



## Registration Decision

<b>Application name</b>	Jirrbal People #4
<b>Name of applicant</b>	Angela Braun, Elizabeth Cashmere, Bradley Go-Sam
<b>Federal Court of Australia No.</b>	QUD983/2015
<b>NNTT No.</b>	QC2015/014
<b>Date of Decision</b>	22 July 2024

### **Claim accepted for registration**

I have decided that the claim in the Jirrbal People #4 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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<sup>1</sup> A section reference is to the *Native Title Act 1993* (Cth) (the Act), unless otherwise specified.

Michael Raine

Delegate of the Native Title Registrar pursuant to ss 190–190D of the Act under an instrument of delegation dated 5 February 2024 and made pursuant to s 99 of the Act.

# 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')

*Aplin on behalf of the Waanyi Peoples v Queensland* [2010] FCA 625 ('Aplin')

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

*Butchulla People v State of Queensland* [2006] FCA 1063; (2006) 154 FCR 233 ('Butchulla')

*Cashmere on behalf of the Jirrbal People #1 v Queensland* [2010] FCA 1090; (2010) 283 ALR 610 ('Jirrbal Determinations')

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

*Fesl v Delegate of the Native Title Registrar* [2008] FCA 1469; (2008) 173 FCR 150 ('Fesl')

*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 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')

*Noble v Mundraby, Murgha, Harris and Garling* [2005] FCAFC 212 ('Noble')

*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')

*Sampi on behalf of the Bardi and Jawi People v Western Australia* [2010] FCAFC 26; (2010) 266 ALR 537 ('Sampi 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 Strickland* [2000] FCA 652; (2000) 99 FCR 33 ('Strickland FC')

*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 decision relates to an amended application filed on behalf of the Jirrbal People #4 native title claim group ('claim group'). This is the fourth application for a determination of native title made on behalf of the Jirrbal People ('Jirrbal People #4 Claim'). It covers land and waters of approximately 2800 square kilometres in Queensland, from Herberton south through Ravenshoe towards Tully and west to the Herbert River.
- [2] The Federal Court of Australia ('Court') delivered a determination of native title in each of the previous three claims on 8 October 2010.<sup>2</sup> The original Jirrbal People #4 application was filed on 22 October 2015 and was accepted for registration and entered on the Register of Native Title Claims ('Register') on 9 February 2016. The application was amended on 28 February 2023, primarily to reduce the area of land and waters and was accepted for registration on 4 May 2023 under s 190A(6A).
- [3] The Jirrbal People #4 Claim was administratively partitioned into two parts on 25 March 2022, with Part A to proceed and be determined separately from Part B.<sup>3</sup> The Court made orders in the Jirrbal People #4 Claim on 22 May 2024, replacing the applicant under s 66B and granting leave for an amended application to be filed. The amended application was filed on 22 May 2024, and the Registrar of the Court gave a copy of the amended application and accompanying affidavits to the Native Title Registrar ('Registrar') on 3 June 2024 pursuant to s 64(4) of the Act. This has triggered the Registrar's duty to consider the Jirrbal People #4 Claim for registration in accordance with s 190A.<sup>4</sup>

## Preliminary considerations

### *Registration conditions*

- [4] Sections 190A(1A), (6), (6A) and (6B) set out the decisions available to the Registrar under s 190A. 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 dealing mainly with the merits of the claim) and s 190C (which the Act refers to as dealing 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.
- [5] Section 190A(1A) provides for exemption from the registration test for certain applications amended under s 87A. I am satisfied that s 190A(1A) does not apply to the amended application because the granting of leave by the Court to amend the application was not made pursuant to s 87A.
- [6] Section 190A(6A) sets out the conditions under which the Registrar must accept an amended application for registration without testing under ss 190B and 190C. The amendments that have been made to this amended application are set out in Schedule S and include the following:

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<sup>2</sup> *Jirrbal Determinations*.

<sup>3</sup> Orders of Collier J in *Braun & Ors on behalf of the Jirrbal People #4 v Queensland* (Federal Court of Australia, QUD983/2015, 25 March 2022).

<sup>4</sup> Section 190A(1).

- amending the composition of the persons who jointly comprise the applicant;
- amending the description of the claim group;
- amending the details of the authorisation of the applicant, including by updating the details at Schedule R and Attachment R and including details of the conditions imposed on the authority of the applicant under s 251BA at Attachment IA;
- minor or technical updates to Schedules H, HA, K and T and Attachment B; and
- including details at Schedule L relating to the areas where the applicant claims the benefit of ss 47A and 47B.

[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.

### *Information considered*

[8] 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’.

[9] I have had regard to the information in the amended application and accompanying documents. I have also had regard to the following material provided by the applicant on 19 June 2024:

- Affidavit of Louise Ngahia Keepa in support of the interlocutory application to further amend the application and replace the applicant in accordance with s 66B dated 10 May 2024;
- Report by Dr Benjamin Smith and Dr John Burton entitled “Anthropological Report in support of Jirrbal People Native Title Applications QC03/1 (Q6001/03), QC04/3 (Q41/04), and QC04/4 (Q42/04)” dated 29 March 2010;
- Appendix prepared by Dr Benjamin Smith and Dr John Burton entitled “Genealogies – Appendix Two of Anthropological Report in support of Jirrbal People Native Title Applications QC03/1 (Q6001/03), QC04/3 (Q41/04), and QC04/4 (Q42/04)” dated May 2005 (revised 30 November 2009);
- Report by Ms Rosalind Glass entitled “Genealogical Report in support of Jirrbal People Native Title Determination Applications QUD 6007/06, QUD 41/04, and QUD 42/04” dated May 2010 (revised August 2010);
- Report by Ms Ophelia Rubinich entitled “Jirrbal People Application Report” dated September 2015;
- Affidavit of [claim group member 1] dated 9 September 2015;
- Affidavit of Bradley Go-Sam dated 10 September 2015;
- Affidavit of Elizabeth Cashmere dated 22 March 2016;
- Affidavit of [claim group member 2] dated 23 March 2016;

- Report by Dr John Burton entitled “Expert Opinion regarding whether Wambino should be added as an apical ancestor to the Jirrbal #4 native title claim and other matters” dated 4 October 2019 (revised 23 October 2019);
  - Report by Ms Sarah Bell entitled “Sam Boyd – Ancestor Research Report” dated 12 May 2022;
  - Witness statement of [claim group member 3] dated 3 August 2022;
  - Witness statement of Elizabeth Cashmere dated 3 August 2022;
  - Witness statement of Bradley Go-Sam dated 3 August 2022;
  - Witness statement of [claim group member 4] dated 4 August 2022; and
  - Witness statement of [claim group member 5] dated 25 October 2022
- (together referred to as the ‘Applicant’s Additional Material’).

[10] 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>5</sup>

[11] The State of Queensland (‘State’) has not provided any submissions or information in relation to the application of the registration test that I must have regard to under s 190A(3)(c).<sup>6</sup>

[12] Section 190A(3) provides that I may also have regard to such other information as I consider appropriate. I have also considered it appropriate to have regard to the original registration test decision dated 9 February 2016 (‘Original Registration Decision’) and a geospatial assessment and overlap analysis prepared by the Tribunal’s Geospatial Services in relation to the area covered by the application, dated 21 June 2024 (‘Geospatial Assessment’).

### *Procedural fairness*

[13] As noted above, on 19 June 2024, the Applicant’s Additional Material was provided to the Tribunal for the purpose of the registration test. The applicant identified this material as confidential in nature because it contains personal and culturally sensitive information.

[14] On 20 June 2024 a Senior Officer of the Tribunal wrote to the applicant to ascertain whether the applicant intended to provide any further material and if so, for that material to be provided by 3 July 2024. On 4 July 2024 the Senior Officer confirmed that no further material had been received.

[15] On 20 June 2024, a Senior Officer of the Tribunal wrote to the State to provide a copy of the amended application and confirm that the application would be assessed against each of the conditions of the registration test and that should the State wish to provide any submissions in relation to the registration test, they should do so by 3 July 2024. The letter dated 20 June 2024 also informed the State that the applicant had provided the Applicant’s Additional

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<sup>5</sup> Section 190A(3)(b).

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

Material. Because of the confidential nature of the material, the State was required to enter into a confidentiality undertaking in order to receive copies of that material.<sup>7</sup>

[16] The State did not enter into the confidentiality undertaking or provide any submissions and did not respond to the letter of 20 June 2024.

[17] This concluded the procedural fairness process.

## **Section 190C: conditions about procedural and other matters — conditions met**

### **Sections 190C(2) and ss 61 and 62: registration conditions about procedural and other matters – condition met**

[18] I have examined the amended application and for the reasons set out below, I am satisfied that it contains all details and other information and is accompanied by affidavits and other documents as required by ss 61 and 62.

[19] 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 61–62. This condition does not require any merit assessment of the material to be undertaken, however it does seek ‘...to ensure that the application contains “all details” required by s 61...’.<sup>8</sup> As such, in my view s 190C(2) requires consideration of whether the application contains the required material and whether such material is sufficient to enable the Registrar to form an opinion about whether the claim satisfies all of the conditions in ss 190B and 190C.<sup>9</sup>

### *Section 61 – native title applications*

#### **Section 61(1): persons who may make an application**

[20] Section 61(1) provides that only persons included in and authorised by the native title claim group may make a native title determination application for the particular native title claimed.

[21] Three persons are named in the amended application as comprising the applicant. Schedule A contains a description of the native title claim group. Each of the persons comprising the applicant has deposed an affidavit for the purposes of s 62 and these are annexed to the amended application at Attachment R (‘Applicant Affidavits’). The Applicant Affidavits indicate that each deponent is a member of the native title claim group and is authorised to make the application by the persons in the native title claim group.<sup>10</sup>

[22] From the material contained in Schedule A and the Applicant Affidavits, I am satisfied that the amended application meets the requirements of ss 61(1) and 190C(2).

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<sup>7</sup> *WA v NTR* [38].

<sup>8</sup> *Doepel* [35].

<sup>9</sup> See also s 190D(3)(b).

<sup>10</sup> Form 1, Attachment R, Applicant Affidavits [1], [5].

[23] Section 61(2) then provides that the persons authorised to make the native title determination application are jointly the applicant and none of the other members of the native title claim group is the applicant. I am satisfied that there is nothing in the amended application or other material that I have considered that would suggest otherwise.

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

[24] Section 61(3) requires an application to state the name and address for service of the applicant. The names of each of the persons comprising the applicant are stated in the amended application and Part B states that the applicant is represented by North Queensland Land Council ('NQLC') and includes the relevant address for service. As such, I am satisfied that this requirement is met.

**Section 61(4): applications authorised by persons**

[25] Section 61(4) requires a native title determination application authorised by persons in a native title claim group to name or describe the persons in that claim group so that it can be ascertained whether any particular person is one of those persons.

[26] Section 61(4) was considered in *Gudjala 2007*, where Dowsett J emphasised the procedural nature of the exercise undertaken by a delegate under s 190C(2) regarding the details and information required by ss 61 and 62 in contrast to the merits exercise undertaken pursuant to s 190B(3).<sup>11</sup>

[27] Schedule A of the amended application contains a description of the native title claim group as those Aboriginal persons descended by birth or adoption from 41 named apical ancestors, and who identify as and are accepted by other members of the claim group as Jirrbal. I am satisfied that Schedule A of the amended application meets the requirements of ss 61(4) and 190C(2) because Schedule A contains a description of the native title claim group that is sufficiently clear so that it can be ascertained whether any particular person is one of those persons.<sup>12</sup>

**Section 61(5): prescribed form filed in the Federal Court**

[28] 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. In my view, these are matters for the Court however I note that the amended application is made in the prescribed form and was accepted for filing by the Court.

*Section 62(1), (1A) and (2): information etc. in relation to certain applications; claimant applications*

**Section 62(1)(a) and (1A): affidavits containing specified details**

[29] Section 62(1)(a) requires a claimant application to be accompanied by an affidavit sworn by the applicant stating each of the matters mentioned in subsection (1A). The amended application is accompanied by the affidavits deposited by each of the three persons comprising

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<sup>11</sup> *Gudjala 2007* [31]–[32].

<sup>12</sup> Section 61(4)(b).

the applicant. These affidavits are in substantially identical terms, and include statements to the effect that:

- the deponent is a member of the native title claim group as described in Schedule A;
- the deponent believes that the native title rights and interests claimed have not been extinguished in relation to any part of the area covered by the application;
- the deponent believes that none of the area covered by the application is also covered by an approved determination of native title as defined in s 13(3) of the Act;
- the deponent believes that all of the statements made in the application are true;
- the deponent and the other persons comprising the applicant are authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it;
- there is no decision-making process under traditional laws and customs that must be complied with and the claim group has an agreed and adopted process of decision-making (by way of resolutions made at a meeting of the claim group by majority vote, once sufficient notice of the meeting has been given and the members present are sufficiently representative of the claim group to make important decisions);
- the original application was authorised at a meeting on 8 August 2015, an amendment to the description of the claim group was authorised at a meeting on 6 December 2022, and this amended application was authorised at a meeting on 4 April 2024, including confirming the continuing authority of the three persons comprising the applicant in the amended application; and
- at the authorisation meeting in 2015, five conditions were imposed on the applicant that relate to the making of the amended application, and these have continued in effect and have been satisfied in the making of the amended application for the reasons set out.

[30] I am satisfied that the amended application satisfies the requirements of ss 62(1A) and 190C(2) because each of the s 62 affidavits accompanying the amended application contains the required statements addressing the matters listed at s 62(1A)(a)–(g).

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

[31] 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. Schedule L of the amended application indicates that there is no agreement under s 47C in relation to the area covered by the amended application. As such, the amended application does not contravene the requirement at s 62(1)(d).

**Section 62(2)(a) and (b): information about the boundaries of the area and any areas within those boundaries that are not covered by the application**

[32] Section 62(2)(a) requires that the application contain information that enables the boundaries of the area covered by the application and any areas within those boundaries that are not covered by the application to be identified.

- [33] Schedule B of the amended application refers to Attachment B, which contains a written description of the external boundaries of the area. Schedule B also provides a description of those areas within the external boundaries that are not covered by the amended application.
- [34] Section 62(2)(b) requires that the application include a map showing the boundaries of the area mentioned in s 62(2)(a). Schedule C refers to Attachment C, which comprises a map showing the external boundaries of the amended application.
- [35] Schedule S indicates that a minor typographical error has been corrected in Attachment B and the word 'Further' has been included in the title. The Geospatial Assessment confirms that the area covered by the amended application has not been amended or reduced from the previous application.
- [36] As such, I am satisfied that the amended application meets the requirements of ss 62(2)(a)–(b) and 190C(2).

**Section 62(2)(c): searches of any non-native title interests**

- [37] Section 62(2)(c) requires that the application include details and results of searches of any non-native title rights and interests covered by the application. Schedule D of the amended application confirms that no searches have been carried out by the applicant, and as such this requirement is met.

**Section 62(2)(d): description of native title rights and interests**

- [38] Section 62(2)(d) requires an application to contain a description of the native title rights claimed in relation to particular land or waters. This description must 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 of the amended application contains a detailed description of the native title rights and interests claimed in relation to the amended application.
- [39] I am satisfied that Schedule E of the application meets the requirements of ss 62(2)(d) and 190C(2).

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

- [40] 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. The amended application contains a general description of the relevant factual basis at Schedule F.
- [41] I am satisfied that Schedule F of the amended application meet the requirements of ss 62(2)(e) and 190C(2).

**Section 62(2)(f): activities in relation to the land and waters**

- [42] Section 62(2)(f) requires that if the native title claim group currently carry on any activities in relation to the land or waters claimed, details of those activities must be included in the application. Schedule G of the amended application lists the activities currently being undertaken by members of the claim group in the application area.
- [43] I am satisfied that Schedule G of the amended application meet the requirements of ss 62(2)(f) and 190C(2).

### **Section 62(2)(g): other applications**

[44] Section 62(2)(g) requires an application to include details of any other court applications seeking a determination of native title or native title compensation over any of the area covered by the application. Schedule H of the amended application states that the applicant is not aware of any other extant applications in relation to the whole or part of the area covered by the amended application.

[45] I am satisfied that Schedule H of the application meets the requirements of ss 62(2)(g) and 190C(2).

### **Section 62(2)(ga): future act notices**

[46] Section 62(2)(ga) requires the application include details of any s 24MD(6B)(c) notifications relevant to the claim area. Schedule HA of the amended application indicates that the applicant is not aware of any notification under s 24MD(6B)(c) that relate to the whole or part of the application area.

[47] I am satisfied that Schedule HA of the application meets the requirements of ss 62(2)(ga) and 190C(2).

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

[48] Section 62(2)(h) requires that the application include details of any s 29 notifications relevant to the claim area of which the applicant is aware. Schedule I of the amended application states that the applicant is not aware of any notices under s 29 that relate to the whole or part of the application area.

[49] I am satisfied that Schedule I of the application meets the requirements of ss 62(2)(h) and 190(2).

### **Section 62(2)(i): conditions under s 251BA**

[50] Section 62(2)(i) requires the application include details of any conditions under s 251BA on the authority of the applicant to make the application and to deal with matters arising in relation to it. Schedule IA of the amended application contains details of the five conditions imposed on the authority of the applicant for the purposes of s 251BA. These are the same conditions referred to in each of the Applicant Affidavits.

[51] I am satisfied that Attachment IA of the amended application meets the requirements of ss 62(2)(i) and 190C(2).

### ***Conclusion on s 190C(2)***

[52] For the above reasons, I am satisfied that the amended application contains all of the details and other information, and is accompanied by any affidavit or other document, as required by ss 61–62. As such the condition at s 190C(2) is met.

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

[53] 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’.

- [54] Although s 190C(3) is expressed in the past tense, the Explanatory Memorandum to the *Native Title Amendment Act 1998* (Cth) which inserted this provision indicates that its purpose 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>13</sup> 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).
- [55] 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>14</sup>
- [56] 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>15</sup> These criteria are that any previous application covers at least some of the same area, was accepted for registration under s 190A and is on the Register.
- [57] The Geospatial Assessment indicates that there is no previous claim overlapping any of the area covered by the application. I have undertaken my own searches of the Tribunal’s mapping database which have confirmed this.
- [58] 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.

### Section 190C(4): identity of claimed native title holders – condition met

- [59] Section 190C(4) provides that the Registrar must be satisfied that either a certificate under s 203BE has been issued by the relevant representative Aboriginal/Torres Strait Islander body,<sup>16</sup> or the requirements in subsection (4AA) are met.<sup>17</sup> Schedule R of the amended application confirms that the application is not certified. As such and in accordance with s 190C(4)(b), I must proceed to consider the requirements at s 190C(4AA).

#### *Sections 190C(4)(b) and (4AA): identity of claimed native title holders*

##### *Section 190C(4AA)(a): member authorised by native title claim group to be the applicant*

- [60] Section 190C(4AA)(a) requires the applicant to be a member of the native title claim group and further requires that the applicant is authorised to make the application, and deal with all

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<sup>13</sup> Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) 303 [29.25], emphasis added.

<sup>14</sup> *Doepel* [16].

<sup>15</sup> *Strickland FC* [9].

<sup>16</sup> Section 190C(4)(a).

<sup>17</sup> Section 190C(4)(b).

matters arising in relation to it, by all the other persons in the native title claim group.<sup>18</sup> It is therefore necessary to identify whether:

- the persons comprising the applicant are members of the native title claim group;
- the applicant is ‘authorised’ in accordance with the requirements in s 251B; and
- that such authorisation was given by ‘all the other persons’ in the native title claim group.

[61] Having regard to the authorities concerning authorisation of the applicant, I understand that consideration of the provisions at s 190C(4)(b) and (4AA)(a):

- requires the Registrar to be satisfied ‘of the fact of authorisation by all members of the native title claim group’;<sup>19</sup>
- requires the Registrar to be satisfied as to the identity of the claimed native title holders, including the applicant;<sup>20</sup>
- is not ‘to be met by formulaic statements in or in support of applications’;<sup>21</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>22</sup>

[62] The first limb of s 190C(4AA)(a) requires that ‘the applicant is a member of the native title claim group’. Schedule A of the amended application provides that membership of the claim group is derived by descent from one of the 41 listed apical ancestors. As indicated in paragraph 29 above, each of the persons comprising the applicant has deposed an affidavit stating that they believe all statements made in the application are true and that they are a member of the native title claim group as described in Schedule A.<sup>23</sup> Having regard to Schedule A and the contents of the Applicant Affidavits, I am satisfied that each person comprising the applicant is a member of the native title claim group.

[63] The second limb of s 190C(4AA)(a) requires that ‘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’. In my view, the second limb requires consideration of s 251B, which sets out the relevant definition of the word ‘authorise’.

### *Section 251B: authorising the making of applications*

[64] As s 251B contains multiple requirements, it is convenient to identify and address each requirement separately:

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<sup>18</sup> The word ‘authorise’ is defined in s 251B: Note to s 190C(4AA).

<sup>19</sup> *Doepel* [78].

<sup>20</sup> *Wiri People* [29].

<sup>21</sup> *Strickland* [57].

<sup>22</sup> *Harrington-Smith* [1230].

<sup>23</sup> Form 1, Attachment R, Applicant Affidavits [1], [4].

- ‘...all the persons in a native title claim group...’
- ‘...authorise ... persons to make a native title determination application ... and to deal with matters arising in relation to it, if’:
  - (a) where there is a traditional decision-making process to be complied with by the native title claim group, that process has been used to authorise the person or persons to make the native title determination application; or
  - (b) where there is no traditional decision-making process applicable, the persons in the native title claim group authorise the person or persons to make the application in accordance with a process of decision-making agreed to and adopted by the native title group.

[65] As regards ‘all the persons in a native title claim group’, Stone J in *Lawson* commented that ‘the effect of the section is to give the word “all” a more limited meaning’, that it does not require a unanimous vote and ‘[i]t 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>24</sup> In 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>25</sup> As such, I understand that I must assess whether all the persons in the native title claim group were provided with an opportunity to attend and participate in the relevant authorisation meeting of 4 April 2024.

[66] In *Weribone*, Rares J held that a notice for an authorisation meeting ‘must be sufficient to enable the persons to whom it is addressed ... 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>26</sup>

[67] As regards ‘...authorise...persons to make a native title determination application...and to deal with matters arising in relation to it’, I must assess whether the application was ‘authorised’ under s 251B. Justice O’Loughlin listed a number of questions in *Ward* relating to the authorisation process which 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 the questions should be addressed,<sup>27</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>28</sup>

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<sup>24</sup> *Lawson* [25]. See also *Butchulla* [33].

<sup>25</sup> *Ibid* [27].

<sup>26</sup> *Weribone* [40], [41]; see also *Burragubba* [31].

<sup>27</sup> *Ward* [24]–[25].

<sup>28</sup> *Ward* [24], cited with approval in *Lawson* [26].

[68] The Full Court stated in *Noble*:

Section 251B does not require proof of a system of decision-making beyond proof of the process used to arrive at the particular decision in question. The section accommodates a situation where a native title claim group agrees to follow a particular procedure for a particular decision even if other procedures are normally used for other decisions. Nor does s 251B require a formal agreement to the process adopted for the making of a particular decision. Agreement within the contemplation of s 251B may be proved by the conduct of the parties. There was evidence in this case that the claim group conducted itself at the meeting on the basis that it agreed to a vote by the members of the group to determine the question of authorisation. All persons present voted in favour of the motion. Nobody is recorded as leaving the meeting or refusing to vote or in any other way conducting to indicate dissent from the course adopted. There was thus evidence from the conduct of the claim group on which the primary judge could base his conclusion that the requirements of s 251B were satisfied.<sup>29</sup>

[69] In *Fesl*, Logan J considered the meaning and effect of s 251B as dealt with in the above passage from the Full Court in *Noble*, and stated the following principles distilled from the authorities concerning s 251B:

- (a) the effect of the s 251B is to give the word ‘all’ in, materially, the table which appears below s 61(1) a more limited meaning than it might otherwise have;
- (b) in those cases where there is no relevant traditional decision-making process, s 251B does not mandate any one particular decision-making process, only that it be one that is agreed to and adopted by the persons in the native title claim group or compensation group;
- (c) “agreed to and adopted by” imports the giving to all of those whose whereabouts are known and have capacity to authorise a reasonable opportunity to participate in the adoption of a particular process and the making of decisions pursuant to that process;
- (d) unanimous decision-making is not mandated;
- (e) agreement to a particular process may be proved by the conduct of the parties even in the absence of proof of a formal agreement.<sup>30</sup>

#### **Information provided in support of s 190C(4AA): s 190C(5)**

[70] Section 190C(5) provides that the Registrar cannot be satisfied that an uncertified application meets the requirements of s 190C(4) unless the application<sup>31</sup> contains statements to the effect that the requirements in sub-s (4AA) have been met and briefly sets out the grounds upon which the Registrar should consider that the conditions have been met (but need not include brief grounds relating to conditions under s 251BA where none are imposed).

[71] Justice French (as his Honour then was) stated in *Strickland* that s 190C(5):

*requires no more than a statement that the requirement of authorisation referred to in s 190C(4)(b) has been met. It is also required briefly to set out the grounds on which the Registrar should consider that it has been met. The insertion of the word "briefly" at the beginning*

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<sup>29</sup> *Noble* [18].

<sup>30</sup> *Fesl* [71].

<sup>31</sup> *Doepel* [16], [78].

*of par 190C(5)(b) suggests that the legislature was not concerned to require any detailed explanation of the process by which authorisation is obtained.*<sup>32</sup>

[72] I consider that the first two paragraphs at Schedule R contain statements that meet the description of s 190C(5)(a), and that the balance of Schedule R contains the brief grounds required by s 190C(5)(b). In addition, the Applicant Affidavits each depose that the individuals comprising the applicant are members of the native title claim group and have been authorised, and set out the process of decision-making and information about the conditions on authority under s 251BA. In my view these affidavits also contain statements to the effect that the requirements of s 190C(4AA) have been met.

[73] As such, I am satisfied that the amended application contains the statements and brief grounds required by s 190C(5). Having concluded that the specific requirement of s 190C(5) is met, I will proceed to consider whether the amended application meets the requirement of s 190C(4)(b). I note that this requires ‘some inquiry through the material available to the Registrar to see if the necessary authorisation has been given’.<sup>33</sup>

[74] The material available that relates to the authorisation of the applicant given at a meeting conducted on 4 April 2024 is primarily contained in an affidavit of Ms Louise Keepa, Senior Legal Officer at NQLC, affirmed on 10 May 2024 contained in the Applicant’s Additional Material. This material includes the following information:

- Research conducted by a consultant anthropologist in 2022 concluded that an additional apical ancestor (Sam Boyd) should be included in the claim group description, and information sessions were held with the claim group in November 2022 in relation to this research and its findings.<sup>34</sup>
- Authorisation meetings were then held on 6 December 2022 for the purpose of proposing a resolution to amend the description of the claim group to include Sam Boyd as an apical ancestor (‘2022 Authorisation Meetings’). Notice for the 2022 Authorisation Meetings was provided as follows:
  - by post and email on 15 November 2022 to all members of the claim group whose details were recorded in a database of traditional owners maintained by NQLC, together with a ‘confidential information document’;<sup>35</sup>
  - by publication in the *Cairns Post* newspaper on 12 November 2022;<sup>36</sup> and
  - on the NQLC website and Facebook page on 21 November 2022.<sup>37</sup>
- The notice for the 2022 Authorisation Meetings set out that the purpose of the meetings was for members of the claim group as constituted at that time to authorise an amendment to the description of the claim group (to include Sam Boyd) and then for that newly constituted claim group to endorse that amendment to the

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<sup>32</sup> *Strickland* [57].

<sup>33</sup> *Doepel* [78].

<sup>34</sup> Affidavit of Louise Keepa affirmed 10 May 2024 [18]–[20].

<sup>35</sup> *Ibid* [21].

<sup>36</sup> *Ibid*.

<sup>37</sup> *Ibid*.

claim group description (as well as other matters relating to the progression of the claim). The notice invited all Jirrbal People, including the descendants of Sam Boyd, to attend the 2022 Authorisation Meetings (although descendants of Sam Boyd were not entitled to participate in the initial meeting of the claim group as previously constituted). The notice listed each of the relevant apical ancestors, and with the inclusion of Sam Boyd is the same list as in the amended application.<sup>38</sup>

- A presentation was given at the 2022 Authorisation Meeting in relation to the research and participants were provided with the opportunity to pose questions and have them answered and to discuss the proposed change to the description of the claim group.<sup>39</sup> A descendant of Sam Boyd also spoke to the attendees by phone and answered questions from the participants.<sup>40</sup>
- The claim group as previously described passed resolutions at the 2022 Authorisation Meetings, including to:
  - confirm that sufficient notice was given of the meeting and the members of the Jirrbal People #4 claim group present were sufficiently representative of the claim group to make decisions (resolutions 3 and 4);<sup>41</sup>
  - confirm that there is no traditional decision-making process that must be followed, and agreeing and adopting a process whereby resolutions are passed by a majority vote of members of the claim group that are over 18 years of age (resolution 5);<sup>42</sup> and
  - resolve that the description of the claim group be amended to include Sam Boyd (resolution 6).<sup>43</sup>
- The claim group as newly described (including descendants of Sam Boyd) then passed resolutions at the 2022 Authorisation Meetings, to the same effect as those set out above, including for the Jirrbal People #4 claim to be amended to reflect the amended claim group description (resolutions 7–10).<sup>44</sup>
- A further authorisation meeting was held on 4 April 2024 ('2024 Authorisation Meeting'). The purpose of this meeting was to confirm the previously authorised amendment, as well as other amendments, to the claim group description and to confirm the authority of the three persons comprising the applicant in this amended application.<sup>45</sup>

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<sup>38</sup> Ibid [22], Annexure LKN18.

<sup>39</sup> Ibid [26]–[27].

<sup>40</sup> Ibid [28].

<sup>41</sup> Ibid [25].

<sup>42</sup> Ibid.

<sup>43</sup> Ibid [29].

<sup>44</sup> Ibid [34].

<sup>45</sup> Ibid [38].

- Notice of the 2024 Authorisation Meeting was provided as follows:
  - by post to 342 persons and by email to 159 persons on 7 March 2024, being all members of the claim group whose details were recorded in a database of traditional owners maintained by NQLC;<sup>46</sup>
  - by online and print publication in the *Koori Mail* newspaper on 13 March 2024;<sup>47</sup>
  - by online and print publication in the *Cairns Post* and *Townsville Bulletin* newspapers on 16 March 2024;<sup>48</sup>
  - on the NQLC website and Facebook page on 13 March 2024.<sup>49</sup>
- The notice for the 2024 Authorisation Meeting invited all members of the claim group and listed each of the apical ancestors in the claim group as described following the 2022 Authorisation Meetings.<sup>50</sup> Each of the apical ancestors is also listed in Schedule A of the amended application. The notice also stated that the purpose of the 2024 Authorisation Meeting included to confirm the proposed amendments to the claim group description, the conditions on the authority of the applicant, and to authorise a proposed s 87A agreement to progress Part A of the Jirrbal People #4 claim to a consent determination. The notice also included a map of the claim area, including the proposed Part A determination area and the existing area of the *Jirrbal Determinations*.<sup>51</sup>
- NQLC legal officers and staff from NQLCs anthropology unit, as well as counsel, attended the 2024 Authorisation Meeting and provided legal advice to the participants.<sup>52</sup> An attendance register was kept, which indicates that the persons participating in the meeting were members of the claim group.<sup>53</sup> Copies of the meeting agenda, the PowerPoint presentation given at the meeting and the proposed resolutions were provided to attendees, together with other information and maps.<sup>54</sup> Officers of NQLC gave a presentation to attendees, including in relation to the need to confirm the authority of the persons comprising the applicant noting that a former member of the applicant had resigned.<sup>55</sup> The proposed resolutions were read out to the attendees and were explained by counsel.<sup>56</sup> Votes were taken on the resolutions in accordance with the agreed and adopted decision-making process (set out below) and were counted by NQLC staff.<sup>57</sup>

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<sup>46</sup> Ibid [37].

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid, Annexure LNK19.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid [40].

<sup>53</sup> Ibid [45].

<sup>54</sup> Ibid [41].

<sup>55</sup> Ibid [42].

<sup>56</sup> Ibid.

<sup>57</sup> Ibid [43].

- The claim group passed resolutions at the 2024 Authorisation Meeting, including to:
  - confirm that there is no traditional decision-making process that must be followed (resolution 1.4), and agreeing and adopting a process whereby resolutions are passed by a majority vote by show of hands of members of the claim group that are over 18 years of age (resolution 1.5);<sup>58</sup>
  - confirm that sufficient notice was given of the meeting and the members of the Jirrbal People #4 claim group present were sufficiently representative of the claim group to make decisions (resolution 2);<sup>59</sup>
  - resolve to amend the description (to that as contained in the amended application) and as authorised at the 2022 Authorisation Meetings (resolution 3);<sup>60</sup>
  - confirm the continuing authority of Angela Braun, Elizabeth Cashmere and Bradley Go-Sam and the five conditions placed on that authority at the applicant's original authorisation in 2015 (resolution 4.1);<sup>61</sup>
  - confirming and instructing the members of the applicant to make the amended application as recommended by NQLC, including to give effect to the resolutions made to amend the description of the claim group (resolution 4.2).<sup>62</sup>

**Has the applicant been authorised: ss 190C(4AA)(a) and 251B?**

[75] I am satisfied that the material contained in the amended application summarised above contains information addressing the necessary elements of 'authorisation' as defined by s 251B for the purpose of meeting the condition for uncertified applications at s 190C(4)(b) and (4AA).

[76] In my view, the material demonstrates that the notices provided a reasonable opportunity for members of the claim group to participate and fair notice of the business to be conducted at both the 2022 and 2024 meetings.<sup>63</sup> The notices were sent to all members of the claim group on the NQLC database by post an email, which for the 2024 Authorisation meetings comprised 342 persons. The notices were also published in regional newspapers and for the 2024 Authorisation Meeting, a specialist interest Aboriginal and Torres Strait Islander newspaper. The notices clearly set out the purpose of the authorisation meetings and invited all persons in the claim group to participate and listed each of the relevant apical ancestors. The notices also included a map of the relevant area.

[77] I also consider that the material addresses the substance of the questions referred to in *Ward*. Although the material does not include details relating to the process for registration at either the 2022 or 2024 authorisation meetings, the material indicates that an attendance register

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<sup>58</sup> Ibid [44].

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> *Lawson* [20], *Weribone* [41].

was maintained for the 2024 Authorisation Meeting and that those persons registered were all members of the claim group. Members of the claim group participating at the meeting were provided with information including copies of the meeting agenda, proposed resolutions, and relevant information including maps. The proposed resolutions were read out at the meeting and votes taken and recorded in accordance with the agreed and adopted decision-making process. Although the material provided does not include information about the eventual vote tallies, the material states that each resolution was passed in accordance with the agreed and adopted decision-making process which required a majority vote to pass a proposed resolution.

[78] 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).

*Section 190C(4AA)(b): s 251BA conditions*

[79] 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.

[80] The five conditions imposed on the authority of the applicant are set out in Schedule IA as follows:

1. the Applicants represent the entire claim group, not just their family;
2. if an Applicant is unable or unwilling to continue to act as an Applicant, whether as a result of death, ill-health or any other reason, the remainder of the Applicants continue to be authorised to act on behalf of the claim group until the Applicant comprises of less than three remaining persons, in which case replacements will be authorised by the claim group at an authorisation meeting;
3. the Applicant can take any formal steps required to achieve a determination without the need for an authorisation meeting other than reduce the claim area, in which case such decisions will be made by the claim group at an authorisation meeting;
4. the Applicant will make decisions by majority and all Applicants will abide by majority decisions; and
5. the Applicant may negotiate and reach agreement with respect to future act and cultural heritage matters, and the benefits from which will be held by the Wabubadda Aboriginal Corporation on behalf of all Jirrbal People.

[81] Each of the Applicant Affidavits depose that these conditions have been satisfied because, in turn:

- (a) the Applicant has at all relevant times acted in the interests of the Native Title Claim Group and not just their specific family;
- (b) despite the resignation of [a former member of the applicant] as a member of the Applicant by written notice on 27 February 2023, there remain three persons acting on behalf of the Native Title Claim Group;
- (c) the Applicant has only acted to reduce the area of the Application in accordance with a decision made by the Native Title Claim Group at an authorisation meeting;

- (d) the Applicant has at all relevant times complied with the condition of making decisions by majority and abiding by such decisions; and
- (e) the Applicant has at all relevant times complied with the condition set out in paragraph [5 above].

[82] In my view and having regard to the nature of the conditions, the Applicant Affidavits and the material contained in the amended application, I am satisfied that the relevant conditions imposed under s 251BA have been satisfied.

[83] As such, I am satisfied that the requirements of s 190C(4AA)(b)(ii) have been met.

## **Section 190B: conditions about merits of the claim – conditions met**

### **Section 190B(2): identification of area subject to native title – condition met**

- [84] Section 190B(2) requires the Registrar to be satisfied that the written information and map contained in the application are sufficient to identify, with reasonable certainty, the land and waters in relation to which the native title rights and interests are claimed.
- [85] Schedule B of the amended application refers to Attachment B, which describes the application area as all the land and waters within an external boundary by reference to the boundaries of native title determinations, drainage basins, land parcels identified by lot on plan, the centrelines of Dirran and Blencoe creeks and the Herbert River, and geographic coordinates in decimal degrees shown to six decimal places.
- [86] Schedule B also lists general exclusions, and Attachment B lists specific exclusions comprising all the land and waters within ten native title determinations and one historic native title determination application.
- [87] Schedule C of the amended application refers to Attachment C, which comprises a general topographic map which includes the application area depicted by a bold dark blue outline and blue stipple, a labelled commencement point, scalebar, locality map, coordinate grid as well as notes relating to the source, currency and datum of data used to prepare the map. Schedule C states that '[i]n the event of inconsistency between the information in Attachments B and C, the information in Attachment B will prevail'.
- [88] The Geospatial Assessment concludes that the written description and map are consistent and identify the claim area with reasonable certainty. I agree with this assessment and am satisfied that the written description and map contained in the amended application are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land and waters. As such, the requirement at s 190B(2) is met.

## Section 190B(3): identification of the native title claim group – condition met

[89] Section 190B(3) requires the Registrar to be satisfied that either the persons in the native title claim group are named in the application,<sup>64</sup> or that persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.<sup>65</sup>

[90] When assessing the requirements under s 190B(3), I understand that:

- I am required to address only the content of the application;<sup>66</sup>
- ‘only ... the members of the claim group are required to be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification’;<sup>67</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>68</sup> and
- to determine whether the conditions or rules specified in the application have 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>69</sup>

[91] Schedule A describes the composition of the Jirrbal People #4 native title claim group as those Aboriginal persons who:

- (a) are descended by birth or by adoption in accordance with the traditional laws acknowledged and the traditional customs observed by the Jirrbal People, from one or more of the following apical ancestors (listed alphabetically);

[41 named apical ancestors]

- (b) identify themselves as Jirrbal; and
- (c) are accepted as Jirrbal by other Jirrbal People in accordance with the traditional laws acknowledged and the traditional customs observed by the Jirrbal People.

[92] I consider that the description of the native title claim group at Schedule A comprises three elements, descent by birth or adoption under traditional laws and customs from a named apical ancestor, self-identification as a member of the native title claim group and acceptance by other members of the claim group in accordance with traditional laws and customs.

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<sup>64</sup> Section 190B(3)(a).

<sup>65</sup> Section 190B(3)(b).

<sup>66</sup> *Doepel* [51]; *Gudjala 2007* [30].

<sup>67</sup> *Gudjala 2007* [33].

<sup>68</sup> *Gudjala 2007* [34].

<sup>69</sup> *WA v NTR* [67].

- [93] In relation to the first element of the claim group description requiring descent from a named apical ancestor, the Court has previously accepted such an approach as satisfying the requirements of s 190B(3)(b).<sup>70</sup>
- [94] In relation to descent through adoption, paragraph (a) of Schedule A states that descent by adoption is in accordance with the claim group's traditional laws and customs. In *WA v NTR*, Carr J accepted a description which included 'persons adopted by the named people and by the biological descendants of the named people' without any qualification indicating whether the adoption was according to traditional laws and customs or otherwise.<sup>71</sup> In my view, the description of the Jirrbal People claim group is sufficiently clear that it is the traditional laws and customs that provide the relevant rules or principles for ascertaining whether a person has a descent link by adoption for the purpose of paragraph (a) of the Jirrbal People claim group description.
- [95] As such, I consider that requiring a person to show descent by birth or adoption from a named ancestor provides a clear starting or external reference point and that with some factual inquiry it will be possible to identify the persons who fit this part of the description of the native title claim group.
- [96] In relation to the second element of the claim group description requiring a member of the claim group to self-identify as Jirrbal, in my view this may be ascertained through inquiries of the relevant person in question.
- [97] In relation to the third element of the claim group description requiring acceptance by other members of the claim group, I note that group acceptance has been previously held by the Court as 'inherent in the nature of a society'.<sup>72</sup> In *Sampi FC*, the Full Court noted that:
- in determining whether a group constitutes a society in the *Yorta Yorta* sense is the internal view of the members of the group – the emic view. The unity among members of the group required by *Yorta Yorta* means that they must identify as people who are bound by the one set of laws and customs or normative system.<sup>73</sup>
- [98] Attachment F sets out information relating to the traditional laws and customs of the Jirrbal People, and I consider that it is by reference to these laws and customs that those persons are to be accepted as Jirrbal when applying the description of the claim group at paragraph (c) of Schedule A.
- [99] For the above reasons, 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 requirement is met.

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<sup>70</sup> *WA v NTR* [67].

<sup>71</sup> *WA v NTR* [64]–[67].

<sup>72</sup> *Aplin* [260]; *Yorta Yorta* [108].

<sup>73</sup> *Sampi FC* [45].

## Section 190B(4): identification of claimed native title – condition met

[100] Section 190B(4) requires the Registrar to be satisfied that the description contained in the application as required by s 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified. I understand that in order to assess the requirements of this provision, I am confined to the material contained in the application itself.<sup>74</sup>

[101] The description 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.

[102] I understand that my task pursuant to s 190B(4) is to identify whether the claimed rights and interests can be ‘readily identified’. Justice Mansfield noted in *Doepel* that the description of the native title rights and interests must be understandable, have meaning and be without contradiction.<sup>75</sup> In *Strickland*, French J stated 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>76</sup>

[103] Paragraph 1 of Schedule E of the amended application claims ‘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’, in areas where exclusive possession can be recognised.

[104] In areas where exclusive possession cannot be recognised, paragraph 2 of Schedule E lists the following claimed non-exclusive rights and interests:

- (a) live and be present on the application area;
- (b) take, use, share and exchange Traditional Natural Resources for personal, domestic and non-commercial, communal purposes;
- (c) conduct burial rites;
- (d) conduct ceremonies;
- (e) teach on the area about the physical and spiritual attributes of the area;
- (f) 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;
- (g) light fires for domestic purposes including cooking but not for the purposes of hunting or clearing vegetation;
- (h) be accompanied into the claim area by non-claim group members being people required;
  - (1) by traditional law and custom for the performance of ceremonies or cultural activities; and
  - (2) to assist in observing and recording traditional activities on the claim area; and

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<sup>74</sup> *Doepel* [16].

<sup>75</sup> *Doepel* [99], [123].

<sup>76</sup> *Strickland* [60]; *Strickland FC* [85]–[87].

- (i) In relation to Water, take and use;
  - (1) Traditional Natural Resources from the Water for personal, domestic and non-commercial communal purposes; and
  - (2) for personal, domestic and non-commercial, communal purposes.

[105] Paragraph 3 includes the following definitions:

“Live” means to reside and for that purpose erect shelters and temporary structures but does not include a right to construct permanent structures;

“Traditional Natural Resources” means:

- (1) “animals” as defined in the Nature Conservation Act 1992 (Qld);
- (2) “plants” as defined in the Nature Conservation Act 1992 (Qld);
- (3) “charcoal, shells and resin”; and
- (4) “clay, soil, sand; ochre; gravel or rock on or below the surface”;

“Water” means water as defined by the Water Act 2000 (Qld);

[106] Paragraph 4 of Schedule E states that the native title rights and interests are subject to the valid laws of the State and the Commonwealth, and the rights conferred under those laws.

[107] I consider that the description of the claimed native title rights and interests is clear and readily identifiable and without contradiction. As such I am satisfied that the requirements of s 190B(4) have been met.

[108] I note that I consider below whether the factual basis material is sufficient to establish the existence of these claimed rights and interests on a prima facie basis under my consideration of the condition at s 190B(6).

### Section 190B(5): factual basis for claimed native title – condition met

[109] Section 190B(5) requires the Registrar to be satisfied that the factual basis for the claimed native title rights and interests is sufficient to 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.

[110] In *Doepel*, Mansfield J stated that the task under s 190B(5):

requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests... The role is not to test whether the asserted facts

will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts.<sup>77</sup>

[111] As such, when assessing the requirements of this condition, I understand that I must treat the asserted facts as true and assess whether they are sufficient to support each of the relevant assertions.

[112] Relevant to the task under s 190B(5) is the guidance provided by the Full Court in *Gudjala FC* in respect of the details required under s 62(2)(e)(i) to (iii) ‘general description of the factual basis on which it is asserted that the native title rights and interests claimed exist...’:

The fact that the detail specified by s 62(2)(e) is described as “a general description of the factual basis” is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim.<sup>78</sup>

[113] In *Gudjala 2009*, Dowsett J further clarified the task under s 190B(5) as follows:

In assessing the adequacy of a general description of the factual basis of the claim, one must be careful not to treat, as a description of that factual basis, a statement which is really only an alternative way of expressing the claim or some part thereof. In my view it would not be sufficient for an applicant to assert that the claim group’s relevant laws and customs are traditional because they are derived from the laws and customs of a pre-sovereignty society, from which the claim group also claims to be descended, without any factual details concerning the pre-sovereignty society and its laws and customs relating to land and waters. Such an assertion would merely restate the claim. There must be at least an outline of the facts of the case.<sup>79</sup>

[114] From the above, it is my understanding that although the material provided by the applicant need not provide evidence to make out each claim, it must nevertheless provide sufficient factual details to enable a ‘genuine assessment’ of the factual basis for the assertions set out in ss 190B(5)(a) to (c) and at a minimum provide ‘an outline of the facts of the case’.<sup>80</sup>

[115] Attachment F is identical to that in the previously amended claim as well as the original application. The applicant has also provided further factual basis material (the Applicant’s Additional Material as set out above at paragraph 9). Three of the documents that are included in the Applicant’s Additional Material were also considered by the delegate in the original registration decision (the affidavit of [claim group member 1] dated 9 September

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<sup>77</sup> *Doepel* [17]; *Gudjala FC* [57], [83].

<sup>78</sup> *Gudjala FC* [92].

<sup>79</sup> *Gudjala 2009* [29]; *Anderson* [43], [47]–[48].

<sup>80</sup> *Gudjala 2009* [29].

2015, the affidavit of Bradley Go-Sam dated 10 September 2015 and the report by Ms Ophelia Rubinich entitled “Jirrbal People Application Report” dated September 2015) (‘Rubinich Report’)).<sup>81</sup> This material was found in the original registration decision as being sufficient to support each of the assertions at s 190B(5). Also included with the Applicant’s Additional Material is the 2010 expert anthropological report of Drs Smith and Burton (‘Smith and Burton Report’) and the genealogical report of Ms Glass, referred to in the *Jirrbal Determinations*.<sup>82</sup> I note that the material at Attachment F and the three documents referred to above provided for the purpose of the original registration decision were found to be sufficient to meet the condition at s 190B(5) and that the Jirrbal People have had native title recognised over adjacent lands and waters in the *Jirrbal Determinations*. Although in forming my opinions I have had regard to the Applicant’s Additional Material, I have not considered it necessary to include references to all of the material in my reasons. In light of the amendment to the claim group description in the amended application, I have had particular regard to the report of Ms Bell entitled “Sam Boyd – Ancestor Research Report” dated 12 May 2022 (‘Bell Report’) contained in the Applicant’s Additional Materials. I have set out my consideration under each of the assertions at s 190B(5)(a) to (c) in turn below.

*Section 190B(5)(a): the association of the native title claim group and their predecessors with the area*

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

- there is an ‘association between the whole group and the area’, although not ‘all members must have such association at all times’;<sup>83</sup>
- the predecessors of the group were associated with the area over the period since sovereignty;<sup>84</sup>
- 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>85</sup> and
- the identified claim group (and not some other group) hold the identified rights and interests (and not some other rights and interests).<sup>86</sup>

**Predecessors’ association with the claim area**

[117] Schedule F refers to archaeological evidence demonstrating Aboriginal occupation of sites at Mount Mulligan dating back 40,000 years.<sup>87</sup> The factual basis material at Schedule F also includes detail relating to the history of the claim area, including encounters with European explorers and settlers from 1845 to 1891 demonstrating that the claim area was inhabited by Aboriginal people, including a reference from 1891 to the ‘Jel-Bul’ (Jirrbal) People.<sup>88</sup> The

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<sup>81</sup> Jirrbal People #4 QC2015/014 (registration test decision dated 9 February 2016), page 3 [11].

<sup>82</sup> *Jirrbal Determinations* [7].

<sup>83</sup> *Gudjala 2007* [52].

<sup>84</sup> *Ibid.*

<sup>85</sup> *Martin* [26]. See also *Corunna* [45].

<sup>86</sup> *Gudjala 2007* [39].

<sup>87</sup> Form 1, Schedule F [2].

<sup>88</sup> *Ibid* [3].

material sets out further references during the period of pastoral expansion and through the discovery of gold, tin and other minerals that demonstrate the claim area as being the Country of the Jirrbal People.<sup>89</sup> The Rubinich Report places the date of ‘effective sovereignty’ as 1865–1870.<sup>90</sup> The material then sets out the connection the predecessors of the claim group have with the area, and refers to the adjoining determinations of native title in favour of the Jirrbal People.<sup>91</sup>

[118] The association of the predecessors of the claim group is set out comprehensively in the 2010 genealogical report of Dr Glass.<sup>92</sup> Examples of the association of some of the apical ancestors listed at Schedule A, broadly covering the geographical distribution of the claim area, include:

- The son of apical ancestor **Jerry Linedale** was born around 1874 at Cashmere Station, Mount Garnet and was associated with Innot Hot Springs, Mt Garnet and Herberton (within the vicinity of the northern part of the claim area).<sup>93</sup>
- **Polly Robinson (1) (aka Polly Ingham)** was brought up at Wooroora Station, south of Ravenshoe, and her descendants are widely known and recorded in many secondary sources for the oral history of the Jirrbal People, particularly in the Ravenshoe area.<sup>94</sup>
- **King Jimmy Robinson** was born around 1860 and his son was born around 1885–1896 at Tully Falls. Jirrbal elders record that he was made a King ‘so he could communicate with the white people’, and his king plate is displayed at Ravenshoe. The records indicate that he was buried at the Aboriginal Cemetery at Little Millstream.<sup>95</sup>
- **Bulbulyarraman** was born in 1871 in the Tully area and was tribally married to **Nellie** and **Calida**, raising a number of biological children as well as other children with family kin ties.<sup>96</sup>
- The daughter of **Nellie Goooonburra** was born around 1894–1903 at Riversdale via Euramo and was widely recognised as Jirrbal. Her descendants continue to reside at Euramo on the Tully River.<sup>97</sup>

[119] As noted above at paragraph 115, the information in the Bell Report provides further information in relation to apical ancestor **Sam Boyd**, included in the description of the claim group following the amendments made in the amended application. This material indicates that Sam Boyd was listed as ‘Djirubal’ in Tindale’s ‘Palm Island 209’ genealogy.<sup>98</sup> The Bell

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<sup>89</sup> Ibid [4]–[6].

<sup>90</sup> Applicant’s Additional Materials, Report of Ms Ophelia Rubinich entitled “Jirrbal People Application Report” dated September 2015 (‘Rubinich Report’), page 14 [37].

<sup>91</sup> Form 1, Schedule F [9]–[11].

<sup>92</sup> Applicant’s Additional Material, Report by Ms Rosalind Glass entitled “Genealogical Report in support of Jirrbal People Native Title Determination Applications QUD 6007/06, QUD 41/04, and QUD 42/04” dated May 2010 (revised August 2010) (‘Dr Glass Report’).

<sup>93</sup> Dr Glass Report, page 17.

<sup>94</sup> Ibid, page 21.

<sup>95</sup> Ibid, page 106.

<sup>96</sup> Ibid, page 97.

<sup>97</sup> Ibid, pages 65–66.

<sup>98</sup> Applicant’s Additional Material, Report of Ms Bell entitled “Sam Boyd – Ancestor Research Report” dated 12 May 2022 (‘Bell Report’), page 14 [35].

Report then examines material relating to a ‘Sambo’, and concludes that they are different persons, with Sam Boyd being a Jirrbal man of the Tablelands area.<sup>99</sup> Sam Boyd partnered with Nora, and they had three children together.<sup>100</sup> Sam Boyd is otherwise not referred to in the Smith and Burton Report, including the genealogy at Appendix 2, or the Rubinich Report.

[120] The material pertaining to the association of current members of the claim group is set out in the original registration decision at paragraphs 90 to 93. Having regard to the material set out in the original registration decision, the Applicant’s Additional Material, in particular the 2010 genealogical report of Dr Glass and the Bell Report, I am satisfied that factual basis material indicates that the predecessors of the native title claim group had an association with the claim area.

#### **Native title claim group association with the claim area**

[121] The material at Attachment F pertaining to the association of current members of the claim group is set out in the original registration decision at paragraphs 95 to 101. In addition, the further affidavits and witness statements provided with the Applicant’s Additional Material that was not before the delegate in the original registration decision includes further information relevant to the consideration of this condition, as set out below.

[122] The affidavit of Ms Elizabeth Cashmere, one of the persons comprising the applicant, indicates that she grew up at Herberton and that there were other Jirrbal People living in Herberton.<sup>101</sup> Ms Cashmere refers to important art sites in the Silver Valley that she regularly visits and that should be protected.<sup>102</sup> Mr Bradley Go-Sam also refers to this area, stating that ‘I have always lived in Silver Valley because it is Jirrbal country, and it is my father and grandfather’s country. I am spiritually connected to this area. I belong to the country, not the other way around’.<sup>103</sup>

[123] The witness statement of [claim group member 3] refers to three particular parcels in Herberton that were Unallocated State Land at the time the claim was originally made, and states that:

Having lived in Herberton most of my life, I am very familiar with these parcels. I often camp, hunt, fish and gather bush tucker all over the claim area, including in the location of these parcels. I have responsibilities to preserve and care for Jirrbal country, and to pass down my traditional law and custom, culture and stories told to me by my Elders.<sup>104</sup>

[124] Similarly, the witness statement of [claim group member 4] describes swimming in the Cardstone Weir (near Tully) as a child, and that he and his family have a strong connection with this area through camping, hunting goanna, turkey, cassowary, pigs, carpet snake and wallaby, fishing on the Tully River including for eels, black brim, catfish and turtle and collecting bush tucker such as Herbert River Cherry and wild ginger in the Tully area.<sup>105</sup> A further example is demonstrated in the witness statement of [claim group member 5], who

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<sup>99</sup> Ibid, page 17 [53]–[54].

<sup>100</sup> Ibid, page 16 [47].

<sup>101</sup> Applicant’s Additional Material, affidavit of Elizabeth Cashmere affirmed 22 March 2016 [25].

<sup>102</sup> Ibid [39], Annexure EAC9.

<sup>103</sup> Applicant’s Additional Material, witness statement of Bradley Go-Sam dated 3 August 2022 [4].

<sup>104</sup> Applicant’s Additional Material, witness statement of [claim group member 3] dated 3 August 2022 [10].

<sup>105</sup> Applicant’s Additional Material, witness statement of [claim group member 4] dated 4 August 2022 [6]–[10].

describes how her family fish, hunt and gather resources in Jirrbal Country around Innot Hot Springs, and that '[t]his country is where our heart is, it's home'.<sup>106</sup>

[125] From the above information, and having regard to the material set out in the original registration decision, I consider that the factual basis material is sufficient to enable a 'genuine assessment' of the assertions that members of the claim group have an ongoing association with the claim area. I consider that the factual basis material is comprehensive and provides sufficient geographical particularity to support the assertion of an association between the whole group and the remaining area of the Jirrbal People #4 Claim since sovereignty.<sup>107</sup> I am satisfied that the factual basis material is sufficient to support the assertion at s 190B(5)(a).

*Section 190B(5)(b): traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the native title rights and interests*

[126] 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.

[127] In *Yorta Yorta*, the High Court observed 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>108</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>109</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>110</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>111</sup>
- those laws and customs have been acknowledged and observed without substantial interruption since sovereignty.<sup>112</sup>

[128] In *Gudjala 2009*, Dowsett J discussed some of the factors that may guide the Registrar in assessing the factual basis in, 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>113</sup>

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<sup>106</sup> Applicant's Additional Material, witness statement of [claim group member 5] dated 25 October 2022 [8]–[9].

<sup>107</sup> *Gudjala 2007* [52].

<sup>108</sup> *Yorta Yorta* [46].

<sup>109</sup> *Ibid* [49].

<sup>110</sup> *Ibid* [47].

<sup>111</sup> *Ibid* [46], [79].

<sup>112</sup> *Ibid* [87].

<sup>113</sup> *Gudjala 2009* [37], [52].

- 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>114</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>115</sup>

[129] 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>116</sup>

[130] The factual basis material pertaining to this condition is summarised in the original registration decision at paragraphs 119 to 124. This material includes the information contained in the Rubinich Report. In addition, the Applicant's Additional Material includes the Smith and Burton Report that was referred to in the adjoining *Jirrbal Determinations*., as well as affidavits and witness statements from claim group members that set out the traditional laws and customs of the Jirrbal People.

[131] The Rubinich Report outlines the Jirrbal laws and customs particularly pertaining to land or rights and interests in land. This material demonstrates that, as described by Drs Burton and Smith, the Jirrbal People are part of a regional society.<sup>117</sup> Membership of the Jirrbal group is through descent rules, which is generally patrilineal, but now also matrilineal.<sup>118</sup> The Rubinich Report refers to the Smith and Burton Report which shows the 'connection between what the early observers recorded of local organisation and rights in country and how contemporary Jirrbal people speak of their rights in Jirrbal country' and that 'Jirrbal people constantly acknowledge the appropriate individual and family connections when speaking about specific tracts of country'.<sup>119</sup>

[132] Jirrbal People are also described in the Rubinich Report as demonstrating connection to country through stories passed down from their predecessors. These includes stories from the *djudjaba* (creation period) when 'creator beings traversed the landscape leaving their marks in Jirrbal country, often with geographical features and localised stories relating to particular places'.<sup>120</sup> Place names are derived from these stories, for example many traditional Jirrbal names are derived from the *Girugarr* story, demonstrating the link between these stories,

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<sup>114</sup> Ibid [40].

<sup>115</sup> Ibid [29], [54].

<sup>116</sup> *Warrie* [107]; see also *Alyawarr* [78].

<sup>117</sup> Applicant's Additional Material, Rubinich Report, page 44 [120].

<sup>118</sup> Ibid, page 45 [125].

<sup>119</sup> Ibid, page 48 [135], page 49 [137].

<sup>120</sup> Ibid, page 50 [139].

family and particular tracts of country.<sup>121</sup> As an example of this, [claim group member 1] deposes as follows:

The eel is an important food source for Jirrbal people but also a symbolic animal for us because many of the important places on our country were named by *girrigur*, a man who travelled throughout Jirrbal country and the surrounding region. The story about *girrigur* is about a time beyond living memory, which is called the *djudjaba* in Jirrbal language. He named many of our places after parts of the eels he carried with him.<sup>122</sup>

[133] Traditional walking tracks are also a feature of the connection to Country for Jirrbal People.<sup>123</sup>

The material from members of the claim group also refers to *yalgay* (traditional walking tracks) that were used when traditional business and corroborees were being conducted in Tully.<sup>124</sup>

[134] The Rubinich report also details the Jirrbal People's belief that spirits inhabit Jirrbal Country, including the spirits of deceased Jirrbal People, because a person's spirit returns to the country from which they came.<sup>125</sup> Jirrbal People follow rules in dealing with the spirits on Jirrbal (and other) Country to avoid punishment by the spirits, for example in places where the *yamani* (Rainbow Serpent) resides Jirrbal People are taught not to touch or swim in the water.<sup>126</sup> These are also demonstrated in the affidavits and witness statements from current members of the claim group. For example, Mr Go-Sam described the spiritual beliefs that he was taught by his parents and Elders about 'hairy men' who are spirits that protect the land and punish wrongdoing.<sup>127</sup> Jirrbal People also continue to observe laws and customs relating to men's and women's places, for example [claim group member 2] states that her mother warned her to avoid a cave in Silver Valley because 'it was a men's place and Jirrbal women could not go there'.<sup>128</sup> Rules relating to asking permission to go onto particular country from the right people continues to be maintained by members of the claim group.<sup>129</sup>

[135] The Rubinich Report refers to other aspects of the traditional laws and customs of the Jirrbal People, such as authority and decision-making for the collective welfare and interests of the Jirrbal People through a 'camp council' of elder males of high social rank and initiation stages.<sup>130</sup> This authority structure is reflected in the decision-making of the contemporary claim group.<sup>131</sup>

[136] Other aspects of Jirrbal traditional laws and customs are also detailed in the affidavits and witness statements of current members of the claim group, for example [claim group member 1] describes the traditional marriage rules that had been strictly adhered to and how these are currently practiced, as well as rules prohibiting a son from speaking with their

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<sup>121</sup> Ibid, page 53 [149].

<sup>122</sup> Applicant's Additional Material, affidavit of [claim group member 1] affirmed 9 September 2015 [29].

<sup>123</sup> Applicant's Additional Material, Rubinich Report, page 58 [169].

<sup>124</sup> Applicant's Additional Material, affidavit of Elizabeth Cashmere affirmed 22 March 2016 [29].

<sup>125</sup> Applicant's Additional Material, Rubinich Report, page 55 [157].

<sup>126</sup> Ibid, page 55–56 [159]–[160].

<sup>127</sup> Applicant's Additional Material, affidavit of Bradley Go-Sam affirmed 10 September 2015 [57].

<sup>128</sup> Applicant's Additional Material, affidavit of [claim group member 2] affirmed 23 March 2016 [55].

<sup>129</sup> Applicant's Additional Material, Rubinich Report, page 57 [164]–[166].

<sup>130</sup> Ibid, page 61–62 [183]–[185].

<sup>131</sup> Ibid, page 62 [189].

mother-in-law except through a third person or using the *djalnguy* language.<sup>132</sup> [Claim group member 1] also describes that:

A person's *budi* is their name. Jirrbal call the process of giving a person their name *djarranbudi*, which comes from the words *djarran*, meaning stick, and *budi*, meaning name. It means to stick something in the ground, a name or a stick. As well as a *budi*, Jirrbal have their *ngalbay* which is their "totem" animal.<sup>133</sup>

[137] I am satisfied that the material outlined above and in the original registration decision is sufficient to enable a genuine assessment of whether there exist traditional laws acknowledged by and customs observed by the Jirrbal People that give rise to the claim to native title rights and interests. In my view, the material is comprehensive and provides many examples, some of which are set out above, that the Jirrbal People acknowledge and observe traditional laws and customs that give rise to the native title rights and interests. Having regard to this information, I am satisfied that the factual basis material is sufficient to support the assertion at s 190B(5)(b).

*Section 190B(5)(c): the native title claim group have continued to hold the native title in accordance with those traditional laws and customs*

[138] 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 traditional laws and customs. The traditional laws and customs referred to in s 190B(5)(c) are those referred to under s 190B(5)(b).<sup>134</sup>

[139] I 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>135</sup>

[140] The material from Attachment F relevant to this condition is considered in the original registration decision at paragraphs 147 to 151.

[141] In my view the factual basis material contains many examples of how the Jirrbal People have continued to hold native title in accordance with the traditional laws and customs. For example, the affidavit of Ms Cashmere describes how her mother was taught by her grandmother about 'where she could go and what places she had to avoid, like streams around Herberton where the Rainbow Serpent lives' and that her mother 'has showed me these places and I have shown them to my nieces, nephews and other Jirrbal young people, warning them to stay out of the water and not throw things in it'.<sup>136</sup>

[142] As a further example, [claim group member 4] describes how

[d]uring camping trips, I teach my kids how to survive off the land and use the resources of Jirrbal country. I'll teach them how to make *midga* using the lawyer cane leaves and the fan palm. Sometimes the only thing we bring camping is a cup, a tea billy and a fishing

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<sup>132</sup> Applicant's Additional Material, affidavit of [claim group member 1] affirmed 9 September 2015 [19]–[20].

<sup>133</sup> Applicant's Additional Material, affidavit of [claim group member 1] affirmed 9 September 2015 [45].

<sup>134</sup> *Martin* [29].

<sup>135</sup> *Gudjala 2009* [33].

<sup>136</sup> Applicant's Additional Material, affidavit of Elizabeth Cashmere affirmed 22 March 2016 [17].

rod. We tell the kids that if you're hungry, you've got to hunt for food, and teach them what to look for.

My mother and her sisters were the main teachers for me when I was growing up. Whenever I was with my mother and her sisters, they would remind me of the animals that were associated with the Jirrbal stories... I now pass on this knowledge to the younger generations. I have responsibilities to preserve and care for Jirrbal country, and to pass down my traditional law and custom, culture and stories told to me by my Elders.<sup>137</sup>

[143] In addition, the Rubinich Report details how the Jirrbal People continue to follow traditional laws and customs relating to land, for example in relation to permission to enter or use the country and ensuring that the 'right person' is informed when travelling on Jirrbal Country.<sup>138</sup> Jirrbal People also maintain and protect important places, including through maintaining secrecy about the location of sites of importance.<sup>139</sup> The Rubinich Report states that 'Jirrbal elders also continue to transmit knowledge about Jirrbal country based on an understanding that it is their responsibility to do so'.<sup>140</sup>

[144] In my view, the factual basis material contains sufficient detail relating to the transmission of traditional laws and customs from generation to generation to enable a genuine assessment of the extent to which the Jirrbal People have continued to hold the native title in accordance with those traditional laws and customs. I consider that the factual basis material, including the information above and in the original registration decision with respect to this condition and the conditions at ss 190B(5)(a) and (b), demonstrates that the Jirrbal People have maintained a strong connection to their traditional laws and customs that existed in the pre-sovereignty society and continue to this day. I am satisfied that the factual basis material is sufficient to support the assertion at s 190B(5)(c).

## Section 190B(6): prima facie case – condition met

[145] Section 190B(6) requires the Registrar to consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.<sup>141</sup> In undertaking this assessment, I understand that I may consider material additional to the application.<sup>142</sup> As a 'more onerous test [is] to be applied to the individual rights and interests claimed' than under s 190B(5),<sup>143</sup> I consider that the task involves some weighing of the factual basis for the claimed rights and interests. It follows that 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>144</sup>

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<sup>137</sup> Applicant's Additional Material, witness statement of [claim group member 4] dated 4 August 2022 [11]–[12].

<sup>138</sup> Applicant's Additional Material, Rubinich Report, page 65 [201].

<sup>139</sup> *Ibid*, page 81 [270].

<sup>140</sup> *Ibid*, page 81 [273].

<sup>141</sup> Section 186(1)(g) of the Act requires the Register of Native Title Claims to include a description of the native title rights and interests that, in applying s 190B(6), could be established on a prima facie basis.

<sup>142</sup> *Ibid* [16].

<sup>143</sup> *Doepel* [127], [132].

<sup>144</sup> *Yorta Yorta* [86]; *Gudjala 2007* [86].

[146] In *Gudjala 2007*, Dowsett J stated that s 190B(6) is to be considered having regard to the definition of ‘native title rights and interests’ in s 223(1).<sup>145</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.

[147] In *Ward HC*, Kirby J observed 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>146</sup> The term “in relation to” is here to be given a ‘wide import’.<sup>147</sup>

[148] The claimed native title rights and interests are contained at Schedule E of the amended application and are summarised above at paragraphs 103 to 106. The claimed rights and interests have not been amended. In my view all of these claimed rights and interests are ‘in relation to’ lands or waters.

[149] The original registration decision found that all of the claimed native title rights and interests could be prima facie established.<sup>148</sup> I have set out my consideration of the claimed rights and interests below.

#### *Exclusive rights to possession, occupation, use and enjoyment of the lands and waters*

[150] Paragraph 1 of Schedule E provides that over areas where a claim to exclusive possession can be recognised, ‘the claim group claims 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’.

[151] I note the comments of the High Court in *Ward HC*, that exclusive rights are ‘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>149</sup>

[152] 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

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<sup>145</sup> *Gudjala 2007* [85]–[87].

<sup>146</sup> *Ward HC* [577].

<sup>147</sup> *Alyawarr* [93].

<sup>148</sup> Ngemba/Ngiyampaa People NC2012/001 (registration test decision dated 12 April 2012), page 32.

<sup>149</sup> *Ward HC* [88].

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>150</sup>

[153] Justice French noted in *Sampi* 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>151</sup>

[154] The original registration decision summarises some of the relevant material in relation to this at paragraphs 164 to 169. In addition to this, I note the information provided in the Rubinich Report, including that the historical records indicate that ‘the boundaries of hunting grounds were enforced and not asking permission to enter or take resources could result in punishment’.<sup>152</sup> An example of this is given in the Smith and Burton Report, which notes the early ethnographic records of the ‘trespass’ and ‘proprietary rights’ that were ‘safeguarded under the strictest laws’ in the area and that people of other groups were ‘strictly forbidden’ to enter another area, with ‘punishment and enmity arising from trespass by members of other groups’.<sup>153</sup>

[155] Further examples are set out in the affidavits and witness statements provided by current members of the claim group, such as:

All Jirrbal have certain rights and privileges in our country, such as the right to hunt, gather, camp and fish on our country. Other people don’t have those rights and must get our permission if they want to come onto our country and do these things. If they don’t, they will be punished by our ancestors, who are in the land. They know if you are there uninvited or without permission. The right thing to do is to call a Jirrbal family from that area and let one of their Elders know that you want to go onto their country to do something.<sup>154</sup>

[156] Similarly, [claim group member 2] describes the important places on Jirrbal Country and that

[i]f you are not from our country, you won’t know that these places can be dangerous. Something bad might happen to strangers who go to our special places without our permission or not accompanied by a Jirrbal person. They or someone close to them could get sick or suffer an injury.<sup>155</sup>

[157] In my view, this material demonstrating the importance that Jirrbal People place on controlling access to Country in order to protect places and avoid spiritual harm as described in *Griffiths*. I consider that the material also demonstrates the exercise of rights to ‘speak for

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<sup>150</sup> *Griffiths* [127].

<sup>151</sup> *Sampi* [1072].

<sup>152</sup> Applicant’s Additional Material, Rubinich Report, page 80 [264].

<sup>153</sup> Applicant’s Additional Material, Report by Dr Benjamin Smith and Dr John Burton entitled “Anthropological Report in support of Jirrbal People Native Title Applications QC03/1 (Q6001/03), QC04/3 (Q41/04), and QC04/4 (Q42/04)” dated 29 March 2010 (‘Smith and Burton Report’), page 20 [81]–[82].

<sup>154</sup> Applicant’s Additional Material, affidavit of Elizabeth Cashmere affirmed 22 March 2016 [37].

<sup>155</sup> Applicant’s Additional Material, affidavit of [claim group member 2] affirmed 23 March 2016 [48].

country' as described in *Ward HC* and *Sampi*. I also note that there was no amendment made to Schedule E and there is no material before me to suggest that the claimed exclusive rights currently on the Register of Native Title Claims cannot be prima facie established. Having regard to the material in the amended application, as well as the Applicant's Additional Material, I am satisfied that the factual basis material demonstrates that the claimed exclusive rights and interests can be prima facie established.

### *Non-exclusive rights and interests*

[158] Paragraph 2 of Schedule E lists nine claimed non-exclusive rights and interests, with relevant terms defined at paragraph 3, as set out at paragraph 104 and 105 above. As noted above, each of these were found to be prima facie established in the original registration decision. I have considered the material in the amended application and the Applicant's Additional Material myself and consider that each of these claimed non-exclusive rights and interests can be established on a prima facie basis.

[159] In my view the factual basis material, in particular the affidavits and witness statements of current members of the claim group contain many examples of the exercise of these rights and interests in accordance with the traditional laws and customs of the Jirrbal People. [Claim group member 2] describes living on Jirrbal Country at Ravenshoe, and describes the story relating to the journey of the *bajigal* (sea turtle) as she travelled from the coast, relating to Herbert Gorge, Silver Valley, Top Nettle Creek and *jambalguli* (Innot Hot Springs).<sup>156</sup> Mr Go-Sam describes hunting *yuri* (kangaroo) and *barrgan* (wallaby), as well as collecting food such as Burdekin plum, Quondong, wild lemon and apple and bush medicine such as 'Blue Top'.<sup>157</sup> [Claim group member 1] describes fishing using traditional methods, including nets made from lawyer cane and *bumbil* (red fig),<sup>158</sup> and being taught about Jirrbal camping sites and *buya* and *brun* grounds used for ceremony.<sup>159</sup> Ms Cashmere describes feeling the connection to country when camping regularly on Jirrbal Country, using water from the creeks and rivers and gathering wood for fires.<sup>160</sup> Mr Go-Sam also describes the responsibility to care for country, including to pass on traditional knowledge to younger generations, such as about how silver eels can be made into a soup to help people who are sick.<sup>161</sup> Ms Cashmere also describes her responsibilities to 'preserve and care for Jirrbal Country' and often takes her family out on country to pass on knowledge and customs.<sup>162</sup> Ms Cashmere also described how the spirits of people buried at a cemetery in the Kirrima Range know that she is from the land and she always sleeps well there.<sup>163</sup> [Claim group member 2] further describes traditional mortuary practices and ceremony, where people used to be buried wrapped in animal skins,<sup>164</sup> as well

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<sup>156</sup> Applicant's Additional Material, affidavit of [claim group member 2] affirmed 23 March 2016 [34], [46].

<sup>157</sup> Applicant's Additional Material, affidavit of Bradley Go-Sam affirmed 10 September 2015 [55].

<sup>158</sup> Applicant's Additional Material, affidavit of [claim group member 1] affirmed 9 September 2015 [30].

<sup>159</sup> *Ibid* [11], [38].

<sup>160</sup> Applicant's Additional Material, affidavit of Elizabeth Cashmere affirmed 22 March 2016 [44]–[45].

<sup>161</sup> Applicant's Additional Material, witness statement of Bradley Go-Sam dated 3 August 2022 [17].

<sup>162</sup> Applicant's Additional Material, witness statement of Elizabeth Cashmere dated 3 August 2022 [13].

<sup>163</sup> Applicant's Additional Material, affidavit of Elizabeth Cashmere affirmed 22 March 2016 [47].

<sup>164</sup> Applicant's Additional Material, affidavit of [claim group member 2] affirmed 23 March 2016 [31].

as the importance of strangers being accompanied by a Jirrbal person when going on country.<sup>165</sup>

[160] Having regard to this material, and in the absence of any material to the contrary, I am satisfied that the requirements of s 190B(6) are met in respect of the each of the claimed non-exclusive rights and interests in Schedule E.

### Section 190B(7): traditional physical connection – condition met

[161] 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 to currently have a traditional physical connection with any part of the land or waters, but for certain things done.

[162] In *Gudjala* 2009, Dowsett J observed that the traditional physical connection under s 190B(7) ‘must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs’.<sup>166</sup> ‘Traditional’ as that term is used under s 223 of the Act, was considered by the members of the joint judgment in *Yorta Yorta* who noted 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>167</sup>

[163] Justice Mansfield stated in *Doepel* that the task of the Registrar under s 190B(7), requires ‘some measure of substantive (as distinct from procedural) quality control upon the application, if it is to be accepted for registration’.<sup>168</sup>

[164] Having regard to these authorities, I understand that I must be satisfied that the material provides a factual basis from which I can establish that at least one member of the claim group has or had the necessary ‘traditional’ physical association with the application area.

[165] I refer to my reasons and conclusions regarding the requirements of s 190B(5) and s 190B(6). I consider that in particular the affidavits and witness statements of members of the claim group contained in the Applicant’s Additional Materials set out many examples of their traditional physical connection with the lands and waters in the claim area. Ms Cashmere describes her traditional physical connection as follows:

I love going out onto Jirrbal country. I feel really good when I’m on Jirrbal land and I feel uncomfortable when I’m on another tribe’s land. When I am on country, I take off my shoes and feel the connection to it through my feet. I know it’s my country by that feeling it gives me.<sup>169</sup>

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<sup>165</sup> Ibid [48].

<sup>166</sup> *Gudjala* 2009 [84].

<sup>167</sup> *Yorta Yorta* [86].

<sup>168</sup> *Doepel* [18].

<sup>169</sup> Applicant’s Additional Material, affidavit of Elizabeth Cashmere affirmed 22 March 2016 [44].

[166] I am satisfied that the amended application establishes that at least one member of the claim group currently has and has had a traditional physical connection with the lands and waters of the claim area. As such, I am satisfied that the amended application meets the requirements of s 190B(7).

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

[167] Section 190B(8) provides 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 because it does not comply with s 61A.

[168] Section 61A restricts the making of a native title determination application over areas where there has been a previous native title determination/s, where a previous exclusive possession act was done in relation to the area or from claiming certain native title rights and interests where a previous non-exclusive possession act was done in relation to an area.

[169] Paragraph 3 of each of the Applicant Affidavits state that none of the claim area is covered by an approved determination of native title. This is confirmed in the geospatial assessment and my own searches of the Tribunal's database.

[170] I am satisfied that the terms of Schedule B of the amended application indicate that the application does not cover any areas where a previous exclusive possession act was done.

[171] Paragraph 3 of Schedule B confirms that exclusive rights and interests are not claimed over areas where there has been a previous non-exclusive possession act, subject to the operation of various provisions including ss 47, 47A and 47B.

[172] In the absence of evidence to the contrary, I am satisfied that the information contained in the Applicant Affidavits, the geospatial assessment and Schedule B of the amended application meet the requirements of s 190B(8).

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

[173] Section 190B(9) provides that the application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that claimed native title rights and interests include claims to ownership of minerals, petroleum or gas wholly owned by the Crown, exclusive rights to waters in an offshore place or extinguished native title rights and interests (except where such extinguishment can be disregarded under certain provisions of the Act).<sup>170</sup>

[174] Schedules Q and P to the application do not include claims under s 190B(9)(a) and (b) to minerals, petroleum or gas or to any waters in an offshore place.

[175] Paragraph 6 of Schedule B of the amended application confirms that the application does not cover any areas where native title rights and interests have otherwise been extinguished.

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<sup>170</sup> See ss 47(2), 47A(2), 47B(2) or 47C(8) of the Act.

[176] In the absence of evidence to the contrary, I am satisfied that Schedules B, Q and P of the amended application meet the requirements under s 190B(9).

*End of reasons*

## Attachment A

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

Application name	Jirrbal People #4
NNTT No.	QC2015/014
Federal Court of Australia No.	QUD983/2015

#### 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:

22 October 2015

#### Date application entered on Register:

9 February 2016

#### Applicant:

Angela Braun, Elizabeth Cashmere, Bradley Go-Sam

#### Applicant's address for service:

As per the Schedule

#### Conditions on Applicant's authority

The authority of the Applicant to make the application and to deal with matters arising in relation to it is subject to the following conditions:

1. the Applicants represent the entire claim group, not just their family;
2. if an Applicant is unable or unwilling to continue to act as an Applicant, whether as a result of death, ill-health or any other reason, the remainder of the Applicants continue to be authorised to act on behalf of the claim group until the Applicant comprises of less than three remaining persons, in which case replacements will be authorised by the claim group at an authorisation meeting;
3. the Applicant can take any formal steps required to achieve a determination without the need for an authorisation meeting other than reduce the claim area, in which case such decisions will be made by the claim group at an authorisation meeting;
4. the Applicant will make decisions by majority and all Applicants will abide by majority decisions; and

5. the Applicant may negotiate and reach agreement with respect to future act and cultural heritage matters, and the benefits from which will be held by the Wabubadda Aboriginal Corporation on behalf of all Jirrbal People.

**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 5 February 2024 and made pursuant to s 99 of the Act.

22 July 2024