and interests are all that may exist or have not been extinguished. Schedule E contains a description of the native title rights and interests claimed in the amended application that meets the requirements of this subsection.

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

- [29] Section 62(2)(e) requires an application to contain a general description of the factual basis on which it is asserted that the native title rights and interests are claimed to exist. Schedule F and Attachment F and M contain information about the factual basis, and as such this requirement is met.

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

- [30] Section 62(2)(f) requires an application to include details of activities in relation to the land or waters. This requirement is met as Schedule G lists the activities currently being undertaken by members of the native title claim group in the area covered by the amended application.

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

- [31] Section 62(2)(g) requires an application to include details of any other relevant court applications seeking a determination of native title. Schedule H states that the area covered by the amended application is not covered by any other applications, and as such this requirement is met.

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

[32] Sections 62(2)(ga) and (h) require an application to include details of any notices under ss 24MD(6B)(c) or 29.

[33] Schedule HA states that the applicant is not aware of any notifications under s 24MD(6B)(c) that have been given. Schedule I refers to Attachment I, which comprises a geospatial overlap analysis prepared by the Tribunal dated 2 August 2023 containing the required details of s 29 notices that have been given and relate to the whole or part of the area covered by the amended application.

[34] As such, the amended application contains the details required by ss 62(2)(ga) and (h).

*Any conditions: s 62(2)(i)*

[35] If there are any conditions under s 251BA on the authority of the applicant to make the application and deal with matters arising in relation to it, s 62(2)(i) requires an application to contain details of those conditions. Schedule IA of the amended application contains the details required by this subsection.

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

[36] The condition at s 190C(3) requires that ‘no person included in the native title claim group for the application ... was a member of the native title claim group for any previous application’.

[37] Although couched in the past tense, the Explanatory Memorandum to the amendments to the Act in 1998 which inserted s 190C(3) indicates that the purpose of this section is served if it is interpreted in the present tense, such that ‘no member of the claim group for the application ... *is* a member of the claim group for a registered claim which was made before the claim under consideration, which *is* overlapped by the claim under consideration and which itself has passed the registration test’.<sup>5</sup>

[38] As such, I understand that the purpose of s 190C(3) is to prevent overlapping claims by members of the same native title claim group from being on the Register at the same time. This purpose is achieved by preventing a claim from being registered if it includes members in common with an overlapping claim that is on the Register when the registration test is applied. I consider that taking this approach more accurately reflects the intention of the legislature, rather than a more literal reading of s 190C(3).

[39] I understand that in assessing this requirement I may have regard to information which does not form part of the application and accompanying documents.<sup>6</sup>

[40] The condition at s 190C(3) only arises where there is a previous application that meets the criteria set out in subsections (a) to (c).<sup>7</sup> These criteria are that any previous claim covers at least some of the same area and was accepted for registration under s 190A and on the Register of Native Title Claims.

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<sup>5</sup> Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) 303 [29.25], emphasis added.

<sup>6</sup> *Doepel* [16].

<sup>7</sup> *Strickland FC* [9].

[41] The geospatial assessment indicates that there is no previous claim overlapping any of the area covered by the amended application. I have undertaken my own searches of the Tribunal's mapping database which have confirmed this.

[42] As there is no previous overlapping application which meets the conditions set out in ss 190C(3)(a) – (c), the amended application does not contravene this requirement.

### Identity of claimed native title holders – s 190C(4): condition met

[43] For the reasons set out below, I am satisfied that the condition set out in s 190C(4) is met.

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

[44] In order for the condition in s 190C(4) to be met, I must be satisfied that either the amended application has been certified in accordance with s 190C(4)(a) or has met the authorisation requirements under s 190C(4)(b).

[45] Schedule R of the amended application indicates that the application has not been certified. I must therefore consider whether the requirements of s 190C(4)(b) have been met. That subsection provides that the Registrar must be satisfied that the following requirements referred to in s 190C(4AA) have been met:

- the applicant is a member of the native title claim group;
- the applicant 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; and
- any conditions under s 251BA on the authority to make the application have been satisfied.

[46] Section 190C(5) then provides that the Registrar cannot be satisfied that this condition has been met unless an application includes a statement to the effect that the requirements mentioned in s 190C(4AA) have been met and briefly sets out the grounds on which the Registrar should be satisfied that these requirements have been met.

[47] I will first consider s 190C(5) before turning to the requirements of s 190C(4AA).

#### *Does the application contain the information specified in s 190C(5)?*

[48] Schedule R of the amended application contains a statement to the effect that the requirements set out in s 190C(4AA) have been met. Schedule R also refers to Attachment R which comprises the affidavits of each of the members of the applicant provided for the purpose of s 62 and an affidavit of Mr Michael Pagsanjan affirmed on 6 September 2023.

[49] I am satisfied that Schedule R and the affidavits accompanying the amended application at Attachment R contain the statement and brief grounds as required by s 190C(5).

[50] I will consider whether the material provided meets the requirements of s 190C(4AA) below.



*Have the requirements of s 190C(4)(b) been met?*

**What is required to meet the condition at s 190C(4)(b)?**

[51] My understanding is that the condition at s 190C(4)(b):

- requires the Registrar to be satisfied ‘of the fact of authorisation by all members of the native title claim group’ by way of ‘inquiry through the material available ... to see if the necessary authorisation has been given’;<sup>8</sup>
- requires the Registrar to be satisfied as to the identity of the claimed native title holders, including the applicant;<sup>9</sup>
- is not ‘to be met by formulaic statements in or in support of applications’;<sup>10</sup>
- does not permit a claim group to choose between the two decision-making processes set out in s 251B, as where there is a traditionally mandated process, that process must be followed to authorise the applicant, and where there is no mandated traditional process, the process must be that which has been agreed and adopted by the native title claim group.<sup>11</sup>

**What information has been provided in support of this condition?**

[52] The following information is contained in the affidavit of Mr Pagsanjan affirmed on 6 September 2023 and its annexures:

- Two information meetings were held concurrently on 14 July 2023, with one meeting in the morning for descendants of the apical ancestors Thomas Tiger Mitchell and Dinah, and in the afternoon for descendants of the apical ancestors Minnie, Topsy and Sophie.<sup>12</sup> The purpose of the information sessions was to provide information to different family groups and to enable questions to be posed and answered prior to the decisions proposed to be made at the authorisation meetings.<sup>13</sup>
- Notice of the information meetings was provided by post and email on 14 June 2023 to all members of the claim group for whom MPS Law (the law firm on record for the applicant) had postal or email addresses.<sup>14</sup>
- The information meetings on 14 July 2023 took place at a venue in Cloncurry and were facilitated by Mr Pagsanjan and three other members of MPS Law staff. Presentations were given by Mr Pagsanjan and Special Counsel Ms Georgina Reid, and attendees were able to pose questions and have them answered.<sup>15</sup>

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<sup>8</sup> *Doepel* [78].

<sup>9</sup> *Wiri People* [29].

<sup>10</sup> *Strickland* [57].

<sup>11</sup> *Harrington-Smith* [1230].

<sup>12</sup> Affidavit of Michael Pagsanjan affirmed 6 September 2023, [17].

<sup>13</sup> *Ibid*, Annexure MDP1.

<sup>14</sup> *Ibid* [12].

<sup>15</sup> *Ibid* [17]–[19] and Annexure MDP1.

- The authorisation meetings were then held on 15 July 2023. This comprised two meetings, the first for the current claim group (as it was prior to the amended application) for the purpose of amending the claim group description to include Billy Chisholm as an apical ancestor, and the second to authorise the amendments to the claim and to authorise the applicant for the amended claim.<sup>16</sup>
- Notice of the authorisation meetings was provided as follows:
  - by post and email on 14 June 2023 to all members of the claim group for whom MPS Law had postal or email addresses;<sup>17</sup>
  - by notice published in three regional newspapers (the *Townsville Bulletin* on 19 June 2023, *The Cairns Post* on 19 June 2023 and *The North West Star* on 22 June 2023);<sup>18</sup>
  - by notice published in a specialist Aboriginal and Torres Strait Islander newspaper on 28 June 2023 (the *Koori Mail*);<sup>19</sup>
  - through notices displayed on notice boards at Cloncurry IGA, Cloncurry Post Office, Mt Isa Neighbourhood Centre, Mitakoodi Aboriginal Centre and Cloncurry Library;<sup>20</sup> and
  - at the request of MPS Law, by email sent from Queensland South Native Title Services ('QSNTS') to descendants of Billy Chisholm for whom QSNTS held contact details.<sup>21</sup>
- The notice of the authorisation meeting included a map of the claim area and set out the purpose of the meeting. The notice invited members of the claim group by reference to the apical ancestors of the current claim (as it was then) as well as descendants of Billy Chisholm. Persons wishing to receive more information about the meeting or register their interest in attending were invited to contact MPS Law.<sup>22</sup>
- The authorisation meetings on 15 July 2023 were conducted as follows:
  - Claim group members were required to register their attendance for the meeting. Registration forms were checked by a staff member of MPS Law and participants were issued with a green wristband. Only those persons over the age of 18 were permitted to vote and this was checked at the commencement of the meeting. A total of 144 members of the claim group signed the attendance register.<sup>23</sup>
  - Mr Pagsnajan and Ms Reid gave presentations and legal advice in relation to amending the claim group description and authorising the applicant and

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<sup>16</sup> Ibid [9].

<sup>17</sup> Ibid [12].

<sup>18</sup> Ibid [13] and Annexures MDP3-5.

<sup>19</sup> Ibid [13] and Annexure MDP6.

<sup>20</sup> Ibid [14] and Annexures MDP7-11.

<sup>21</sup> Ibid [15]-[16] and Annexures MDP12-13.

<sup>22</sup> Ibid, Annexure MDP2.

<sup>23</sup> Ibid [22]-[24], Annexure MDP14.

imposing any conditions.<sup>24</sup> Counsel (Mr Graham Carter) was also available online to provide legal advice and answer any questions from the claim group.<sup>25</sup>

- A resolution was passed at the first authorisation meeting that there was no mandated traditional decision-making process that must be complied with, and agreeing and adopting a process where a proposed resolution is read out, moved and seconded and a vote by show of hands taken and recorded, with a majority carrying the resolution (resolution 1).<sup>26</sup>
- In accordance with the agreed and adopted decision-making process, resolutions were then passed at the first authorisation meeting:
  - confirming that the original Mitakoodi #5 native title claim group were entitled to make decisions at the first authorisation meeting and those persons in attendance were sufficiently representative (resolutions 2 and 3);<sup>27</sup> and
  - to make an application to the Court to amend the claim group description (resolution 4).
- The second authorisation meeting then occurred and was opened to all members of the newly amended claim group.<sup>28</sup> The following resolutions were then passed:
  - confirming that there is no mandated traditional decision-making process and the same process as for the first authorisation meeting was agreed and adopted (resolution 1);<sup>29</sup>
  - confirming that the members of the native title claim group as amended that were present at the second meeting were entitled to make decisions at the second authorisation meeting and were sufficiently representative (resolutions 2 and 3);<sup>30</sup>
  - authorising the individuals comprising the replacement applicant (resolution 6);<sup>31</sup>
  - imposing conditions on the authority of the applicant (resolution 7);<sup>32</sup> and
  - authorising the replacement applicant to apply to the Court for orders to replace the applicant and amend the application (resolution 8).<sup>33</sup>

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<sup>24</sup> Ibid [29].

<sup>25</sup> Ibid [30].

<sup>26</sup> Ibid [33], Annexure MDP16.

<sup>27</sup> Ibid [34], Annexure MDP16.

<sup>28</sup> Ibid [37].

<sup>29</sup> Ibid [41], [43], Annexure MDP16.

<sup>30</sup> Ibid [34], Annexure MDP16.

<sup>31</sup> Ibid [44]–[45], [47], Annexure MDP16.

<sup>32</sup> Ibid [46], Annexure MDP16

- [53] The affidavits provided by each member making up the applicant for the purpose of s 62 refer to the authorisation meetings on 15 July 2023. The affidavits also extract the conditions on authority,<sup>34</sup> and state that these conditions have been satisfied by ensuring that the decision to bring the application to the Court seeking orders relevant to the amendments of the claim are made following resolutions passed by the claim group at a properly called and constituted authorisation meeting.<sup>35</sup>

### Consideration

- [54] As mentioned above, in order to satisfy the condition at s 190C(4)(b), the requirements of s 190C(4AA) must be met.

#### *Is the applicant a member of the native title claim group?*

- [55] The first requirement set out in s 190C(4AA)(a) is that the applicant must be a member of the native title claim group.
- [56] Each of the affidavits of the persons making up the applicant provided for the purpose of s 62 state that they are a member of the claim group.<sup>36</sup> I have not been provided with any information that contradicts these statements. I am satisfied that each person making up the applicant is a member of the native title claim group.

#### *Is the applicant authorised by all the other members of the claim group?*

- [57] The second requirement set out in s 190C(4AA)(a) is that the applicant has been 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. In order to meet this requirement, the material must identify the decision-making process that was utilised at the authorisation meeting and consider how that process was applied.<sup>37</sup>
- [58] Section 251B sets out two distinct decision-making processes for authorising the making of applications, being a mandated traditional process where one exists, or otherwise a process that is agreed to and adopted by the native title claim group. In this amended application, resolutions were passed at the two authorisation meetings confirming that there is no mandated traditional decision-making process, and that a process was agreed to and adopted. This process involved the putting of a clearly worded motion, that motion being moved and seconded and a vote being conducted by show of hands, with a majority vote carrying the motion.<sup>38</sup>
- [59] I understand that one of the principles arising from the case law with respect to s 251B is that the effect is to give the word “all” as used in s 190C(4AA) a more limited meaning, and that it

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<sup>33</sup> Ibid [47], Annexure MDP16.

<sup>34</sup> Affidavits accompanying the amended application for the purpose of s 62, [19] or [20].

<sup>35</sup> Ibid [21] or [22].

<sup>36</sup> Ibid [1].

<sup>37</sup> *Doepel* [78]; *Wiri People* [21], [29], [35].

<sup>38</sup> Affidavit of Michael Pagsanjan affirmed 6 September 2023 [33], [41].

'is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process'.<sup>39</sup>

[60] The process of giving notice of the relevant authorisation meeting will inform whether a reasonable opportunity is provided for members of the native title claim group to participate in the decision-making process. In *Weribone*, Rares J held that the 'notice must be sufficient to enable the persons ... to judge for themselves whether to attend the meeting and vote for or against a proposal' and that 'fair notice of the business to be dealt with at the meeting' must be given.<sup>40</sup> In *Burragubba*, Reeves J commented that 'it is necessary that all members be offered a reasonable opportunity to decide whether to attend'.<sup>41</sup>

[61] In *Ward*, O'Loughlin J listed the following questions relating to the conduct of an authorisation meeting:

Who convened it and why was it convened? To whom was notice given and why was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded?<sup>42</sup>

[62] Although these questions do not need to be answered in any formal way, the substance of the questions should be addressed.<sup>43</sup>

[63] In my view the material, in particular the affidavit of Mr Pagsanjan, addresses the substance of the questions referred to in *Ward*. The notice was published in three regional newspapers, a special-interest Aboriginal and Torres Strait Islander newspaper and was sent by email and post to known members of the claim group. The notice was also displayed on notice boards at Cloncurry and Mt Isa and provided to QSNTS to forward to descendants of the proposed additional apical ancestor. The notice clearly set out the purpose of the authorisation meetings. Registration at the meeting was checked by a staff member of MPS Law and an attendance register was completed. A large number of claim group members attended. The proposed resolutions were read out at the meeting and votes taken and recorded. Many of the resolutions were passed unanimously.

[64] I am satisfied that the applicant has been 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 within the meaning of s 190C(4AA)(a).

*Have any conditions been satisfied?*

[65] Section 190C(4AA)(b) requires that any conditions imposed under s 251BA on the authority that relate to the making of the application have been satisfied.

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<sup>39</sup> *Lawson* [25].

<sup>40</sup> *Weribone* [40]–[41].

<sup>41</sup> *Burragubba* [31].

<sup>42</sup> *Ward* [24], cited with approval in *Lawson* [26].

<sup>43</sup> *Ward* [24]–[25].

- [66] Each of the affidavits accompanying the amended application for the purpose of s 62 sets out the conditions on the authority imposed in accordance with s 251BA. In summary, these conditions include that the remaining members of the applicant remain authorised in the case of the death or incapacity of a member of the applicant, that decisions can only be made by the applicant by consensus or majority of members at a properly convened meeting, and that the individual members of the applicant must attend meetings, act in accordance with properly passed resolutions and the best interests of the claim group and sign any documents necessary to facilitate matters arising in relation to the claim.<sup>44</sup>
- [67] In satisfaction of these conditions, each of the affidavits filed for the purpose of s 62 indicates that the relevant application was made ‘in accordance with resolutions passed by the claim group at a properly called and constituted claim group meeting’.<sup>45</sup>
- [68] Having regard to the conditions and statements set out in these affidavits, I am satisfied that the requirement under s 190C(4AA)(b) (that the relevant conditions imposed on the authority of the applicant under s 251BA have been satisfied) is met.
- [69] It therefore follows that I am satisfied that the condition in s 190C(4) is met.

## **Merits of the claim (s 190B) – Conditions met**

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

- [70] Section 190B(2) provides that the Registrar must be satisfied that the information and map contained in the application (as required by ss 62(2)(a) and (b)) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.
- [71] Schedule B of the amended application refers to Attachment B, which describes the application area by metes and bounds referencing watercourses, the Cloncurry River Sub-Catchment Area, land tenure boundaries, geographic coordinates in decimal degrees to six decimal places and existing native title application and determination boundaries.
- [72] Schedule B also sets out general areas within the external boundaries that are not covered by the amended application. Attachment B confirms that any land or waters subject to or within the boundaries of three neighbouring claims is excluded.
- [73] Schedule C refers to the map of the external boundaries of the area covered by the amended application contained at Attachment C. The map is a colour copy of an A3 map prepared by the Tribunal, titled ‘Native Title Determination Application QUD556/2015 Mitakoodi & Mayi People #5 (QC2015/009)’ dated 5 September 2018. The map is a topographic base map showing roads, watercourses and place names and includes the application area depicted by a bold blue outline, scalebar, coordinate grid, locality diagram, map legend and notes relating to the source, currency and datum of data used to prepare the map.

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<sup>44</sup> Affidavits accompanying the amended application for the purpose of s 62, [19] or [20].

<sup>45</sup> Ibid [21] or [22].

[74] The geospatial assessment concludes that the description and map are consistent and identify the amended application area with reasonable certainty. The geospatial assessment notes that the area covered by the amended application has not been amended or reduced from that in the previous application. I agree with this assessment and am satisfied that the information provided about the external boundary and internally excluded areas are sufficient to identify with reasonable certainty the particular land or waters over which native title rights and interests are claimed. As such in my view the amended application meets the requirements of s 190B(2).

### Identification of the native title claim group – s 190B(3) condition met

[75] For the reasons below, I am satisfied that the claim meets the requirements of s 190B(3).

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

[76] In order to meet this condition, I must be satisfied that either the persons in the native title claim group are named in the amended application (s 190B(3)(a)) or are described sufficiently clearly so that it can be ascertained whether any particular person is a member of the claim group (s 190B(3)(b)).

[77] When considering whether the requirements of this consideration have been met, I understand that:

- I am required to address only the content of the application;<sup>46</sup>
- section 190B(3) 'requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification';<sup>47</sup>
- the conditions or rules set out in a claim group description can be sufficient for the purpose of s 190B(3)(b) notwithstanding where it is necessary to 'engage in some factual inquiry when ascertaining whether any particular person is in the group as described'.<sup>48</sup>

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

[78] Schedule A describes the native title claim group as the Mitakoodi and Mayi People, being those Aboriginal people who:

1. Principally identify as Mitakoodi and Mayi People and as belonging to the traditional country of their Mitakoodi and Mayi forebears;
2. Are recognised by other Mitakoodi and Mayi People as the biological descendants of deceased Mitakoodi and Mayi people; and
3. Are the descendants of the following deceased Aboriginal People: Minnie; Thomas 'Tiger' Mitchell; Dinah; Topsy; Sophie; and Billy Chisholm.

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<sup>46</sup> *Doepel* [51]; *Gudjala* 2007 [30].

<sup>47</sup> *Gudjala* 2007 [33].

<sup>48</sup> *WA v NTR* [67].

[79] I consider the effect of this description is to apply two criteria to membership of the claim group, being self-identification and descent from identified apical ancestors where that descent is recognised by other members of the Mitakoodi and Mayi People.

#### *Self-identification*

[80] The first criteria set out in the claim group description requires a person to '[p]rincipally identify' as a Mitakoodi and Mayi person belonging to the relevant traditional country. I consider that whether a person self-identifies as a member of the claim group and as belonging to the traditional country of the Mitakoodi and Mayi People may be ascertained through inquiries of the relevant person in question.

#### *Descent*

[81] The second paragraph of Schedule A requires a person to be 'recognised by other Mitakoodi and Mayi People as the biological descendants of deceased Mitakoodi and Mayi people'.

[82] I note that the requirement relating to recognition by other Mitakoodi and Mayi People is limited to the person in question's biological descent from deceased Mitakoodi and Mayi people. In my view this criteria must also be read together with the third paragraph of Schedule A, which requires descent from one of six named apical ancestors.

[83] The Court has previously accepted the approach of identifying members of a native title claim group by reference to the descendants of named persons.<sup>49</sup> I consider that requiring a person to show descent from one of the named ancestors, with such descent being recognised by other Mitakoodi and Mayi People, provides a clear starting point from which to commence an inquiry.

#### **Conclusion on s 190B(3)**

[84] I am satisfied that the description of the claim group is sufficiently clear such that it can be ascertained whether a particular person is a member of the claim group as required by s 190B(3). This condition is met.

#### **Identification of claimed native title – s 190B(4) condition met**

[85] For the reasons below, I am satisfied that the description at Schedule E of the amended application meets the requirements of this condition.

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

[86] The task at s 190B(4) is to assess whether the description of the native title rights and interests claimed is sufficient to allow the rights and interests to be readily identified. I consider that in order to meet this condition the description in the amended application must be understandable, have meaning and be without contradiction.<sup>50</sup>

[87] Section 190B(4) refers to the description required by s 62(2)(d), which is:

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<sup>49</sup> Ibid.

<sup>50</sup> *Doepel* [99], [123]



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

- [88] For the purpose of s 190B(4), I consider that the focus is only on whether the rights and interests as claimed are 'readily identifiable'. While undertaking this task, I consider that a description of a native title right or interest that is broadly asserted 'does not mean that the rights broadly described cannot readily be identified within the meaning of s 190B(4)'.<sup>51</sup>
- [89] In assessing the requirements of this provision, I understand that I am confined to the material in the application itself.<sup>52</sup>
- [90] I note that whether the claimed rights and interests can be prima facie established as native title rights and interests within the meaning of s 223 is considered in my below reasons on the condition at s 190B(6).

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

- [91] The amended application sets out a description of the claimed native title rights and interests at Schedule E. Paragraph 1 of Schedule E claims exclusive rights 'to possess, occupy, use and enjoy the lands and waters of the application area', but over only those areas where the claim to exclusive possession can be recognised on that basis. Paragraph 2 then lists 11 claimed non-exclusive rights and interests. Paragraph 3 notes that the claimed rights and interests are subject to the valid laws of the State and the Commonwealth and the rights conferred under those laws.
- [92] Having read Schedule E as a whole, I am satisfied that the native title rights and interests described in the amended application are understandable and have meaning. I do not consider there to be any inherent contradictions. As such I am satisfied that the requirements of s 190B(4) are met.

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

- [93] For the reasons set out below, I am satisfied that the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support the assertion. In particular, there is a sufficient factual basis for the three assertions set out in ss 190B(5)(a)–(c).

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

- [94] I understand that when assessing the requirements of this condition I must treat the asserted facts as true and consider whether those facts can support the existence of the native title rights and interests that have been claimed.<sup>53</sup>

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<sup>51</sup> *Strickland* [60]; *Strickland FC* [85]–[87].

<sup>52</sup> *Doepel* [16].

<sup>53</sup> *Doepel* [17]; *Gudjala FC* [57], [83].

[95] Although the facts asserted are not required to be proven by the applicant, I consider that the factual basis must provide sufficient detail to enable a ‘genuine assessment’ of whether the assertions set out in ss 190B(5)(a) to (c) are supported by the applicant’s factual basis material.<sup>54</sup>

[96] I also understand that the applicant’s material must provide ‘more than assertions at a high level of generality’,<sup>55</sup> and cannot merely restate a claim or be an alternate way of expressing a claim.<sup>56</sup> In my view, the condition at s 190B(5) requires the applicant’s factual basis material to provide adequate specificity of particular and relevant facts going to each of the assertions.

[97] The factual basis material is contained in a combined Attachment F and M to the amended application. In addition, Schedule G contains a list of the activities that members of the claim group current carry out in relation to the land and waters. I will consider the sufficiency of this material by addressing each of the assertions set out in s 190B(5) in turn.

#### *Association with the claim area: s 190B(5)(a)*

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

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

- there is ‘an association between the whole group and the area’, although not ‘all members must have such association at all times’;<sup>57</sup>
- the predecessors of the group were associated with the area over the period since sovereignty,<sup>58</sup> and
- there is an association with the entire claim area, rather than an association with part of it or ‘very broad statements’, which for instance have no ‘geographical particularity’.<sup>59</sup>

##### **What material has been provided in support of the assertion at s 190B(5)(a)?**

[99] The factual basis material sets out that ‘effective sovereignty’ occurred in the area covered by the application in the 1860s to the 1870s,<sup>60</sup> through exploration and ‘sustained settlement’ by Europeans from the 1860s to the 1880s.<sup>61</sup> The material describes the history of the area from Burke and Wills’s expedition, where in January 1861 Wills recorded in his field book that there were Aboriginal people in the area, likely to be around the upper Cloncurry River drainage area and further downstream.<sup>62</sup> The discovery of copper in 1865 and gold in the 1870s brought an influx of Chinese and Europeans and the establishment of the township of

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<sup>54</sup> *Gudjala FC* [92].

<sup>55</sup> *Ibid.*

<sup>56</sup> *Gudjala 2009* [28], [29]; *Anderson* [43], [48].

<sup>57</sup> *Gudjala 2007* [52].

<sup>58</sup> *Ibid.*

<sup>59</sup> *Martin* [26]; see also *Corunna* [45].

<sup>60</sup> Attachment F and M, page 2 [6]

<sup>61</sup> *Ibid*, page 1 [2].

<sup>62</sup> *Ibid*, page 1 [4].

Cloncurry and Fort Constantine Station.<sup>63</sup> In 1897 Walter Roth described the Aboriginal people in the area of the Cloncurry River and its branches as Mitakoodi, and the Mayi people as around Canobie Station.<sup>64</sup>

[100] In 1891 Gavan Breen mapped the language groups in the area, with the 'Mayi-thakurti (Mitakoodi) being located on the upper Cloncurry River and south of Canobie Station', the 'Mayi-yapi north of Canobie Station on the lower parts of the Cloncurry River' and the 'Mayi-kulan northeast of Canobie Station'.<sup>65</sup>

[101] The factual basis material records the seasonal patterns of the Mitakoodi and Mayi People in the late 19<sup>th</sup> Century moving campsites at the onset of the wet season,<sup>66</sup> and the importance of waterholes in the dry season.<sup>67</sup> In the Cloncurry region, huts (called *yin-bur*) were constructed using a framework of sticks, grass and bark in campsites that were established where there was a reliable water source.<sup>68</sup> Records from this time also describe the traditional fishing methods using nets called *moo-na* (a smaller net) and *bil-lin-ya* (a larger net), or by using a special plant (*too-ta*) to poison the water.<sup>69</sup>

[102] Attachment F and M sets out the association that each of the six named apical ancestors have with the claim area. This is summarised as follows:

- *Minnie*

Although there is limited documentary evidence, Minnie is identified as a Mitakoodi person in the oral history of her descendants.<sup>70</sup> She is recorded with the surname of 'Hillcott' and 'Hillcoat', having gone in 1908 to work for the Hillcoat family at Boomara station.<sup>71</sup> In around 1931 she 'tribally married Kenny Wilson / Smith at Canobie Station'.<sup>72</sup> She passed away on 20 April 1941 at Fort Constantine Station and was noted as a "'full blood" Aboriginal'.<sup>73</sup> Minnie was identified in a 1897 photograph from Canobie Station and is recorded as 'Mangelo', believed by her descendants as being Minnie's Aboriginal name.<sup>74</sup> Minnie's descendants also believe that a Mitakoodi man known as 'Jackaroo, King of Canobie, Cloncurry River' was Minnie's brother.<sup>75</sup> Minnie's daughter, Ethel, was born at Old Boomarra Station.<sup>76</sup>

- *Thomas 'Tiger' Mitchell*

Thomas 'Tiger' Mitchell is described as a 'Maijabi' (Mayi) man born to a 'Maijabi' man and 'Maikundung' woman in around 1878 on Talawanta Station, near

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<sup>63</sup> Ibid, page 1 [5].

<sup>64</sup> Ibid, page 2 [7].

<sup>65</sup> Ibid, page 2 [12].

<sup>66</sup> Ibid, page 12 [38].

<sup>67</sup> Ibid, page 16 [53].

<sup>68</sup> Ibid, page 12 [39]–[40].

<sup>69</sup> Ibid, page 14–15 [48]–[49].

<sup>70</sup> Ibid, page 3 [15(a)(i)].

<sup>71</sup> Ibid, page 3 [15(a)(i)–(ii)].

<sup>72</sup> Ibid, page 3 [15(a)(i)].

<sup>73</sup> Ibid, page 3 [15(a)(ii)].

<sup>74</sup> Ibid, page 4 [15(a)(v)].

<sup>75</sup> Ibid, page 4 [15(a)(vi)].

<sup>76</sup> Ibid, page 10 [28].

Alexander River.<sup>77</sup> He had two sons and a daughter with Dinah: Willie (born around 1891 to 1895 at Canobie Station); Charles/Charlie (born at Canobie or Lorraine Station between 1895 and 1897); and Molly (born at Canobie Station between 1900 and 1910).<sup>78</sup> Although the brothers are not known to have any descendants, Molly had five children.<sup>79</sup> Thomas ‘Tiger’ Mitchell’s traditional lands, where he ‘lived traditionally with his family’ are described as being in the northwest portion of the claim area.<sup>80</sup>

- *Dinah*

Dinah is estimated to have been born in approximately 1873 or 1875 and grew up at Canobie Station.<sup>81</sup> She had several children, including Maude who was born in 1890 at Monkey Station (later becoming part of Canobie Station).<sup>82</sup> Members of the claim group identify by descent from Dinah through Maude and Molly (Dinah’s daughter with Thomas ‘Tiger’ Mitchell).<sup>83</sup>

- *Topsy*

Although there is little historical record of Topsy, she is described as a Mitakoodi woman who lived all her life at Canobie Station.<sup>84</sup> In 1912 she was married to Alick Smith, an Aboriginal man who was born around 1890,<sup>85</sup> and they had a daughter named Ethel in around 1900, a son named Frank around 1912, and a daughter named Nancy born in around 1913.<sup>86</sup> Topsy had six grandchildren through Ethel and her husband Sir Reginald Douglas,<sup>87</sup> and seven grandchildren through Nancy and her husband Harry Nardoo.<sup>88</sup> In 1907 Topsy had a daughter called May, born to a European man named Arthur Collins.<sup>89</sup> May and Arthur had nine children, although one child passed away at one day old.<sup>90</sup> Topsy also had two other daughters, Eva in around 1920 (and five grandchildren through Eva),<sup>91</sup> and Phyllis.<sup>92</sup>

- *Sophie*

Sophie is described in the oral history as a Mitakoodi woman and is recorded on the Tindale Genealogy as ‘Sophie Monkey’ associated with Monkey Station in the northern part of the claim area.<sup>93</sup> Written records place her probable year of birth as around 1862.<sup>94</sup> Research by Norman Tindale and Joseph Birdsell in 1938 included an

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<sup>77</sup> Ibid, page 6 [15(c)(i)].

<sup>78</sup> Ibid, page 6–7 [15(c)(ii)–(iii)].

<sup>79</sup> Ibid.

<sup>80</sup> Ibid, page 10 [26].

<sup>81</sup> Ibid, page 7–8 [15(d)(i)].

<sup>82</sup> Ibid, page 8 [15(d)(ii)].

<sup>83</sup> Ibid, page 8 [15(d)(v)–(vi)].

<sup>84</sup> Ibid, page 6 [15(b)(viii)].

<sup>85</sup> Ibid, page 4 [15(b)(i)].

<sup>86</sup> Ibid, page 4–5 [15(b)(ii), (iv), (v)].

<sup>87</sup> Ibid, page 4 [15(b)(ii)].

<sup>88</sup> Ibid, page 5 [15(b)(v)].

<sup>89</sup> Ibid, page 5 [15(b)(iii)].

<sup>90</sup> Ibid.

<sup>91</sup> Ibid, page 5 [15(b)(vi)].

<sup>92</sup> Ibid, page 5 [15(b)(vii)].

<sup>93</sup> Ibid, page 25 [1]–[3].

<sup>94</sup> Ibid, page 26 [5].

interview with one of Sophie's five children, Nancy.<sup>95</sup> Both Nancy and Sophie are recorded by Tindale and Birdsell as 'Maithakari'.<sup>96</sup> Sophie's other children include: Gypsy (born at Canobie Station around 1890 or 1895);<sup>97</sup> Alick Wilson/Smith (born at Canobie Station or Cloncurry around 1877–91);<sup>98</sup> Archie Monkey;<sup>99</sup> Kenny Wilson (born around 1893 or 1906–8 at Canobie Station);<sup>100</sup> and Nancy (born between 1896 and 1903 at Monkey Station / Cloncurry / Woorung).<sup>101</sup>

- *Billy Chisholm*

Billy Chisholm was born around the time of 'effective sovereignty', around 1864 or earlier than 1868.<sup>102</sup> Tindale's records indicate that Billy Chisholm was affiliated with the Mitakoodi group in the claim area at this time.<sup>103</sup> Billy's children include Remus and Maude McIntosh, who are described in the records as 'Maidakari' / 'Maithakari',<sup>104</sup> as well as Dolly and Ruby.<sup>105</sup> Ruby's children are described as descendants of Billy Chisholm and include current members of the claim group.<sup>106</sup> The descendants of Billy Chisholm indicate that he lived at Fort Constantine.<sup>107</sup>

[103] The factual basis material describes how current members of the claim group have lived and travelled over the claim area all their lives, and currently reside in or near the area.<sup>108</sup> Current members of the claim group describe their association with the claim area, for example one descendant of Billy Chisholm states:

I always knew that Fort Constantine was my country. Mum told us that she was born at Cloncurry and Ninny [a descendant of Billy Chisholm] was born at Fort Constantine. Mum and Dad taught me and my sisters and brothers about this country. From the time I was young, we always travelled to Fort Constantine and the nearby stations to get food. We hunted, we fished and camped along the Cloncurry River.<sup>109</sup>

[104] This claim group member further describes that there are places along the Cloncurry River where different families used to live, as well as important sites that must be looked after, including rock paintings and initiation sites.<sup>110</sup>

[105] Other contemporary members of the claim group recall visiting the country to fish and collect traditional foods,<sup>111</sup> and frequent forays into the bush to collect traditional foods.<sup>112</sup> A

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<sup>95</sup> Ibid, page 25 [2], [4].

<sup>96</sup> Ibid, page 25 [4].

<sup>97</sup> Ibid, page 26 [8].

<sup>98</sup> Ibid, page 26 [9].

<sup>99</sup> Ibid, page 27 [10].

<sup>100</sup> Ibid, page 27 [11].

<sup>101</sup> Ibid, page 27 [12].

<sup>102</sup> Ibid, page 29 [1]–[2].

<sup>103</sup> Ibid, page 29–30, [4]–[7].

<sup>104</sup> Ibid, page 29, [4(b)–(c)].

<sup>105</sup> Ibid, page 30 [8]–[9].

<sup>106</sup> Ibid, page 30 [9].

<sup>107</sup> Ibid, page 31 [12].

<sup>108</sup> Ibid, page 11 [32]–[33].

<sup>109</sup> Ibid, page 31 [13(a)].

<sup>110</sup> Ibid, page 31 [13(b)–(f)].

<sup>111</sup> Ibid, page 10 [27].

<sup>112</sup> Ibid, page 11 [31], [34].

descendent of Minnie describes how her grandmother (Ethel, Minnie's daughter), 'taught me and my family everything we know about survival, the bush tucker, how to find and dig for water, make fishing fish, catch a goanna or porcupine, how to cook them and prepare the foods'.<sup>113</sup> Schedule G of the amended application also shows that current members of the claim group visit the area covered by the application, including to camp, hunt, fish, collect resources for food and traditional purposes and maintain a spiritual connection with the area.

[106] The factual basis material also demonstrates that current members of the claim group recall spending weeks at a time camping on country, at places such as Fort Constantine, Malbon, and along the Cloncurry River.<sup>114</sup> One contemporary claim group member describes taking family members camping on country in the 'open places' and avoiding 'other places, that for spiritual and cultural reasons, are dangerous and should not be approached'.<sup>115</sup> Current members of the claim group also visit favourite waterways for swimming and as a source of food, such as at Two Mile Waterhole and Five Mile Waterhole near Cloncurry.<sup>116</sup>

[107] Several current members of the claim group also participate in cultural heritage work to protect significant sites from mining exploration.<sup>117</sup>

**Is the factual basis sufficient to support the assertion at s 190B(5)(a)?**

[108] I understand that for the purpose of this condition the Registrar's task is to 'address the relationship which all members claim to have in common in connection with the relevant land'.<sup>118</sup> This task is to be undertaken by assessing whether 'the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)',<sup>119</sup> and that there has been 'an association between the predecessors of the whole group and the area over the period since sovereignty'.<sup>120</sup> Consistently with these principles, I consider that the factual basis material must provide information relating to the identity of the native title claim group, their predecessors and the nature of the association with the area covered by the application.

[109] In my view, the factual basis material clearly identifies the native title claim group and their predecessors. The material establishes that the apical ancestors were recorded in the historical record as being members of the group for the relevant area, and as having an association with the area. For example Thomas 'Tiger' Mitchell 'lived traditionally' in the northwest portion of the claim area,<sup>121</sup> Topsy is described as a Mitakoodi woman who lived all her life at Canobie Station,<sup>122</sup> and both Sophie and Billy Chisholm were likely born around the time of 'effective sovereignty' and were described as 'Maitakari' people.<sup>123</sup> These predecessors, their children and grandchildren are shown as being born and living in the claim

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<sup>113</sup> Ibid, page 10–11 [29].

<sup>114</sup> Ibid, page 13 [43]–[44].

<sup>115</sup> Ibid, page 13 [45].

<sup>116</sup> Ibid, page 16–17 [57].

<sup>117</sup> Ibid, page 21 [82].

<sup>118</sup> *Gudjala* 2007 [40].

<sup>119</sup> Ibid [39].

<sup>120</sup> Ibid [52].

<sup>121</sup> Attachment F and F, page 10 [26].

<sup>122</sup> Ibid, page 6 [15(b)(viii)].

<sup>123</sup> Ibid, page 25–26 [4]–[5]; page 29 [1]–[3].

area at Fort Constantine, Canobie Station, Cloncurry, Old Boomarra Station and Monkey Station.

[110] Further, current members of the claim group describe how they maintain an association with the area through hunting, fishing and collecting bush tucker in ways that were taught by these predecessors.<sup>124</sup>

[111] For the purpose of s 190B(5)(a), I must also be satisfied that the factual basis material is sufficient to support the assertion of an association between the claim group and the whole of the area covered by the claim. From the above information, I consider that the factual basis material is sufficient, and provides sufficient geographical particularity, to support the assertion of an association between the whole group and the whole area since sovereignty.<sup>125</sup> As such, I am satisfied that the requirements of s 190B(5)(a) are met.

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

[112] Section 190B(5)(b) requires the factual basis material to be sufficient to support the assertion of the existence of the traditional laws and customs giving rise to the native title rights and interests claimed. The definition of ‘native title rights and interests’ in s 223(1)(a) provides that those rights and interests must be ‘possessed under the traditional laws acknowledged by, and traditional customs observed’ by the native title holders. Considering the similar wording between this provision and s 190B(5)(b), in my view it is appropriate to have regard to the case law regarding the definition of ‘native title rights and interests’ in s 223(1).

[113] Having regard to the observations of the High Court in *Yorta Yorta*, I consider that laws and customs are ‘traditional’ where:

- ‘the origins and content of the law or custom concerned are to be found in the normative rules’ of a society that existed prior to the assertion of British sovereignty,<sup>126</sup> where the society consists of a body of persons united in and by their acknowledgement and observance of a body of laws and customs;<sup>127</sup>
- the normative system under which those traditional rights and interests are possessed is one which ‘has had a continuous existence and vitality since sovereignty’;<sup>128</sup>
- the laws and customs have been passed from generation to generation, and must be rooted in the traditional laws and customs that existed pre-sovereignty;<sup>129</sup>
- those laws and customs have been acknowledged and observed with substantial interruption since sovereignty.<sup>130</sup>

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<sup>124</sup> See, eg, *ibid*, page 10–11 [29].

<sup>125</sup> *Gudjala 2007* [52].

<sup>126</sup> *Yorta Yorta* [46].

<sup>127</sup> *Ibid* [49].

<sup>128</sup> *Ibid* [47].

<sup>129</sup> *Ibid* [46], [79].

<sup>130</sup> *Ibid* [87].

[114] Dowsett J discussed some of the factors that may guide the Registrar in assessing the factual basis in *Gudjala 2009*, including that:

- it is necessary for the factual basis material to identify the relevant pre-sovereignty society of persons who acknowledged and observed the laws and customs;<sup>131</sup>
- where the basis for membership of the claim group is descent from named ancestors, the factual basis material must demonstrate some relationship between the ancestors and the pre-sovereignty society from which the laws and customs are derived;<sup>132</sup> and
- the factual basis material must provide an explanation, beyond a mere assertion, of how the current laws and customs of the claim group are traditional and derived from the pre-sovereignty society.<sup>133</sup>

[115] I also note the observations of the Full Court in *Warrie*, that although ‘a claim group must establish that the traditional law and custom which gives rise to their rights and interests in that land and waters stems from rules that have a normative character’, the Act does not ‘require establishment of some overarching “society” that can only be described in one way and with which members of a claim group are forever fixed in relation to any other land and waters over which they assert native title’.<sup>134</sup>

**What information has been provided in support of the assertion at s 190B(5)(b)?**

[116] The factual basis material describes how the Mitakoodi and Mayi People hold communal rights and interests, although particular families may have responsibilities under traditional laws and customs for localised areas within the claim area, including responsibility to care for and speak for that localised area.<sup>135</sup> The ‘essential laws’ governing the rights and interests in the claim area arise from descent through a classificatory kinship system and collective ownership of the lands and waters by social groups.<sup>136</sup> The factual basis material describes that senior men would form an open council with responsibilities for settling disputes and punishing offenders of traditional laws.<sup>137</sup>

[117] Attachment F and M refers to ‘stories about totemic beings associated with the Mitakoodi and Mayi claim area’ that have been passed down through the generations, directly from apical ancestors through to current members of the claim group, and are still being passed on to their children.<sup>138</sup> These stories include the Hawk Story (a sacred totemic being) and the Water Gin Dreaming (about a Spirit Woman associated with the Cloncurry River).<sup>139</sup>

[118] The factual basis material describes how the Mitakoodi and Mayi People’s ‘all powerful and at times dangerous spirituality’ requires

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<sup>131</sup> *Gudjala 2009* [37], [52].

<sup>132</sup> *Ibid* [40].

<sup>133</sup> *Ibid* [29], [54].

<sup>134</sup> *Warrie* [107]; see also *Alyawarr* [78].

<sup>135</sup> Attachment F and M, page 8 [16].

<sup>136</sup> *Ibid*, page 9 [18]–[19].

<sup>137</sup> *Ibid*, page 19 [69].

<sup>138</sup> Attachment F and M, page 28 [15].

<sup>139</sup> *Ibid*.



adherence to customary rules that mandate behaviour and actions, including rules relating to avoidance of place, respect for country and animals and plants in terms of taking and using, prohibition on the removal of objects from country and when to acknowledge and speak to spirits of the country so that they can be mollified or placated.<sup>140</sup>

- [119] Records from the late 19<sup>th</sup> Century demonstrate traditional ceremonies relating to initiation and how these areas are still considered as sacred sites to the Mitakoodi and Mayi People.<sup>141</sup> Female members of the claim group were taught to avoid men's business areas.<sup>142</sup> Contemporary members of the claim group describe corroborees occurring in the 1930s, involving dancing, singing and chanting in language.<sup>143</sup>
- [120] A further example of this is the description of a current member of the claim group ensuring that she and her family always return home or back to their camp before dark when visiting country, to respect the spirits on country.<sup>144</sup> These spirits are noted to be particularly dangerous to children and young people, and so if travelling with a toddler care is taken to erase their footprints from the sand before leaving the area.<sup>145</sup> Care is also taken to ensure that any cut hair is burnt, as any stray hairs may get caught by a clever man and used to cause harm to its owner.<sup>146</sup> Current members of the claim group also demonstrate respect for spirits when visiting on country, for example by throwing a stone into the water to announce to the spirits of the old people that they are there and are Mitakoodi and Mayi People,<sup>147</sup> or avoiding places that are dangerous and should not be approached.<sup>148</sup>
- [121] The factual basis material demonstrates that current members of the claim group teach the younger generations the significance of sites,<sup>149</sup> where to find medicinal plants and bush tucker,<sup>150</sup> and to be respectful at story places.<sup>151</sup> Traditional cooking methods have also been passed down from the earlier generations.<sup>152</sup>
- [122] The factual basis material also demonstrates the importance of the Mitakoodi and Mayi society in the broader area through trade, by hosting other groups at trading centres at Canobie Station and Fort Constantine for the trade of chest ornaments, spears, shell-woomeras, ochre, coolamons and boomerangs.<sup>153</sup>
- [123] Traditional laws and customs are also maintained with respect to burial practices, and current members of the claim group describe the importance of being buried on country, having been

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<sup>140</sup> Ibid, page 9 [23].

<sup>141</sup> Ibid, page 19–20 [69]–[72].

<sup>142</sup> Ibid, page 20 [74].

<sup>143</sup> Ibid, page 20 [73].

<sup>144</sup> Ibid, page 12 [36].

<sup>145</sup> Ibid.

<sup>146</sup> Ibid, page 12 [37].

<sup>147</sup> Ibid, page 17 [58].

<sup>148</sup> Ibid, page 13 [45].

<sup>149</sup> Ibid, page 20 [75].

<sup>150</sup> Ibid, page 15 [50], page 21 [76]–[77].

<sup>151</sup> Ibid, page 21 [80].

<sup>152</sup> Ibid, page 22 [85]–[87].

<sup>153</sup> Ibid, page 17–18 [61].

taught by the elders that the spirit returns to and belongs on country when they die, and that the spirits of the old people reside on country to this day.<sup>154</sup>

[124] In addition, I note that the information set out above with respect to my consideration of s 190B(5)(a) is also relevant to the consideration of this assertion.

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

[125] In my view the factual basis material is sufficient to demonstrate the existence of a pre-sovereignty society in the area. I understand that this material asserts that the Mitakoodi and Mayi People hold communal rights in the claim area, with particular family groups having responsibilities in accordance with traditional laws and customs for localised areas, passed down through a classificatory kinship system via descent from the relevant apical ancestors.<sup>155</sup> The rights and interests of the Mitakoodi and Mayi People are governed by customary rules which demonstrate respect for country and spirits.<sup>156</sup> The factual basis material contains many examples of how the laws acknowledged and the customs observed today are traditional, including burial practices, how to respect spirits at particular sites, hunting and fishing practices and cooking methods.

[126] I also consider that the factual basis material shows clear links from the predecessors to contemporary members of the claim group. For example, one current member of the claim group was able to describe how stories about sacred totemic beings related to the Cloncurry River were passed down from ancestors Sophie and Topsy.<sup>157</sup> The factual basis material shows how sites of significance are maintained and respected.

[127] I consider that the factual basis material is sufficient to show that the laws acknowledged and the customs observed by the native title claim group are traditional in the sense required by the case law set out above, including *Yorta Yorta*.

[128] As such, I am satisfied that the factual basis is sufficient to support the assertion at s 190B(5)(b).

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

[129] Section 190B(5)(c) requires the factual basis material to be sufficient to support the assertion that the native title claim group continues to hold native title in accordance with the traditional laws and customs. These traditional laws and customs are those identified for the purpose of s 190B(5)(b).<sup>158</sup> As such, in my view, s 190B(5)(c) requires the factual basis material to demonstrate that the claim group has continued to hold native title through the continued observance of these traditional laws and customs.

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<sup>154</sup> Ibid, page 19 [67].

<sup>155</sup> Ibid, page 8–9 [16]–[20].

<sup>156</sup> Ibid, page 9 [22]–[23].

<sup>157</sup> Ibid, page 28 [15]–[16].

<sup>158</sup> *Martin* [29].

[130] I also understand that continuity may be inferred where there is '[c]lear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs'.<sup>159</sup>

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

[131] In my view there is sufficient information in the factual basis material relating to the transmission and continuity of the native title rights and interests held by the native title claim group in accordance with the relevant traditional laws and customs.

[132] The factual basis material asserts that the knowledge and adherence to the traditional laws and customs (as described in my above consideration of the assertion at s 190B(5)(b)) guides the current members of the claim group in the exercise of the rights and interests, including the generational transmission of rights and interests, and provides evidence of the continuity of these laws and customs.<sup>160</sup>

[133] There are many strong examples in the factual basis material of traditional laws and customs being passed down from the apical ancestors to current members of the claim group, as well as the continued observance of these laws and customs. One member of the claim group describes how her grandmother (Minnie's daughter) taught her and her family everything about how to live on country,<sup>161</sup> another descendant describes still following the rules she was taught from a young age about country, including hunting, fishing and maintaining significant sites.<sup>162</sup> The factual basis material also demonstrates how current members of the claim group teach on country as they were taught, with one claim group member regularly taking their grandchildren 'out onto country to teach them about medicinal plants and show them where to collect bush tucker'.<sup>163</sup>

[134] The factual basis material also shows how ceremonial objects were crafted into the 20<sup>th</sup> Century and how Mitakoodi and Mayi stockmen continued to do things the 'old way'.<sup>164</sup>

[135] In assessing this requirement, I have also had regard to the information contained in the factual basis material relevant to my above consideration in relation to ss 190B(5)(a) and (b). In my view the factual basis material is sufficient to identify the pre-sovereignty society and that the current members of the claim group continue to acknowledge and observe these traditional laws and customs.

[136] As such, I am satisfied that the factual basis material provided is sufficient to support the assertion at s 190B(5)(c).

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

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

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<sup>159</sup> *Gudjala 2009* [33].

<sup>160</sup> Attachment F and M, page 9 [22].

<sup>161</sup> *Ibid*, page 10–11 [29].

<sup>162</sup> *Ibid*, page 31 [13].

<sup>163</sup> *Ibid*, page 21 [77].

<sup>164</sup> *Ibid*, page 18 [62].

### What is required to meet this condition?

[138] Section 190B(6) requires that the Registrar must consider that at least some of the claimed native title rights and interests can be established on the face of application and supporting material. A claim may be accepted on a prima facie basis if it is arguable on its face and notwithstanding any disputed issues of fact or law that may be involved.<sup>165</sup> The Registrar's task involves some weighing of the factual basis and imposes a 'more onerous test to be applied to the individual rights and interests claimed' than at s 190B(5).<sup>166</sup>

[139] I understand that I may consider material outside of the application itself in my assessment of s 190B(6).<sup>167</sup>

[140] I note the comments of Kirby J in *Ward HC*, that 'for a native title right to be recognised under the [Act], the critical threshold question is whether it is a right or interest "in relation to" land or waters'.<sup>168</sup> The term "in relation to" is here to be given a 'wide import'.<sup>169</sup>

[141] I also understand that s 190B(6) is to be assessed having regard to the definition of 'native title rights and interests' in s 223(1).<sup>170</sup> As such, I must consider whether, on a prima facie basis, the claimed native title rights and interests:

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

[142] A claimed native title right and interest can be prima facie established if the factual basis is sufficient to demonstrate that it is possessed pursuant to the traditional laws and customs of the native title claim group.<sup>171</sup>

[143] My below reasons in relation to this condition should also be read in conjunction with, and in addition to, my above reasons and the relevant material outlined for the purpose of s 190B(5).

### *Native title rights and interests prima facie established*

[144] At the outset, I note that having considered each of the claimed native title rights and interests at Schedule E of the amended application, in my view they are all clearly "in relation to" lands or waters.

[145] I also note that I consider that Schedule B of the amended application sufficiently addresses extinguishment for the purpose of my assessment of s 190B(6).

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<sup>165</sup> *Waanyi* [35], cited with approval in *Doepel* [135].

<sup>166</sup> *Doepel* [127], [132].

<sup>167</sup> *Ibid* [16].

<sup>168</sup> *Ward HC* [577].

<sup>169</sup> *Alyawarr* [93].

<sup>170</sup> *Gudjala 2007* [85]–[87].

<sup>171</sup> *Yorta Yorta* [86]; *Gudjala 2007* [86].

## **The right to possess, occupy, use and enjoy the land and waters to the exclusion of all others**

[146] Paragraph 1 of Schedule E claims the following:

Over areas where a claim to exclusive possession can be recognized [sic] (such as areas where there has been no prior extinguishment of native title or where s238, ss47, 47A, 47B, or 47C apply), the Mitakoodi and Mayi People claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group.

[147] There is considerable judicial guidance with respect to claims for exclusive native title rights and interests. In *Ward HC*, the High Court commented that it ‘is the rights under traditional law and custom to be asked permission and to “speak for country” that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others’.<sup>172</sup>

[148] In *Griffiths*, the Full Court held:

It is not necessary to a finding of exclusivity in possession, use and occupation, that the native title claim group should assert a right to bar entry to their country on the basis that it is “their country”. If control of access to country flows from spiritual necessity because of the harm that ‘the country’ will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive. The relationship to country is essentially a ‘spiritual affair’. It is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people. The question of exclusivity depends upon the ability of the [native title holders] effectively to exclude from their country people not of their community. If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have ... an exclusive right of possession, use and occupation.<sup>173</sup>

[149] In *Sampi*, French J noted that:

The right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation.<sup>174</sup>

[150] The material in attachment F and M sets out the following:

- the spirituality of the Mitakoodi and Mayi People is ‘all powerful and at times dangerous’,<sup>175</sup> and there are ‘many spirits on country that require respect [and] that can be dangerous to people’;<sup>176</sup>

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<sup>172</sup> *Ward HC* [88].

<sup>173</sup> *Griffiths* [127].

<sup>174</sup> *Sampi* [1072].

<sup>175</sup> Attachment F and M, page 9 [23].

<sup>176</sup> *Ibid*, page 12 [36].

- rights and interests are governed by mandatory rules relating to avoiding particular places and ‘when to speak to spirits of the country so that they can be mollified or placated’;<sup>177</sup>
- early records indicate that when accessing certain places, different groups required permission or consent from the owner of a particular place, such as large lagoons or hunting grounds;<sup>178</sup>
- visiting groups would carry message sticks as a form of passport or safeguard when meeting for trade or ceremony, and would walk on designated trade routes;<sup>179</sup>
- a current member of the claim group ‘stressed the importance today of non-traditional owners being accompanied by traditional owners when going out onto country’ as ‘[i]n the past people had fallen sick and passed away for wandering into places that they were not allowed’;<sup>180</sup>
- another current member of the claim group refers to significant rock art sites and that in order to protect the sites they ‘don’t take strangers who can’t be trusted ... don’t even tell them about those special places’;<sup>181</sup> and
- current members of the claim group warn that damage to significant sites, such as Two Mile Waterhole, ‘could lead to harm on the part of the perpetrator’.<sup>182</sup>

[151] From this material I understand that the Mitakoodi and Mayi People maintain rights to speak for country and adhere to rules about controlling access to country to respect the dangerous spirits in order to prevent harm. In this way I consider that the claim group act as ‘gatekeepers’ for country to respect spiritual sanctions as described in *Griffiths*.

[152] As such, I am satisfied that the claimed right to possess, occupy, use and enjoy the land and waters to the exclusion of all others is prima facie established.

### **Non-exclusive rights and interests**

[153] Paragraph 2 of Schedule E sets out the following claimed non-exclusive native title rights and interests:

- (a) access, be present on, move about on and travel over the application area;
- (b) camp, and live temporarily on the application area as part of camping, and for that purpose build temporary shelters;
- (c) hunt, fish and gather on the land and waters of the application area for personal, domestic, commercial and communal purposes;
- (d) take, use, share and exchange natural resources from the land and waters of the application area for personal, domestic, commercial and communal purposes;

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<sup>177</sup> Ibid, page 9 [23].

<sup>178</sup> Ibid, page 23 [88].

<sup>179</sup> Ibid, page 23 [89].

<sup>180</sup> Ibid, page 23 [90].

<sup>181</sup> Ibid, page 31 [13(d)].

<sup>182</sup> Ibid, page 22 [84].

- (e) take and use the water of the application area for personal, domestic, commercial and communal purposes;
- (f) conduct ceremonies and dance on the application area;
- (g) hold meetings on the application area;
- (h) teach on the area the physical and spiritual aspects of the application area;
- (i) light fires on the application area;
- (j) maintain places of importance and areas of significance to the native title holders under their traditional laws and customs, and protect those places and areas from physical harm;
- (k) be accompanied onto the application area by certain non native title holders, being:
  - i. immediate family of native title holders, pursuant to the exercise of traditional laws acknowledged and customs observed by the native title holders; and
  - ii. people required under the traditional laws acknowledged and traditional customs observed by the native title holders for the performance of, or participation in, ceremonies and dance.

[154] In my view the material set out in Attachments F and M contains sufficient detail to establish each of these claimed native title rights and interests on a prima facie basis. This material provides examples of the exercise of these rights and interests by current members of the claim group and their predecessors under the relevant headings for each of these claimed rights and interests.<sup>183</sup> I have referred to this material in my above consideration of s 190B(5).

[155] The material demonstrates that apical ancestors accessed, lived on and travelled throughout the area covered by the application, for example Topsy lived at Canobie Station all her life,<sup>184</sup> and many current claimants reside on or frequently return to their traditional country.<sup>185</sup> The historical material refers to the *yin-bur* huts used to camp on the area by the Mitakoodi and Mayi People,<sup>186</sup> and how current claim group members and their families continue to camp within the area, for example on the banks of the Cloncurry River.<sup>187</sup> Early historical records from the late 19<sup>th</sup> Century show that the Mitakoodi and Mayi People would hunt and fish using traditional methods,<sup>188</sup> as well as to gather plants for food and medicine.<sup>189</sup> Current members continue to hunt, fish and gather plants such as sugary mana, wild bananas, black conker berries and wild onions.<sup>190</sup> In relation to taking and using water, the factual basis material shows that '[m]uch of the river and its associated aquatic and terrestrial resources were exploited on a nearly daily basis by claimants, a trend which continues today'.<sup>191</sup> Other natural resources continue to be collected using traditional methods, such as honey from native bees.<sup>192</sup> The exchange of natural resources is demonstrated through trade with other groups, with traditional trading centres at Canobie Station and Fort Constantine.<sup>193</sup> The factual

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<sup>183</sup> Ibid, page 10–23 [25]–[90].

<sup>184</sup> Ibid, page 10 [27].

<sup>185</sup> Ibid, page 11 [33].

<sup>186</sup> Ibid, page 12 [39].

<sup>187</sup> Ibid, page 13 [43]–[45].

<sup>188</sup> Ibid, page 13–15 [46]–[49].

<sup>189</sup> Ibid, page 15 [50].

<sup>190</sup> Ibid, page 16 [52].

<sup>191</sup> Ibid, page 16 [56].

<sup>192</sup> Ibid, page 18 [63].

<sup>193</sup> Ibid, page 17 [61].

basis material refers to the use of fires for traditional cooking methods for fish, goanna and kangaroo.<sup>194</sup> The importance of ceremony is demonstrated throughout the factual basis material, for example one claim group member remembers corroborees at Canobie Station.<sup>195</sup> Burial practices and the importance of being buried on country are also demonstrated in the material.<sup>196</sup> The factual basis material provides many examples of how the Mitakoodi and Mayi People were taught, and continue to teach the younger generations, about important physical and spiritual attributes of the area.<sup>197</sup> Claim group members also describe how they maintain sites of significance and ensure that the spirits are respected, for example by throwing a rock into the water at a waterhole near Black Mountain.<sup>198</sup> This respect for the spirits is also demonstrated in ensuring that traditional owners accompany other persons onto country.<sup>199</sup>

[156] I am satisfied that the factual basis material establishes on a prima facie basis that the claim group possess the claimed non-exclusive rights and interests under their traditional laws and customs. As such the requirement of s 190B(6) is met.

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

[157] I am satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with a part of the claim area.

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

[158] Section 190B(7) requires the Registrar to 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, or previously had and would reasonably be expected currently to have a traditional physical connection with any part of the land or waters but for certain things done.

[159] In *Gudjala 2009*, Dowsett J observed that the ‘traditional physical connection’ for the purpose of this condition ‘must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs’.<sup>200</sup> In interpreting connection in the traditional sense as required by s 223, the joint judgment in *Yorta Yorta* stated that ‘the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs ... “traditional” in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty’.<sup>201</sup>

[160] I also note the observations of Mansfield J in *Doepel* that the task imposed by s 190B(7) requires the Registrar to be satisfied of this condition based on a particular fact or facts.<sup>202</sup> I

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<sup>194</sup> Ibid, page 22 [86]–[87].

<sup>195</sup> Ibid, page 20 [73].

<sup>196</sup> Ibid, page 19 [67]–[68].

<sup>197</sup> Ibid, page 20–21 [75]–[80].

<sup>198</sup> Ibid, page 22 [84].

<sup>199</sup> Ibid, page 23 [90].

<sup>200</sup> *Gudjala 2009* [84].

<sup>201</sup> *Yorta Yorta* [86].

<sup>202</sup> *Doepel* [18].



consider that there must be factual material to demonstrate that at least one member of the native title claim group has or had the necessary traditional physical association with the area covered by the application.

**Is there evidence that a member of the claim group has or had a traditional physical connection?**

[161] I note my above reasons with respect to s 190B(5) that the factual basis material supports the assertion that the native title claim group acknowledges and observes the traditional laws and customs of the pre-sovereignty society.

[162] In my view, the factual basis material demonstrates that members of the native title claim group have a traditional physical connection with the claim area, through living, camping, hunting, fishing and gathering resources on the claim area. There are many examples of current claim group members continuing to use and access the area, being taught about the country and travelling to hunt, fish and camp on country.<sup>203</sup>

[163] Having regard to the information in the amended application and supporting material, I am satisfied that at least one member of the native title claim group has a traditional physical connection with the land or waters in the area covered by the application within the meaning of s 190B(7). As such I consider that this condition is met.

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

[164] In my view the application does not contravene the provisions of ss 61A(1)–(3) for the reasons set out below, and therefore the application satisfies the condition at s 190B(8).

**What is required to meet the condition in s 190B(8)?**

[165] Section 190B(8) requires that the application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that the application should not have been made due to the operation of s 61A. Section 61A provides that an application must not be made over an area where there is an approved determination of native title, or where previous exclusive or non-exclusive possession acts have been made.

**Does the application meet the requirements of s 190B(8)?**

*Section 61A(1)*

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

[167] The geospatial assessment shows that there is no approved determination of native title over the area covered by the amended application. I have also conducted my own searches of the Tribunal's mapping database to confirm this. I am satisfied that the amended application does not contravene s 61A(1).

*Section 61A(2)*

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

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<sup>203</sup> See eg, Attachment F and M, page 31 [13(a)].

[169] Schedule B of the amended application confirms that any area where native title has been wholly extinguished, due to a previous exclusive possession act or otherwise, is excluded. As such I am satisfied that the amended application does not contravene s 61A(2).

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

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

[171] Paragraph 3 of Schedule B of the amended application confirms that exclusive possession is not claimed over areas subject to non-exclusive possession acts attributable to the Commonwealth or the State. As such I am satisfied that the amended application does not contravene s 61A(3).

#### **Conclusion on the condition at s 190B(8)**

[172] In my view the amended application has not been made contrary to s 61A, and as such I am satisfied that the condition in s 190B(8) is met

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

[173] Section 190B(9) provides three sub-conditions that restrict the extent of the native title rights and interests that may be claimed. As set out below I consider that the amended application and accompanying documents do not contravene any of the provisions of ss 190B(9)(a)–(c) and therefore the application meets the condition of s 190B(9).

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

[174] The sub-condition at s 190B(9)(a) requires that an application does not include a claim of ownership of minerals, petroleum or gas wholly owned by the Crown.

[175] Schedule Q of the amended application confirms that the native title claim group does not claim ownership of minerals, petroleum or gas wholly owned by the Crown. As such this sub-condition is met.

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

[176] The sub-condition at s 190B(9)(a) requires that an application does not claim exclusive possession over all or part of waters in an offshore place.

[177] Schedule P of the amended application confirms that the native title claim group does not include a claim for exclusive possession over all or part of waters in an offshore place. As such I am satisfied that this sub-condition is met.

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

[178] The sub-condition at s 190B(9)(c) requires that the native title rights claimed must not have otherwise been extinguished.

[179] Paragraph 6 of Schedule B confirms that native title is not claimed over any area where native title rights and interests have been extinguished. As such this sub-condition is met.

**Conclusion on the condition at s 190B(9)**

[180] In my view the amended application and accompanying documents do not disclose that the sub-conditions of s 190B(9) have been contravened. I am therefore satisfied that this requirement is met.

*End of reasons*

## Attachment A

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

Application name	Tanya Kum Sing & Ors on behalf of the Mitakoodi and Mayi People and State of Queensland & Ors
NNTT No.	QC2015/009
Federal Court of Australia No.	QUD556/2015

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

In accordance with ss 186, 190A(1) 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:

8 July 2015

#### Date application entered on Register:

21 February 2020

#### Applicant:

Tanya Kum Sing, Pearl Connelly, Kay Douglas, Norman Douglas, Ronald Major, Sharn Fogarty, Clyde Fogarty, Justin Asse and Kristal Chapman

#### Applicant's address for service:

Michael Pagsanjan  
MPS Law  
100 Carrington Street  
Adelaide SA 5000

Phone: 08 7221 1690

Email: filing@mpslaw.com.au

#### Conditions on Applicant's authority

1. If one or more members of the Applicant passes away or is unable to act as an Applicant because of physical or mental incapacity, the continuing members of the Applicant:
  - (a) remain authorised to make the Mitakoodi and Mayi #5 native title determination application and deal with matters arising in relation to it; and

- (b) may make application to the Federal Court for an order that they jointly replace the current Applicant without the need to convene an authorisation meeting of the claim group.
2. Decisions in relation to matters arising in relation to the Mitakoodi and Mayi #5 native title determination application may only be made:
- (a) by consensus of the Applicant, in which case the resolution may be made by flying minute without the need to convene a meeting of the Applicant; or
  - (b) where consensus cannot be achieved, by a resolution supported by at least a majority of the members of the Applicant at a properly notified and convened meeting of the Applicant at which at least a majority of the members of the Applicant are in attendance, in which case the decision will be binding on the Applicant despite the absence of any Applicant or Applicants.
3. Any individual who is a member of the Applicant must:
- (a) attend all properly notified and convened meetings of the Applicant or if they are unable to attend provide reasonable notice and reasons as to why they are unable to attend;
  - (b) act in accordance with resolutions passed by the Applicant at a properly notified and convened meetings of the Applicant;
  - (c) act in accordance with resolutions passed by the claim group at a properly called and constituted claim group meeting;
  - (d) act in the best interests of the claim group to pursue the recognition of native title under the *Native Title Act 1993* (Cth); and
  - (e) sign any document or agreement that is necessary to facilitate any matters arising in relation to the native title claim or that has been authorised by the Applicant or claim group.
4. A member of the Applicant who:
- (a) fails to meet the conditions in item 3; or
  - (b) provides notice in writing that they are no longer willing or able to act as a member of the Applicant,
- will cease to be authorised by the claim group to be a member of the Applicant and the continuing members of the Applicants may make application to the Federal Court for an order that they jointly replace the current Applicant.

**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]

Michael Raine

Delegate of the Native Title Registrar pursuant to ss 190–190D of the Act under an instrument of delegation dated 19 May 2021 and made pursuant to s 99 of the Act.

15 December 2023