



## Registration Decision

<b>Application name</b>	Ernest Michael Hoolihan & Ors on behalf of the Gugu Badhun People #3 and State of Queensland (Gugu Badhun People #3)
<b>Name of applicant</b>	Ernie Hoolihan, Harry Gertz, Narda Kennedy, Hazel Illin, Elsie Thomson
<b>Federal Court of Australia No.</b>	QUD777/2019
<b>NNTT No.</b>	QC2019/003
<b>Date of Decision</b>	21 March 2023
<b>Claim accepted for registration</b>	

I have decided that the claim in the Gugu Badhun People #3 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.

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Daniel Deibler

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 (*Anderson*)  
*Bell v Native Title Registrar* [2021] FCA 229 (*Bell*)  
*Burrabungba on behalf of the Wangan and Jagalingou People v State of Queensland* [2017] FCA 373 (*Burrabungba*)  
*Corunna v Native Title Registrar* [2013] FCA 372 (*Corunna*)  
*Evans v Native Title Registrar* [2004] FCA 1070 (*Evans*)  
*Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People* [2019] FCAFC 177 (*Warrie*)  
*Griffiths v Northern Territory of Australia* [2007] FCAFC 178 (*Griffiths*)  
*Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*)  
*Gudjala People # 2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*)  
*Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*)  
*Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9)* [2007] FCA 31 (*Harrington-Smith*)  
*Hazelbane v Doepel* [2008] FCA 290 (*Hazelbane*)  
*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*)  
*McLennan v State of Queensland* [2019] FCA 1969 (*McLennan*)  
*Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (*Yorta Yorta*)  
*Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group* [2005] FCAFC 135 (*Alyawarr*)  
*Northern Territory of Australia v Doepel* [2003] FCA 1384 (*Doepel*)  
*Risk v National Native Title Tribunal* [2000] FCA 1589 (*Risk*)  
*Sampi v Western Australia* [2005] FCA 777 (*Sampi*)  
*State of Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*)  
*Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*)  
*Ward v Northern Territory* [2002] FCA 171 (*Ward*)  
*Weribone on behalf of the Mandandanji People v State of Queensland* [2013] FCA 255 (*Weribone*)  
*Western Australia v Native Title Registrar* [1999] FCA 1591 (*WA v NTR*)  
*Western Australia v Ward* [2002] HCA 28 (*Ward HC*)  
*Wiri People v Native Title Registrar* [2008] FCA 574 (*Wiri People*)

## BACKGROUND

- [1] This is an amended application filed on behalf of the Gugu Badhun People #3 native title claim group (the claim group). It covers land and waters of about 1,795 square kilometres in north Queensland, about 145 kilometres west of Townsville.

- [2] The original application was filed on 17 December 2019 and was accepted for registration on 6 March 2020. It was entered on the Register of Native Title Claims (the Register) and has remained on the Register since that date.
- [3] By orders of 14 October 2022 the applicant was granted leave to amend the application. The applicant filed an amended application with the Federal Court (the Court) on 24 October 2022.
- [4] On 23 December 2022 the applicant was granted leave to further amend the application. The applicant filed this amended application with the Court on 10 January 2023. The Registrar of the Court gave a copy of the further amended application and accompanying affidavits to the Native Title Registrar (the Registrar) on the same date 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

- [5] Sections 190A(1A), (6), (6A), (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 deals mainly with the merits of the claim) and s 190C (which deals with 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.
- [6] I am satisfied that neither s 190A(1A) nor s 190A(6A) apply to the claim made in this amended application. The granting of leave by the Court to amend the application was not made pursuant to s 87A, and thus the circumstance described in s 190A(1A) does not arise. The amendments to the application include changes to the authorisation of the applicant and the claim group description. These types of changes are not of a type contemplated in s 190A(6A) and do not therefore meet the requirements of that condition.
- [7] I have decided that the claim in the application must be accepted for registration and this document sets out my reasons for that decision. Attachment A contains information that will be included in the Register.

### Procedural fairness

- [8] As a delegate of the Registrar, I am bound by the principles of administrative law, including the rules of procedural fairness, when making a registration decision.<sup>3</sup> Those rules seek to ensure that decisions are made in a fair, just and unbiased way. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication.<sup>4</sup> When applying the registration test and making my registration decision I have followed the case law

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

<sup>3</sup> *WA v NTR* [37].

<sup>4</sup> *Hazelbane* [25].

regarding procedural fairness requirements<sup>5</sup> and note that the following steps were undertaken to ensure procedural fairness has been accorded:

- On 11 January 2023 the Tribunal’s senior officer for this matter sent a letter to the State of Queensland (the State) informing the State that any submission in relation to the registration of this claim should be provided by 25 January 2023. No submission was received from the State.
- The senior officer, also on 11 January 2023, wrote to inform the applicant that any information additional to the application should be provided by 25 January 2023. No additional information was received from the applicant.

[9] This concluded the procedural fairness process.

### 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 provides that the Registrar ‘may have regard to such other information as he or she considers appropriate’.

[11] I have had regard to information in the application.<sup>6</sup>

[12] I note there is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers.<sup>7</sup>

[13] The State has not provided any submissions in relation to the application of the registration test.<sup>8</sup>

[14] I have 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 20 January 2023 (the geospatial report). Moreover, I have conducted my own searches using the Tribunal’s registers and mapping database.

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

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

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

[16] 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>9</sup>

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<sup>5</sup> See, for instance, *WA v NTR* [21] – [38]; *Hazelbane* [23] – [31]; *Bell* [73] – [84].

<sup>6</sup> Section 190A(3)(a).

<sup>7</sup> Section 190A(3)(b).

<sup>8</sup> Section 190A(3)(c).

<sup>9</sup> *Doepel* [16], [35]–[39].

## Section 61

[17] The application contains the details specified in s 61.

Section	Details	Form 1	Result
s 61(1)	Native title claim group	Schedule A, Attachments A, T6, T7, T8, T9 and T10	Met
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Schedule A, Attachment A	Met

## Section 62

[18] The application contains the details specified in s 62.

Section	Details	Form 1	Result
s 62(1)(a)	Affidavits in prescribed form	Attachments T6, T7, T8, T9 and T10	Met
s 62(1)(d)	Section 47C agreement		Met
s 62(2)(a)	Information about the boundaries of the area	Schedule B, Attachment B	Met
s 62(2)(b)	Map of external boundaries of the area	Attachment C	Met
s 62(2)(c)	Searches	Schedule D, Attachment D	Met
s 62(2)(d)	Description of native title rights and interests	Schedule E	Met
s 62(2)(e)	Description of factual basis	Schedule F, Attachments F, F2, T1 and T4	Met
s 62(2)(f)	Activities	Schedule G, Attachment G	Met
s 62(2)(g)	Other applications	Schedule H	Met
s 62(2)(ga)	Notices under s 24MD(6B)(c)	Schedule HA	Met
s 62(2)(h)	Notices under s 29	Schedule I, Attachment I	Met
s 62(2)(i)	Conditions on applicant's authority	Schedule IA, Attachments T6, T7, T8, T9 and T10	Met

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

[19] As outlined in my reasons below, I am satisfied that no person is included in the native title claim group for this application that was a member of the native title claim group for any previous overlapping application.

[20] The Explanatory Memorandum that accompanied the *Native Title Amendment Bill 1997* provides that the 'Registrar must be satisfied that no member of the claim group for the

application ... is a member of the claim group for a registered claim which was made before the claim under consideration, which is overlapped by the claim under consideration and which itself has passed the registration test'.<sup>10</sup> The Explanatory Memorandum further discusses the general discouragement of overlapping claims by members of the same claim group and encouragement of consolidation of such multiple claims into one application.<sup>11</sup>

- [21] It is therefore my understanding that s 190C(3) was enacted to prevent overlapping claims by members of the same native title claim group from being on the Register at the same time. That purpose is achieved by preventing a claim from being registered where it has members in common with an overlapping claim that is on the Register when the registration test is applied.
- [22] I note that I am permitted to have regard to information, which does not form part of the application, when assessing the requirements of s 190C(3).<sup>12</sup>
- [23] The geospatial report advises that no other native title claim applications or determinations fall within the external boundaries of the Gugu Badhun People #3 claim. Using the Tribunal's geospatial database and registers, I have verified this information. I am therefore satisfied that there is no previous application that covered the whole or part of the area covered by the current application.
- [24] In my view, as there is no previous application to which ss 190C(3)(a) to (c) apply, I do not need to consider the requirements of s 190C(3) further.

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

- [25] For the reasons set out below, I am satisfied that the requirements set out in s 190C(4)(b) are met.

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

- [26] I must be satisfied that either the certification or authorisation requirements set out in ss 190C(4)(a) or (b) respectively are met, in order for the condition at s 190C(4) to be satisfied.
- [27] I note that Attachment R1 contains a certificate of North Queensland Land Council (NQLC). However, I also note that this certificate relates to an authorisation meeting on 30 November 2019. According to Part A, Item 2, the applicant was authorised at an authorisation meeting on 6 August 2022. I will therefore consider whether the requirements of s 190C(4)(b) are met.
- [28] That subsection provides that the Registrar must be satisfied that the following requirements, which are mentioned in subsection (4AA), are 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

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<sup>10</sup> Explanatory Memorandum 29.25.

<sup>11</sup> Ibid 35.38.

<sup>12</sup> *Doepel* [16].

- if there are any conditions under s 251BA on the authority that relate to the making of the application, then those conditions must be satisfied.

[29] Section 190C(5) contains a threshold test that must be met before the Registrar may be satisfied that the applicant is authorised in the way described in s 190C(4)(b).

[30] I will therefore consider s 190C(5) before turning to the requirements in s 190C(4)(b).

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

[31] Section 190C(5) requires that the application:

- (a) includes a statement to the effect that the requirements mentioned in subsection (4AA) have been met; and
- (b) briefly sets out the grounds on which the Registrar should consider that they have been met.

[32] I am satisfied that Part A, Schedule R, Item 2 and Attachments T1, T6, T7, T8, T9 and T10 include statements to the effect that the requirements in s 190C(4AA) have been met and contain an outline of the grounds on which the applicant considers the Registrar should be satisfied in this regard.

[33] I will assess whether the material provided addresses those requirements below.

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

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

[34] It is my understanding that s 190C(4)(b):

- Requires the Registrar to be satisfied that the applicant has been authorised by all members of the native title claim group, which ‘clearly ... involves some inquiry through the material available ... to see if the necessary authorisation has been given’;<sup>13</sup>
- Requires the Registrar to be satisfied as to the identity of the claimed native title holders, including the applicant, and that the applicant needs to be authorised by all the other persons in the native title claim group;<sup>14</sup>
- Is not ‘to be met by formulaic statements in or in support of applications’;<sup>15</sup>
- Does not permit a claim group to choose between the two decision-making processes described in s 251B, and therefore if there is a traditionally mandated process, then that process must be followed to authorise the applicant otherwise the process

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<sup>13</sup> *Doepel* [78].

<sup>14</sup> *Wiri People* [21], [29], [35]; *Risk* [60].

<sup>15</sup> *Strickland* [57].

utilised for authorisation must be one that has been agreed to and adopted by the native title claim group.<sup>16</sup>

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

[35] The following information is included in the application:

- Anthropological research in the region commenced in 2018 and a community meeting in June 2019 of Gugu Badhun, Gudjala and Ewamian People passed a resolution acknowledging that the application area was Gugu Badhun;<sup>17</sup>
- An anthropologist undertook extensive research in the region to identify the claim group for the application area;<sup>18</sup>
- NQLC holds various reports previously compiled as to the claim group description and those findings were checked by the NQLC in-house anthropologist prior to a meeting on 30 November 2019;<sup>19</sup>
- On 30 November 2019 the previous claim group authorised the application;<sup>20</sup>
- The anthropologist conducted further research, which was presented to the old claim group and Gugu Badhun Elders in 2021.<sup>21</sup> In mid-July 2022 NQLC approached a current member of the claim group about the inclusion of her ancestor into the claim group description;<sup>22</sup>
- NQLC assisted the applicant to call an authorisation meeting to consider and authorise the making of an amendment to the claim group description in accordance with new anthropological research;<sup>23</sup>
- NQLC maintains a register of names, postal and email addresses of persons it understands to be Gugu Badhun People. NQLC revises and updates the register;<sup>24</sup>
- On 7 July 2022 a legal administration officer from NQLC emailed notices for an authorisation meetings to those Gugu Badhun People with an email address on the NQLC's contacts register;<sup>25</sup>
- On 7 July 2022 NQLC mailed notices for an authorisation meeting to all Gugu Badhun People on the NQLC's contacts register;<sup>26</sup>

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<sup>16</sup> *Harrington-Smith* [1230]; *Evans* [7].

<sup>17</sup> Attachment R1 p.1.

<sup>18</sup> *Ibid* p. 2.

<sup>19</sup> *Ibid*.

<sup>20</sup> *Ibid* p. 1.

<sup>21</sup> Attachment T5 [9], [16] – [17].

<sup>22</sup> Attachment T1 [7] – [8].

<sup>23</sup> Attachment T5 [9].

<sup>24</sup> Attachment T3 [3].

<sup>25</sup> *Ibid* [5].

<sup>26</sup> *Ibid* [4].

- A notice for the authorisation meeting was published on 16 July 2022 in the Cairns Post and the Townsville Bulletin;<sup>27</sup>
- The notices included the purpose of the meeting, a description of the old and new claim group, the date, time and location of the meeting and contact details of NQLC for registration, travel assistance and zoom attendance. The Gugu Badhun People, as described in the old claim group description, were invited to two meetings and the Gugu Badhun People, as described in the new claim group description, were invited to the second meeting only;<sup>28</sup>
- On 6 August 2022 two meetings took place, one of the old claim group and one of the new claim group;<sup>29</sup>
- In the first meeting NQLC's in-house anthropologist presented and discussed the new anthropological research and the old claim group passed resolutions to add two apical ancestors to the claim group description;<sup>30</sup>
- In this meeting the old claim group used an agreed and adopted decision-making process with each family having one vote;<sup>31</sup>
- The attendees also confirmed that they were all members of the old claim group and that the persons present were sufficiently representative of the Gugu Badhun People to make decisions;<sup>32</sup>
- In the second meeting the new claim group, including descendants from the two newly added apical ancestors, agreed and adopted a decision-making process of a simple majority of the persons present, after everyone had an opportunity to discuss the matter for resolution and matters have been deferred to Elders present (Resolution 1);<sup>33</sup>
- The persons present also confirmed that they were all members of the new claim group (Resolution 2) and that the persons present were sufficiently representative of the Gugu Badhun People to make decisions (Resolution 4);<sup>34</sup>
- The new claim group then confirmed the members of the applicant (Resolution 5), authorised the applicant, subject to certain conditions, to make the application and deal with matters arising in relation to it (Resolution 6);<sup>35</sup>
- Those conditions were:

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<sup>27</sup> Attachment T2.

<sup>28</sup> Attachment T2 Annexures BC-01, BC-02; Attachment T3 Annexures SVP-03, SVP-04.

<sup>29</sup> Attachments T6, T7, T8, T9, T10 [3].

<sup>30</sup> Attachment T5 [18], [21] – [23].

<sup>31</sup> Attachments T5 [14], T6, T7, T8, T9, T10 [5].

<sup>32</sup> Attachment T5 [15].

<sup>33</sup> Attachments T5 [24] – [27], T6, T7, T8, T9, T10 [5].

<sup>34</sup> Attachment T5 [27].

<sup>35</sup> Attachments T5 [24] – [27], T6, T7, T8, T9, T10 [6].

- The applicant is to act at all times in the interests of all Gugu Badhun People;
- The applicant is to act on the advice of legal representatives;
- The applicant can make all decisions by majority;<sup>36</sup>
- All resolutions in the second meeting were adopted unanimously and the names of the mover and seconder of each resolution is provided.<sup>37</sup>

### Consideration

[36] As mentioned above, in order to be satisfied that the condition at s 190C(4)(b) has been met, the requirements of s 190C(4AA) must be met.

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

[37] I note that the first limb of s 190C(4AA) requires that all the persons comprising the applicant must be members of the native title claim group.

[38] Schedule R, Item 2 and Attachments R2, R3, R4, R5, R6, T6, T7, T8, T9, and T10<sup>38</sup> indicate that the persons comprising the applicant are members of the native title claim group. I have not been provided with any material that contradicts these statements. It follows that I am satisfied that the persons who comprise the applicant are members of the native title claim group.

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

[39] Regarding the second limb of s 190C(4AA), namely that the persons who jointly comprise the applicant are authorised by all the other members of the claim group to make the application and to deal with matters arising in relation to it, the material must identify the decision-making process utilised at the authorisation meeting and I must consider how that process was applied.

### What decision-making process has been identified?

[40] Section 251B stipulates two distinct decision-making processes, namely:

- (a) a process that is mandated by traditional laws and customs; and
- (b) a process that has been agreed to and adopted by the native title claim group.

[41] According to Attachments T5, T6, T7, T8, T9 and T10 no mandatory decision-making process under traditional law and customs existed and the claimants adopted and agreed to a decision-making process, which was used at the authorisation meeting.<sup>39</sup> Therefore, I will consider the applicant's material in light of the requirements of s 251B(b).

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<sup>36</sup> Attachments T5 [27], T6, T7, T8, T9, T10 [6].

<sup>37</sup> Attachments T5 [27]

<sup>38</sup> Attachments R2, R3, R5, R6 [6], R4 [2(d)], T6, T7, T8, T9, T10 [1].

<sup>39</sup> Attachments T5 [14], [26], T6, T7, T8, T9, T10 [4] – [5].

### How has the decision-making process been applied?

[42] The requirements of s 251B(b) were discussed by Stone J in *Lawson* where Her Honour observed that the 'effect of the section is to give the word "all" a more limited meaning than it might otherwise have'.<sup>40</sup> Her Honour held that:

the subsection does not require that "all" the members of the relevant claim Group must be involved in making the decision. Still less does it require that the vote be a unanimous vote of every member. Adopting that approach would enable an individual member or members to veto any decision and may make it extremely difficult if not impossible for a claimant group to progress a claim. In my opinion the Act does not require such a technical and pedantic approach. It 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>41</sup>

[43] Whilst considering whether a reasonable opportunity to participate was given, Stone J was prepared to accept, in the absence of contrary evidence, that those who did not participate chose not to be involved in the decision-making process.<sup>42</sup>

[44] In *Weribone*, Rares J held that '[t]he notice must be sufficient to enable the persons to whom it is addressed ... to judge for themselves whether to attend the meeting and vote for a proposal' and that 'fair notice of the business to be dealt with at the meeting' must be given.<sup>43</sup>

[45] Further consideration has to be given to the conduct at the authorisation meeting and the process of authorisation of the application. In *Ward*, O'Loughlin J identified deficiencies in the information provided in that matter regarding the authorisation process and listed a number of questions which in substance were required to be addressed. The questions identified by O'Loughlin J, which do not need to be answered in any formal way, but the substance of which must be addressed,<sup>44</sup> are:

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>45</sup>

[46] I note that the notice clearly stated the purpose of the meeting, included the date, time and venue of the meeting and invited Gugu Badhun People, according to the old and new claim group description, to attend. The notice was published in two newspapers and additionally sent to Gugu Badhun People known to NQLC by mail and email. I consider that the notice gave fair notice of the business to be dealt with at the meeting to the addressees and allowed them to judge for themselves whether to attend the authorisation meeting and vote for or against the proposal.

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<sup>40</sup> *Lawson* [25].

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid* [27].

<sup>43</sup> *Weribone* [40], [41]; see also *Burragubba* [31].

<sup>44</sup> *Ward* [25].

<sup>45</sup> *Ibid* [24], cited with approval in *Lawson* [26].

[47] In regard to the questions identified in *Ward* it is my view that the substance of those questions has been addressed in the material provided. The authorisation meeting was organised by the applicant with the help of NQLC to authorise a change to the claim group description, the application and the applicant. Notice was given to Gugu Badhun People. The notice was published in two newspapers and sent to known Gugu Badhun People. The material indicates that the persons who attended the meeting were provided with the updated anthropological research regarding the composition of the claim group. The persons present at the meeting confirmed that no traditional decision-making process existed, and unanimously adopted a decision-making process for the meeting, and authorised the making of the application and the applicant. I have also been provided with the names of the persons who moved and seconded each resolution and the voting results. I note that I have no information before me about registration of attendees or how many persons attended the two meetings. However, I note that the persons present at the second meeting confirmed in Resolution 2 that they were all members of the new claim group and in Resolution 4 that the persons present were sufficiently representative of the Gugu Badhun People to make decisions. I am therefore satisfied that questions identified in *Ward* have been answered at least in substance.

[48] The information provided also shows that the persons who were present at the meeting were given a reasonable opportunity to participate in the decision-making process. I consider that the conduct of the meeting is such that those present agreed to use the adopted decision-making process, and the actual process is indicative that it was inclusive by giving everyone an opportunity for discussion and having one's vote count. Moreover, the claim group members who were present were provided with information.

*Have any conditions been satisfied?*

[49] The last limb of s 190C(4AA) requires that if there are any conditions under s 251BA on the authority that relate to the making of the application, they have been satisfied.

[50] Schedule S and Attachments T6, T7, T8, T9, and T10 indicate that the conditions on the authority have been satisfied.<sup>46</sup> I have not been provided with any material that contradicts these statements. It follows that I am satisfied that the conditions have been satisfied.

### *Decision*

[51] I consider the process adopted ensured that the persons who jointly comprise the applicant are authorised by all the other members of the claim group to make the application and to deal with matters arising in relation to it. I am satisfied that all conditions on the authority of the applicant that relate to the making of an application have been satisfied. It follows that I am satisfied that the condition at s 190C(4)(b) is met.

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<sup>46</sup> Attachments T6, T7, T8, T9, T10 [7].

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

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

[52] I am satisfied the claim meets the requirements of s 190B(2). 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.

[53] Schedule B refers to Attachment B and lists general exclusions. Attachment B describes the application area by metes and bounds referring to land parcels, the Upper Burdekin River sub catchment boundaries, the Gregory Developmental Road reserve boundaries, the centreline of the Clarke River, geographic coordinates and the boundaries of two native title determinations. It also specifically excludes all land and waters subject to:

- Native title determination QUD85/2005 Gugu Badhun People #2 (QCD2012/002)
- Native title determination QUD80/2005 Gudjala People (QCD2014/006)

[54] Schedule C refers to Attachment C. Attachment C contains a map titled 'Gugu Badhun' dated 14 October 2019, which includes:

- The application area depicted with a bold dark blue outline with light blue semi-transparent fill;
- Background colour topographic raster image;
- Scalebar, legend, coordinate grid and locality diagram; and
- Notes relating to the source, currency and datum of data used to prepare the map.

[55] The geospatial report concludes that the description and map are consistent and identify the application area with reasonable certainty. I agree with this assessment and am therefore satisfied that the description and the map of the application area, as required by ss 62(2)(a) and (b), are sufficient for it to be said with reasonable certainty that the native title rights and interests are claimed in relation to particular land or waters.

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

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

[57] Section 190B(3) stipulates that the Registrar must be satisfied that:

- (a) the persons in the native title claim group are named in the application; or
- (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[58] It is my understanding that, when assessing the requirements of this provision:

- I am required to address only the content of the application;<sup>47</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>48</sup>
- The focus ‘is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the identified native title claim group can be ascertained. It, too, does not require any examination of whether all the named or described persons do in fact qualify as members of the native title claim group’;<sup>49</sup>
- Where a claim group description contains a number of paragraphs, the paragraphs should be read ‘as part of one discrete passage, and in such a way as to secure consistency between them, if such an approach is reasonably open’;<sup>50</sup>
- To determine whether the conditions (or rules) specified in the application has a sufficiently clear description of the native title claim group, ‘[i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described’.<sup>51</sup>

[59] Attachment A provides that

The Gugu Badhun native title claim group is comprised of the descendants (including through adoption or raising up in accordance with traditional law and customs) of the following apical ancestors:

[list of named ancestors]

[60] I note that neither Schedule A nor Attachment A entail a list of the names of all the persons in the native title claim group. I therefore consider s 190B(3)(b) to be applicable.

[61] I understand that members of the claim group are the biological descendants of the named apical ancestors. I further understand that the claim group description also provides for adoption/raising up in accordance with the traditional law and customs.

[62] I consider that requiring a person to show descent from a specific ancestor provides an objective criterion about whether a person is a member of the claim group and has been previously accepted by the Courts.<sup>52</sup> I consider that factual enquiries would lead to the identification of the people who meet this criterion.

[63] I am satisfied that the application describes the persons in the claim group sufficiently clearly such that, on a practical level, it can be ascertained whether any particular person is a

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<sup>47</sup> *Doepel* [16], [51].

<sup>48</sup> *Gudjala 2007* [33].

<sup>49</sup> *Doepel* [37].

<sup>50</sup> *Gudjala 2007* [34].

<sup>51</sup> *WA v NTR* [67].

<sup>52</sup> *Ibid.*

member of the group. Therefore, only focusing upon the adequacy of the description of the claim group, I consider the requirements of s 190B(3) to be met.

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

- [64] To meet the requirements of s 190B(4), the Registrar must be satisfied that the description contained in the application is sufficient to allow the claimed native title rights and interests to be readily identified. It is my understanding that the description must be understandable and have meaning.<sup>53</sup> However, this does not mean that rights broadly described cannot readily be identified within the meaning of s 190B(4).<sup>54</sup>
- [65] The description referred to in s 190B(4), and as required by s 62(2)(d), is ‘a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law’.
- [66] When assessing whether the claimed native title rights and interests are readily identified I am confined to the material contained in the application itself.<sup>55</sup> Moreover, I will not consider whether the claimed rights and interests are ‘native title rights and interests’, as defined in s 223, as in my view that question is part of the task at s 190B(6), where I must decide whether each of the claimed rights is established as a native title right on a prima facie basis.
- [67] Schedule E contains a description of the claimed native title rights and interests. Having considered the description, I am satisfied that the description is understandable and has meaning and is sufficient to identify all the claimed rights and interests. I consider s 190B(4) to be met.

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

- [68] Section 190B(5) provides that:

The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:

- (a) that the native title claim group have, and the predecessors of those persons had, an association with the area; and
- (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests; and
- (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

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<sup>53</sup> *Doepel* [99], [123].

<sup>54</sup> *Strickland* [60].

<sup>55</sup> *Doepel* [16].

[69] I understand that, when assessing the requirements of s 190B(5), I am not confined to the information contained in the application but can also have regard to additional information pursuant to s 190A(3).<sup>56</sup> Moreover, I must treat the asserted facts as true.<sup>57</sup>

[70] I consider my task to be assessing whether the asserted facts can support the existence of the claimed native title rights and interests.<sup>58</sup> To do so the applicant's material must be 'more than assertions at a high level of generality' and must not merely restate or be an alternate way of expressing the claim.<sup>59</sup> In my view, the factual basis must provide sufficient detail to enable a 'genuine assessment' of whether the three assertions outlined in s 190B(5) are supported by the claimants' factual basis material.<sup>60</sup>

[71] I note that the relevant information is set out in Attachments F, F2, G, T1 and T4.

### *Factual basis for s 190B(5)(a)*

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

[72] As summarised in *McLennan*, in order to satisfy the condition in s 190B(5)(a), it will be sufficient if the applicant demonstrates that:<sup>61</sup>

- (a) the claim group presently has an association with the area, and the claim group's predecessors have had an association with the area since sovereignty or effective sovereignty;<sup>62</sup>
- (b) there is an association between the whole group and the area, although not all members must have such association at all times;<sup>63</sup> and
- (c) there is an association with the entire area claimed, rather than an association with only part of it or 'very broad statements', which have no 'geographical particularity'.<sup>64</sup>

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

[73] The applicant has provided the following relevant information in regard to s 190B(5)(a):

##### *Association of the predecessors of the claim group with the application area*

- The first European to explore the region was Ludwig Leichhardt in 1847, who observed people living in the application area;<sup>65</sup>
- Settlement of the application area occurred around 1860;<sup>66</sup>

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<sup>56</sup> *Doepel* [16]; *Strickland* [62] approved in *Strickland FC* [88] – [89].

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

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

<sup>59</sup> *Gudjala 2009* [28], [29]; *Anderson* [43], [48].

<sup>60</sup> *Gudjala FC* [92].

<sup>61</sup> *McLennan* [28].

<sup>62</sup> *Gudjala 2007* [52].

<sup>63</sup> *Ibid.*

<sup>64</sup> *Martin* [26]; *Corunna* [39].

<sup>65</sup> Attachment F [4].

<sup>66</sup> *Ibid* [34].

- Pastoral stations, including Valley of Lagoons, Blue Range, Fullstop, Christmas Creek and Kangaroo Hills were established over and around the application area, upon which many claim group members lived and worked;<sup>67</sup>
- Apical ancestor Bella gave birth to a son around 1890 at Kangaroo Hills Station, who went on to marry apical ancestor Nancy Jordan in 1920 at Valley of Lagoons, where he spent the rest of his life and had many children;<sup>68</sup>
- Apical ancestor Lucy Shaw was born at a traditional birthing place in Valley of Lagoons and married apical ancestor King Lava. She had a son at Valley of Lagoons in 1907 and other children who went on to work on the application area, including as stockmen and trackers;<sup>69</sup>
- Apical ancestor Nellie Rankin was born around 1914 and lived at Blue Range Station until she and some of her children were removed by the station owner in 1955. She had many children by that time, whose descendants continued to live and work on the stations in and around the application area;<sup>70</sup>
- Apical ancestor Charlie Burdekin had a son who was born in 1899 at Kangaroo Hills Station, and other children born in the early years of the 20th century. His wife, apical ancestor Nora Lee, was also from the area covered by Kangaroo Hills Station and some of their children worked on the station for many years;<sup>71</sup>
- Apical ancestor Caesar Murray lived all of his life in and around the application area, passing away in 1965 at age 70. While he did not have children, he is remembered by current claimants as being fluent in Gugu Badhun language and as a great bushman;<sup>72</sup>
- Apical ancestor Nora Pope was born around 1886 likely at Lyndhurst Station and she later camped, lived and worked at Clark River Telegraph Station, Christmas Creek Station and Greenvale Station. Her sons lived and worked on stations in and in the vicinity of the application area, such as Christmas Creek, Blue Range and Clarke. One of her sons tribally married apical ancestor Nellie Rankin. The great grandchildren of Nora Pope grew up working on the stations of Blue Range and Greenvale close to the claim area and visited the claim area to fish on the Clarke and Burdekin rivers and practice cultural activities;<sup>73</sup>
- Ancestors of the claim group are buried on the application area and these sites are known to current claimants, who have an obligation to both care for the physical site and to speak appropriately to the resident spirits when visiting;<sup>74</sup>

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<sup>67</sup> Ibid [13], [17].

<sup>68</sup> Ibid [17]–[18].

<sup>69</sup> Ibid [20].

<sup>70</sup> Ibid [24]–[25].

<sup>71</sup> Ibid [26] – [27].

<sup>72</sup> Ibid [28].

<sup>73</sup> Attachment F2 p.1, Attachment T4 [22] – [26], [30].

<sup>74</sup> Attachment F [65]–[67].

- In tribal times unauthorised crossing of the Great Dividing Range into Gugu Badhun country was punished with violent death.<sup>75</sup>

*Association of the current claim group with the claim area*

- Some claimants continue to reside in close proximity to the application area, while the majority reside in larger urban centres such as Townsville.<sup>76</sup> Claimants continue to regularly camp in the application area;<sup>77</sup>
- Senior claimants recall the ‘station days’ when they would build shelters on the application area using leaves and bark;<sup>78</sup>
- The great grandson of apical ancestor Bella is now an Elder of the claim group and resides in Greenvale with his family, just north of the application area;<sup>79</sup>
- Descendants of Lucy Shaw continue to live in Greenvale;<sup>80</sup>
- Youth camps are held on the application area each year through which claimants maintain their association and pass on traditional knowledge to the younger generations;<sup>81</sup>
- Claimants maintain a spiritual association with the application area through dreaming stories about particular features of the landscape, including a story of the rainbow serpent which manifests in the Burdekin River, and also at Pelican Lakes;<sup>82</sup>
- A story about two girls being put under a rock as punishment for cruelty to a turtle is represented by a large boulder in the Burdekin River, and has been passed down through the generations to the current claimants, who in turn have taught it to their children;<sup>83</sup>
- Current claimants hold knowledge, passed onto them by their predecessors, about the location and use of particular resources of the application area, including different types of wood, particular medicinal plants, clay and ochre;<sup>84</sup>
- Current claimants participate in cultural heritage surveys as a way to protect important places in the application area;<sup>85</sup>
- Other Aboriginal people in the regional community acknowledge and observe the Gugu Badhun People as the traditional owners of the application area.<sup>86</sup>

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<sup>75</sup> Ibid [58].

<sup>76</sup> Ibid [14].

<sup>77</sup> Ibid [88].

<sup>78</sup> Ibid [88] – [89].

<sup>79</sup> Ibid [19].

<sup>80</sup> Ibid [21].

<sup>81</sup> Ibid [38] - [39], [88].

<sup>82</sup> Ibid [41]–[42].

<sup>83</sup> Ibid [46].

<sup>84</sup> Ibid [68]–[70], [85].

<sup>85</sup> Ibid [35].

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

- [74] Based on the information provided it is my understanding that European settlement, and thereby effective sovereignty, in the application area occurred in the 1860s. Most of the apical ancestors are estimated to have been born in the early decades of settlement. It can therefore be inferred that the apical ancestors would have had a similar association with the application area as their forebears, who would have been alive at the time of effective sovereignty.
- [75] I also note that some claimants grew up in the application area, continue to live near the application area and that claimants regularly camp in and visit the application area, including during an annual youth camp. It is also my understanding that predecessors lived and worked on the stations in the application area.
- [76] Besides a physical connection, claimants also hold knowledge of the dreaming stories related to the application area, which were passed to them by their predecessors, thus demonstrating an ongoing spiritual association. Moreover, there are burial sites for deceased ancestors in the application area.
- [77] I also note that the Gugu Badhun People are acknowledged by other Aboriginal people as associated with the claim area.
- [78] It is my understanding that the application area does not include any large permanent settlements but that the town of Greenvale lies just outside the northern border, where some claimants and their families continue to live. I also note that the factual basis material includes historical and current references to different places in the application area, amongst others names of pastoral stations. I note that these pastoral stations cover part of the application area. I also note that the Clarke River and the Burdekin River have been mentioned as fishing spots and have been referenced in mythological stories. Lastly I note that the Great Dividing Range has been described as a border in tribal times.

**Decision**

- [79] In light of the above I am satisfied that the claim group has and its predecessors have had an association with the area since effective sovereignty and that there is an association between the whole group and the entire area. I consider the factual basis provided is sufficient to support the assertion described by s 190B(5)(a).

*Factual basis for s 190B(5)(b)*

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

- [80] To meet s 190B(5)(b), the factual basis must be sufficient to support an assertion that there exist traditional laws acknowledged and traditional customs observed by the claim group that give rise to the claim to native title rights and interests. 'Native title rights and interests' is defined in s 223(1)(a) as those rights and interests 'possessed under the traditional laws

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<sup>86</sup> Ibid [58] – [59].

acknowledged, and traditional customs observed,' by the native title holders. I therefore consider it appropriate to apply case law regarding s 223(1)(a) to s 190B(5)(b).

[81] Based on the observations made by the High Court in *Yorta Yorta* I understand that a 'traditional' law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice.<sup>87</sup> In the context of the Act, 'traditional' carries, however, two other elements in its meaning, namely:<sup>88</sup>

...it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are "traditional" laws and customs [and]

...the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist.<sup>89</sup>

[82] In *Warrie*, the Full Federal Court observed that while '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>90</sup>

[83] Finally, further guidance for my assessment of the factual basis can be gained from *Gudjala 2009*, in which Dowsett J required:

- that the factual basis demonstrates the existence of a pre-sovereignty society and identifies the persons who acknowledged and observed the laws and customs of the pre-sovereignty society;<sup>91</sup>
- that if descent from named ancestors is the basis of membership to the group, the factual basis demonstrates some relationship between those ancestral persons and the pre-sovereignty society from which the laws and customs are derived;<sup>92</sup> and
- that the factual basis contains an explanation as to how the current laws and customs of the claim group are traditional (that is laws and customs of a pre-sovereignty society relating to rights and interests in land and waters). Further, the mere assertion that current laws and customs of a native title claim group are traditional because

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<sup>87</sup> *Yorta Yorta* [46].

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid* [46] - [47].

<sup>90</sup> *Warrie* [107]; *Alyawarr* [78].

<sup>91</sup> *Gudjala 2009* [37], [52].

<sup>92</sup> *Ibid* [40].

they derive from a pre-sovereignty society from which the claim group is said to be descended, is not a sufficient factual basis for the purposes of s 190B(5)(b).<sup>93</sup>

[84] I therefore understand my assessment of the sufficiency of the factual basis under s 190B(5)(b) to require the identification of:

- a link between the pre-sovereignty society, the predecessors and the claim group in the application area; and
- the continued observance of normative rules by the successive generations of the claim group, such that the normative rules can be described as ‘traditional laws and customs’.

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

[85] I consider the information extracted above at s 190B(5)(a) also relevant for the assertions at s 190B(5)(b). In addition the material provides the following relevant information about the assertion at s 190B(5)(b):

- Gugu Badhun People as a distinct society are united by their common acknowledgement of and identification with the Gugu Badhun language, the territorial and social limits of this language and the people who spoke it;<sup>94</sup>
- Territorial limits of traditional country are informed by mythology, specifically the dreaming stories about the creation of country;<sup>95</sup>
- The law and custom of the Gugu Badhun People descends from the stories or Dreamtime actions of creative beings that in their travels formed and populated the landscape and laid down rules, which governed traditional life. Contemporary Gugu Badhun People continue to tell the stories and live by the social order created during the Dreamtime period;<sup>96</sup>

#### *Rights and interests in land*

- At sovereignty, the predecessors of the claim group observed a system of land tenure based on descent from ancestors who were connected to particular lands and waters. Current claimants continue to observe this system which gives rise to their claim to rights and interests in the application area;<sup>97</sup>
- The spirits of the deceased ancestors inhabit the country and it is their descendants who can ‘speak for country’ in accordance with the claim group’s laws and customs;<sup>98</sup>

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<sup>93</sup> Ibid [29], [54], [69].

<sup>94</sup> Attachment F [37].

<sup>95</sup> Ibid [40].

<sup>96</sup> Ibid [29].

<sup>97</sup> Ibid [16].

<sup>98</sup> Ibid [54], [59].

### *Kinship system*

- The kinship system observed by the claim group is linked to the tenure system, in that connection to country is mediated and expressed through connections to other claim group members;<sup>99</sup>
- Kinship rules continue to be observed, including rules regarding ‘proper marriage’, which govern the marriage choices available to young people;<sup>100</sup>
- Elders have a social authority in community and family life as well as in decision-making;<sup>101</sup>

### *Trade and ceremony*

- Senior claimants recall people gathering on the application area in the 1920s and 1930s for ceremonies and dances. Today, Elders continue to perform ceremonial duties at claim group gatherings, including ceremonies to communicate with deceased ancestors and other spirits, and the ‘welcome to country’;<sup>102</sup>
- In 1847, Leichhardt recorded trade between people in the application area and their neighbours on the coast, including shells and various foods. Current claimants can identify particular places in Gugu Badhun country which were used as meeting places to conduct trade;<sup>103</sup>

### *Spiritual beliefs*

- Dreaming stories inform the territorial limits of traditional country and also prescribe normative behaviour. Examples for the latter include the prohibitions of being cruel to animals, of burning fish bones and on children playing after dark because of the presence of a dangerous spirit who would take them away;<sup>104</sup>
- The belief that the spirits of the ancestors inhabit the country gives rise to normative behaviours to manage the risk of supernatural misfortune, which may result from unauthorised entry, including calling out to the ancestors in ‘lingo’ and avoiding gender-restricted areas such as birthing and initiation sites;<sup>105</sup>

### *Traditional practices*

- Leichhardt recorded people in the application area harvesting seeds and yams, which current claimants continue to collect in the ways taught to them by their predecessors;<sup>106</sup>

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<sup>99</sup> Ibid [31].

<sup>100</sup> Ibid [33].

<sup>101</sup> Ibid [30], [33].

<sup>102</sup> Ibid [61]–[64].

<sup>103</sup> Ibid [79]–[84].

<sup>104</sup> Ibid [40], [46] - [47], [49].

<sup>105</sup> Ibid [50], [54]–[56].

<sup>106</sup> Ibid [71]–[72].

- The claim group continue to observe particular rules which govern the collection and use of resources, such as calling out to the Old people before fishing, set limits on the number of fish which can be caught, and prohibitions on eating particular animals based on age or one’s totemic relationship;<sup>107</sup>
- As recorded in 1847 Gugu Badhun People continue to burn country during the dry season;<sup>108</sup>

#### *Language*

- An Aboriginal vocabulary published in 1886 from the area of Clarke River has been identified later by a linguistic anthropologist as Gutjal language. Gugu Badhun are one of the groups speaking Gutjal language;<sup>109</sup>
- Apical ancestor Caesar Murray was fluent in Gugu Badhun language;<sup>110</sup>
- A son of apical ancestor Bella and husband of apical ancestor Nancy Jordan was a language informant for a linguistic anthropologist in 1970 and was recorded speaking language;<sup>111</sup>
- While Gugu Badhun language is not the main spoken language of current claimants, most senior claimants have knowledge of a number of words and names of places on country. Language is used as an important part of Gugu Badhun cultural activities and young members are taught language words and their meaning at youth camps;<sup>112</sup>
- Claimants continue to use language names for significant places and are required to speak ‘lingo’ to communicate with ancestral spirits and other supernatural beings;<sup>113</sup>

#### *Transmission of knowledge*

- The detailed knowledge of law and custom, held by senior claimants, was passed down to them by their parents, who in turn were taught by their Elders;<sup>114</sup>
- The process of transmission of knowledge involves active occupation and use of Gugu Badhun country;<sup>115</sup>
- Oral transmission of knowledge is from Old people or Elders to younger members of the group. Younger people are not expected to ask questions or demand to be taught but instead they are expected to observe Elders in silence and participate once they

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<sup>107</sup> Ibid [73]–[77].

<sup>108</sup> Ibid [4], [78].

<sup>109</sup> Ibid [5].

<sup>110</sup> Ibid [28].

<sup>111</sup> Ibid [18].

<sup>112</sup> Ibid [38].

<sup>113</sup> Ibid [50].

<sup>114</sup> Ibid [34].

<sup>115</sup> Ibid [35].

feel they have experience. Traditional skills in material culture and hunting and gathering are learnt from observing Elders;<sup>116</sup>

- Transmission of knowledge included, for example, respect for Elders,<sup>117</sup> language,<sup>118</sup> mythological stories,<sup>119</sup> cultural protocol for specific places,<sup>120</sup> ceremonies and rituals,<sup>121</sup> manufacturing of artefacts,<sup>122</sup> medicine,<sup>123</sup> fishing<sup>124</sup> and sharing food.<sup>125</sup>

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

[86] Based on the information provided, it is my understanding that the society at sovereignty was united by a common language, which was first recorded in 1886, and a common spiritual belief in Dreamtime beings that formed the landscape, populated the area and determined the territorial limits of country and society. Founded in the dreaming stories the pre-sovereignty society observed a system of land tenure based on descent from ancestors who were connected to particular lands and waters.

[87] I further understand that most of the apical ancestors were born in the decades after effective sovereignty. The factual basis material provides considerable information about the apical ancestors, including the details of their birth, marriages, work history and children. It also describes the laws and customs of the society into which the apical ancestors were born. I consider it reasonable to infer that those same laws and customs existed prior to effective sovereignty and were taught to the apical ancestors by their predecessors, who would have been alive at or prior to effective sovereignty, in much the same way as they in turn taught them to the subsequent generations.

[88] The material also elaborates how current claimants are the descendant of the apical ancestors and therefore provides the required link between the society at the time of effective sovereignty, the apical ancestors and the current claimants.

[89] The application also entails multiple examples of claimants and predecessors observing laws and customs. These examples concern, amongst others, land ownership, kinship rules, ceremonies, language and spiritual beliefs. It is further described how the laws and customs have a normative character, as non-compliance may lead to supernatural misfortune.

[90] I am also of the view that the normative rules observed by the pre-sovereignty society are in essence the same as the ones observed by the current society and that those rules are 'traditional' in the *Yorta Yorta* sense. I note that the factual basis material explains in detail how knowledge is transmitted from one generation to the next and includes several examples of current claimants being taught by their parents, who were taught by their Elders. Based on

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<sup>116</sup> Ibid [36].

<sup>117</sup> Ibid [30].

<sup>118</sup> Ibid [38] – [39].

<sup>119</sup> Ibid [41], [43], [49], [52].

<sup>120</sup> Ibid [56].

<sup>121</sup> Ibid [64] – [65].

<sup>122</sup> Ibid [68].

<sup>123</sup> Ibid [69].

<sup>124</sup> Ibid [74].

<sup>125</sup> Ibid [75].

the explanation and examples I am satisfied that the current laws and customs have been handed down to the current claimants by their predecessors from the apical ancestors by word of mouth and common practice. I also note that members of the claim group continue to teach the younger generation in the same way and run youth camps to facilitate intergenerational transfer of cultural knowledge and language.

## Decision

[91] In light of the above I am satisfied that the factual basis is sufficient to support the assertion that traditional laws acknowledged and traditional customs observed by the claim group exist that give rise to the claim to native title rights and interests.

### *Factual basis for s 190B(5)(c)*

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

[92] Section 190B(5)(c) is concerned with whether the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the native title rights and interests claimed in accordance with their traditional laws and customs.

[93] Meeting the requirements relies on whether there is a sufficient factual basis to support the assertion at s 190B(5)(b) that there exist traditional laws and customs which give rise to the claimed native title rights and interests.<sup>126</sup> It also requires a sufficient factual basis to support an assertion that there has been continuity in the observance of traditional laws and customs going back to sovereignty or at least to effective sovereignty.<sup>127</sup>

[94] Based on *Gudjala 2009* it is my understanding that, if the claimant's factual basis relies upon the drawing of inferences, '[c]lear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs may justify an inference of continuity'.<sup>128</sup>

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

[95] It is my view that there is a sufficient factual basis for the assertion that the laws and customs have continued to be observed by the claim group, substantially uninterrupted, since at least the time of effective sovereignty in the application area.

[96] As outlined in my reasons regarding s 190B(5)(b), the applicant has identified the relevant pre-sovereignty society and outlined some facts in relation to that society, in particular regarding their land-owning and kinship system, and the mythological stories as the foundation of the society. Moreover examples of observance and acknowledgement of this system and of other customs and laws by the present claim group and their predecessors have been provided.

[97] The knowledge about country has been transmitted from generation to generation and this transmission included, for example, respect for Elders, language, mythological stories, cultural

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<sup>126</sup> *Martin* [29].

<sup>127</sup> *Gudjala 2007* [82].

<sup>128</sup> *Gudjala 2009* [33].

protocol for specific places, ceremonies and rituals, manufacturing of artefacts, medicine, fishing and sharing food.<sup>129</sup>

### Decision

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

### Conclusion

[99] 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 of ss 190B(5)(a)–(c).

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

#### *What is required to meet s 190B(6)?*

[100] To meet s 190B(6), the Registrar must consider that, prima facie, at least some of the native title rights and interests claimed can be established. If a claim is arguable on its face, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis.<sup>130</sup> The assessment requires, however, some weighing of the factual basis and imposes a more onerous test to be applied to the individual rights and interests claimed than s 190B(5).<sup>131</sup>

[101] I understand that, when assessing the requirements of s 190B(6), I am permitted to consider material beyond the application.<sup>132</sup>

[102] I note that a claimed native title right or 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>133</sup>

[103] I also understand the ‘critical threshold question’ for recognition of a native title right or interest under the Act to be ‘whether it is a right or interest “in relation to” land or waters’.<sup>134</sup> The phrase ‘in relation to’ is however ‘of wide import’.<sup>135</sup>

[104] Taking into account the definition of ‘native title rights and interests’ in s 223(1),<sup>136</sup> it is my view that under s 190B(6) I must consider whether, prima facie, the individual rights and interests claimed:

- exist under traditional laws and customs in relation to any of the land or waters in the application area;

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<sup>129</sup> Attachment F *Ibid* [30], [38] – [39], [41], [43], [49], [52], [56], [64] – [65], [68] – [69], [74], [75].

<sup>130</sup> *Doepel* [135].

<sup>131</sup> *Ibid* [127], [132].

<sup>132</sup> *Ibid* [16].

<sup>133</sup> *Yorta Yorta* [86]; *Gudjala 2007* [86].

<sup>134</sup> *Ward HC* [577].

<sup>135</sup> *Alyawarr* [93].

<sup>136</sup> *Gudjala 2007* [85].

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

[105] Only those rights and interests that I consider to be established prima facie will be entered on the Register.<sup>137</sup>

*Which of the claimed native title rights and interests are established on a prima facie basis?*

[106] At the outset I note that all the rights and interests claimed in Schedule E are claimed in relation to the application area and are therefore, prima facie, rights or interests 'in relation to land or waters'. I also consider that Schedule E sufficiently addresses any issue of extinguishment, for the purpose of the test at s 190B(6), since the application differentiates between rights and interests that are wholly recognisable and that are partially recognisable. Schedule E provides that an exclusive right is only claimed for:

every part of the claim area where there has been no extinguishment to any extent of native title or where extinguishment is required to be disregarded

#### **Possession, occupation, use and enjoyment of the land and waters as against all others**

[107] I understand that the above claimed right is one of exclusive possession, and for such claims, there is significant judicial guidance. In *Ward HC*, the High Court commented that

... a core concept of traditional law and custom [is] the right to be asked permission and to 'speak for country'. It is the rights under traditional law and custom to be asked permission and to 'speak for country' that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others.<sup>138</sup>

[108] 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>139</sup>

[109] Lastly, in *Sampi* the Court held:

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<sup>137</sup> Section 186(1)(g).

<sup>138</sup> *Ward HC* [88].

<sup>139</sup> *Griffiths* [127].

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>140</sup>

[110] I note that, as outlined in my considerations regarding s 190B(5), the members of the claim group have a belief system according to which:

- Dreamtime actions of creative beings formed and populated the landscape and laid down rules which govern traditional life;<sup>141</sup>
- The spirits of deceased ancestors inhabit the country and therefore Gugu Badhun People must be respectful at all times when on country and prevent physical harm to it,<sup>142</sup>
- The Old people and the various spirits in the country are the ones who expel intruders and guard Gugu Badhun country. The spirits are aware of people who are not Gugu Badhun and if they come onto country alone or without the permission of the traditional owners the spirits can cause supernatural misfortune to befall those people,<sup>143</sup>
- Certain sites are restricted, for example due to gender, and in order to avoid sickness, death and calamity the specific cultural protocol for the specific site has to be followed;<sup>144</sup>
- In order to communicate with ancestral spirits and other supernatural beings claimants are required to speak 'lingo'.<sup>145</sup>

[111] In light of this belief system, I consider that, as pointed out in *Griffiths*, the claimants consider it a spiritual necessity to control access to country because of the harm that Old people and the various spirits in the country will inflict upon unauthorised entry. It is also my understanding that controlling access is a necessity to protect the country, and thereby the spirits of deceased ancestors, from harm.

[112] In addition to the spiritual side of controlling access, I note that the factual basis material includes an example of predecessors controlling access to country. A statement recorded in 1973 reads:

[The] penalty for crossing the [Great Dividing] Range in tribal times was violent death.<sup>146</sup>

[113] Moreover, current claimants let the respective local group know when they visit other people's country and expect others to do the same when visiting Gugu Badhun country.<sup>147</sup> In

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<sup>140</sup> *Sampi* [1072].

<sup>141</sup> Attachment F [29].

<sup>142</sup> *Ibid* [54].

<sup>143</sup> *Ibid* [55].

<sup>144</sup> *Ibid* [56].

<sup>145</sup> *Ibid* [50].

<sup>146</sup> *Ibid* [58].

<sup>147</sup> *Ibid*.

this regard I also note that other Aboriginal people in the regional community acknowledge the Gugu Badhun People as the traditional owners of the application area.<sup>148</sup>

[114] I am therefore satisfied that an exclusive right against the whole world is prima facie established.

**Non-exclusive rights to**

**(a) have access to, remain on and use the land and waters;**

**(b) access, take and use the resources of the land and waters for any purpose; and**

**(c) access, maintain and protect places, areas and things of traditional significance on the land and waters.**

[115] The factual basis material outlines how the predecessors of the claimants accessed the application area, including in Leichhardt's journal in 1847 and in the records of various ethnographers and anthropologists throughout the 19th and 20th centuries.<sup>149</sup> Those early records also describe how the predecessors took and used resources of the application area including fruit, yams and wood for weapons.<sup>150</sup> The claim group today access the application area regularly for camping and take and use resources in accordance with the traditional laws and customs passed down to them by their predecessors, such as kangaroo, goanna and fish.<sup>151</sup>

[116] The application also includes information on how claimants are required to protect places of traditional significance such as burial sites.<sup>152</sup> As outlined above, I understand this obligation to arise from the belief that the spirits of deceased ancestors inhabit the country and that therefore country has to be respected and protected.<sup>153</sup>

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

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

[118] For the application to meet the requirements of s 190B(7) I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters, but for certain things done. It is my understanding that the physical connection must be in accordance with the traditional laws and customs of the claim group and that '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>154</sup>

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<sup>148</sup> Ibid [59].

<sup>149</sup> Ibid [4]–[12].

<sup>150</sup> Ibid [71], [79].

<sup>151</sup> Ibid [72]–[77].

<sup>152</sup> Ibid [54], [66].

<sup>153</sup> Ibid [54], [65] – [66].

<sup>154</sup> *Gudjala 2009* [84]; *Yorta Yorta* [86].

[119] The factual basis includes information that describes a traditional physical association of members of the claim group with the application area, including claimants camping, fishing, collecting resources, conducting ceremonies in the application area, visiting places of cultural importance and teaching the younger generations cultural knowledge.<sup>155</sup>

[120] Given the above I am satisfied that at least one member of the native title claim group currently has a traditional physical connection with the land or waters within the application area.

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

[121] In my view the application does not offend any of the provisions of ss 61A(1)–(3) and therefore the application satisfies the condition of s 190B(8):

Requirement	Information addressing requirement	Result
Section 61A(1) No native title determination application if approved determination of native title	Geospatial report, Tribunal’s geospatial database and registers	Met
Section 61A(2) Claimant application not to be made that covers any previous exclusive possession act areas	Schedule B, paragraph 3 (b), (c)	Met
Section 61A(3) Claimant applications not to claim exclusive possession in areas covered by previous non-exclusive possession acts	Schedule E, paragraph 1	Met

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

[122] In my view the application does not offend any of the provisions of ss 190B(9)(a)–(c) and therefore the application meets the condition of s 190B(9):

Requirement	Information addressing requirement	Result
Section 190B(9)(a) No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedules Q, E	Met
Section 190B(9)(b) Exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P	Met
Section 190B(9)(c) Native title rights and/or interests in the application area have otherwise been extinguished	Schedule B, paragraph 3 (d)	Met

*End of reasons*

<sup>155</sup> Attachment F [14], [39], [61]–[67], [73]–[77], [88], Attachment F2 p.1.

## Attachment A

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

Application name	Gugu Badhun People #3
NNTT No.	QC2019/003
Federal Court of Australia No.	QUD777/2019

#### 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:

17 December 2019

#### Date application entered on Register:

6 March 2020

#### Applicant:

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

#### Applicant's address for service:

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

#### Conditions on Applicant's authority

- (a) The Applicant is to act at all times in the interests of all Gugu Badhun People.
- (b) The Applicant is to act on the advice of legal representatives.
- (c) The Applicant can make decisions by majority.

#### Area covered by application:

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

- '2' in para 1 not bold;
- Delete '(Queensland)' in para 3(a) and 3(c);
- Capitalise 'an', 'a', 'an' in para 3(c);
- Add at the end: *[A copy of Attachment B and Attachment C are attached to this register extract.]*

**Persons claiming to hold native title:**

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

**Registered native title rights and interests:**

As appears on the extract from the Schedule of Native Title Applications but delete:

***'Area covered by the native title and who holds the rights***

*5. Each of the native title rights referred to in paragraphs [2] and [4] exist in relation to the whole of each part of the claim area to which those paragraphs respectively apply and is held by the members of the native title claim group subject to and in accordance with traditional law and custom, as further described in paragraphs [2] and [3] in Schedule F.*

***Activities currently carried on***

*6. Activities in the exercise of the native title rights referred to in Schedule E are all such activities as are contemplated by those rights and interests and include the activities identified in Schedule G.'*

and

*'More information is provided for the purposes of Schedule E in Schedules F, G and M to meet the requirements of ss62(2)(d) to (f) and 190B(5), (6) and (7) of the Native Title Act.'*

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Daniel Deibler

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.

21 March 2023