

# Registration test decision

Application name	Indjalandji-Dhidhanu
Name of applicant	Hazel Windsor and Colin Saltmere
State/territory/region	Queensland
NNTT file no.	QC09/3
Federal Court of Australia file no.	QUD243/2009
Date application made	8 October 2009
Name of delegate	Susan Walsh

I have considered this claim for registration against each of the conditions contained in ss. 190B and 190C of the *Native Title Act 1993* (Cwlth).

For the reasons attached, I am satisfied that each of the conditions contained in ss. 190B and C are met. I accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

**Date of decision:** 27 November 2009

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Susan Walsh

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cwlth) under an **instrument of delegation dated** 16 November 2009 and made **pursuant to s. 99 of the Act**.

# Reasons for decision

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# Introduction

This document sets out my reasons, as the Registrar's delegate, for the decision to **accept** the the Indjalandji-Dhidhanu claimant application (the application) for registration pursuant to s. 190A of the Act.

Note: All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cwlth) which I shall call 'the Act', as in force on the day this decision is made, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

## Application overview

The Registrar of the Federal Court of Australia (the Court) gave a copy of the application to the Native Title Registrar (the Registrar) on 13 October 2009 pursuant to s. 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

Given that the claimant application is not on the Register of Native Title Claims and has not been amended, I am satisfied that neither subparagraph 190A(1A) nor subparagraph 190A(6A) apply to my decision. My decision is in fact governed by subparagraphs 190A(6) and (6B) which require that I must accept the claim for registration only if it satisfies all of the conditions in 190B and 190C of the Act. This is commonly referred to as the registration test.

The application is affected by current s. 29 notices. The earliest closing date for one of the notices (ML90190) is Sunday 29 November 2009. Accordingly, I must use best endeavours to finish considering the claim by Friday 27 November 2009 (see s. 190A(2)).

## Registration test

Section 190B sets out conditions that test particular merits of the claim for native title. Section 190C sets out conditions about 'procedural and other matters'. Included among the procedural conditions is a requirement that the application must contain certain specified information and documents. In my reasons below I consider the s. 190C requirements first, in order to assess whether the application contains the information and documents required by s. 190C *before* turning to questions regarding the merit of that material for the purposes of s. 190B.

Pursuant to ss. 190A(6) and (6B), the claim in the application must be accepted for registration because it does satisfy all of the conditions in ss. 190B and 190C. A summary of the result for each condition is provided at Attachment A.

## Information considered when making the decision

Subsection 190A(3) directs me to have regard to certain information when testing an application for registration; there is certain information that I *must* have regard to, but I *may* have regard to other information, as I consider appropriate. I am also guided by the case law (arising from judgments in the courts) relevant to the application of the registration test. Among issues covered by such case law is the issue that some conditions of the test do not allow me to consider anything other than what is contained in the application while other conditions allow me to consider wider material. (I discuss this further below when considering the application against the condition in s. 190C(2).)

In making this decision, I have had regard to the application and to the other documents provided by the applicant. I have also had regard to the documents contained in the Tribunal's case management/delegates file QC09/3 (also described as 2009/02120). Where I have had particular regard to information in documents within that file, I have identified them in this statement of reasons. I have particularly considered the following further documents provided by the applicant:

- statement by **Person 1 – name deleted** dated 9 November 2009
- Statement by **Person 2 – name deleted** dated 11 November 2009
- Overview report to support registration of the Indjalandji-Dhidhanu application prepared by **Person 2**.

I have *not* considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss. 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK, without the prior written consent of the person who provided the Tribunal with that information, either in relation to this claimant application or any other claimant application or any other type of application, as required of me under the Act.

Also, I have *not* considered any information that may have been provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice' (see s. 136A of the Act). Further, mediation is private as between the parties and is also generally confidential (see also ss. 136E and 136F).

### **Procedural fairness steps**

As a delegate of the Registrar making this administration decision I am bound by the principles of administrative law, including rules of procedural fairness, which seek to ensure that decisions are made in a fair, just and unbiased way. Procedural fairness generally requires that a person who may be adversely affected by a decision be given the opportunity to put their views to the decision-maker before that decision is made. They should also be given the opportunity to comment on any material adverse to their interests that is before the decision-maker. I note that a common law duty of procedural fairness may be limited or curtailed by the statutory scheme under which the decision is made.

As my decision is to accept the application for registration, the State of Queensland is a person aggrieved (see *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 at [21] to [38]). The Tribunal provided the State with a copy of the application and accompanying documents filed in the Court pursuant to s. 66(2) on 13 October 2009 and informed the State when the registration test decision would be made, in the event the State wished the Registrar to consider any submissions. On 23 November 2009, the State was provided with a copy of the applicant's additional information provided directly to the Registrar in relation to the registration test and offered an opportunity to comment (these documents are listed above). The State advised the Tribunal on 25 November 2009 that it would not be commenting in relation to the material.

# Procedural and other conditions: s. 190C

## *Subsection 190C(2)*

### *Information etc. required by ss. 61 and 62*

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

The application **satisfies** the condition of s. 190C(2), because it **does** contain all of the details and other information and documents required by ss. 61 and 62, as set out in the reasons below.

I am of the view that *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*) is authority that my consideration of the application pursuant to s. 190C(2) simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss. 61 and 62 and does not require me to undertake any merit or qualitative assessment of the material; as that is the task at other conditions of the registration test, including the authorisation condition in s. 190C(4)(b) and the merit conditions in s. 190B—*Doepel* at [16] and also at [35]–[39]. I am also of the view, following *Doepel*, that it is only to the application that I must turn when considering if the requirements of this section are met.

I turn to each of the various parts of ss. 61 and 62 as follows. I only deal with those parts of ss. 61 and 62 which relevantly prescribe that the application must contain certain details and other information or that the application must be accompanied by any affidavit or other document:

#### **Native title claim group: s. 61(1)**

The application must be made by a person or persons authorised by all of the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group.

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

In line with the authority in *Doepel* at [37] and [39], I have confined my assessment of this requirement to the information contained in the application itself. This assessment does not involve me going beyond the application, nor does it require me to undertake any form of merit assessment of the material to determine if I am satisfied whether ‘in reality’ the native title claim group described is the correct native title group: see *Doepel* at [37].

I note that if the description in the application ‘were to indicate that not all persons in the native title group were included, or that it was in fact a sub-group of the native title claim group’ then I could not accept the claim for registration as the relevant requirement of s. 190C(2) would not be met: see *Doepel* at [36].

In light of the above, I have considered the description of the native title claim group provided in this application. The relevant description of the persons in the native title claim group is found in

Schedule A of the application. I have replicated the description in my reasons at s. 190B(3). Bearing in mind the limited task set by s. 190C(2), there is nothing on the face of this description that causes me to conclude that the requirements of this section are not met.

I am satisfied that the description of the persons in the native title claim group meets the requirement in s. 61(1) for the purposes of s. 190C(2).

**Name and address for service: s. 61(3)**

The application must state the name and address for service of the person who is, or persons who are, the applicant.

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

The names of the two persons jointly comprising the applicant are detailed on page 1 and again on page 15 of the application. The address for service of these persons is also detailed on page 15.

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

The application must:

- (a) name the persons in the native title claim group, or
- (b) otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

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

The task here is confined to ensuring that this information is contained in the application: see *Doepel* at [37] and *Wakaman People 2 v Native Title Registrar and Authorised Delegate (with Corrigendum dated 5 September 2006)* [2006] FCA 1198 (*Wakaman*) at [34]. Whether or not the description operates 'effectively to describe the claim group' (*Gudjala People 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala*) at [32]) is a task required by the merit condition in s. 190B(3) and does not require my consideration at this stage.

The application does not name all of the persons in the native title claim group but it does contain a description of the persons included in that group (see Schedule A). Therefore, the application contains all the information required by s. 61(4)(b) for the purposes of s. 190(C)(2).

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

The application must be accompanied by an affidavit sworn by the applicant that:

- (i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and
- (ii) the applicant believes that none of the area covered by the application is also covered by an approved determination of native title, and
- (iii) the applicant believes all of the statements made in the application are true, and
- (iv) the applicant is 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, and
- (v) setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it.

The application is accompanied by the affidavit required by s. 62(1)(a).

To satisfy the requirements of s. 62(1)(a), the persons comprising the applicant may jointly swear/affirm an affidavit or alternatively, each of the persons may swear/affirm an individual affidavit. There are two persons who jointly comprise the applicant (Hazel Windsor and Colin Saltmere), and they have each made an affidavit where they depose to the matters set out in ss. 62(1)(a)(i) to (iv).

The note above subparagraph (v) indicates that each affidavit must identify how the authorisation decision complies with either of the two decision-making processes in s. 251B—a process mandated by traditional law and custom or a process agreed and adopted by the native title claim group. Each affidavit contains details of the traditional decision-making process which authorised the applicant to make the application and to deal with matters arising in relation to it. Therefore, the requirements of subparagraph (v) have been met. I do not undertake any assessment of the merits of that information when considering whether the application is accompanied by an affidavit for the purposes of s. 190C(2). Whether I am satisfied that the applicant is authorised only arises if the application has not been certified pursuant to s. 203BE: see s. 190C(4) and *Doepel* at [73].

I am satisfied that the requirements of s. 62(1)(a) for the purposes of s. 190(C)(2) have been met.

#### **Application contains details required by s. 62(2): s. 62(1)(b)**

The application must contain the details specified in s. 62(2).

The application **contains** all details and other information required by s. 62(1)(b), as identified in the reasons that follow.

I note again my view that *Doepel* is authority that my consideration of s. 190C(2) does not involve me going beyond the application itself and does not require some form of merit assessment of the material in determining whether the requirements of s. 190C(2) are met.

#### **Information about the boundaries of the area: s. 62(2)(a)**

The application must contain information, whether by physical description or otherwise, that enables the following boundaries to be identified:

- (i) the area covered by the application, and
- (ii) any areas within those boundaries that are not covered by the application.

The application **contains** all details and other information required by s. 62(2)(a).

Attachments B and B1 to Schedule B of the application contain a written description of the external boundaries of the area covered by the application and all areas within that boundary that are not covered by the application.

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

The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

The application **contains** all details and other information required by s. 62(2)(b).

Attachment C to Schedule C of the application contains a map showing the external boundaries of the area covered by the application.

**Searches: s. 62(2)(c)**

The application must contain the details and results of all searches carried out by or on behalf of the native title claim group to determine the existence of any non-native title rights and interests in relation to the land and waters in the area covered by the application.

The application **contains** all details and other information required by s. 62(2)(c).

Attachment D to Schedule D of the application contains a statement that no searches have been carried out by or on behalf of the native title claim group in relation to the application area.

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

The application must contain a description of native title rights and interests claimed in relation to particular lands and 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.

The application **contains** all details and other information required by s. 62(2)(d).

The description of the claimed native title rights and interests is found in Attachment E. This description does not merely consist of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

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

The application must contain a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist, and in particular that:

- (i) the native title claim group have, and the predecessors of those persons had, an association with the area, and
- (ii) there exist traditional laws and customs that give rise to the claimed native title, and
- (iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The application **contains** all details and other information required by s. 62(2)(e).

Schedule F contains a general description of the factual basis provided to support the assertion that the native title rights and interests claimed exist and, specifically, for the assertions found in s. 62(2)(e)(i), (ii) and (iii).

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

If the native title claim group currently carries out any activities in relation to the area claimed, the application must contain details of those activities.

The application **contains** all details and other information required by s. 62(2)(f).

Schedule G lists the activities currently being carried out by the native title claim group in relation to the area claimed.

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

The application must contain details of any other applications to the High Court, Federal Court or a recognised state/territory body of which the applicant is aware, that have been made in relation to the whole or part of the area covered by the application and that seek a determination of native title or of compensation in relation to native title.

The application **contains** all details and other information required by s. 62(2)(g).

Schedule H contains details of native title determination applications QUD6105/98 and QUD6034/02 and notes that both applications were dismissed on 30 September 2009 in accordance with Federal Court orders dated 9 June 2009.

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

The application must contain details of any notification under s. 24MD(6B)(c) of which the applicant is aware, that have been given and that relate to the whole or part of the area covered by the application.

The application **contains** all details and other information required by s. 62(2)(ga).

Schedule HA states that the applicant is not aware of any notifications under s. 24MD(6B)(c) that have been given and that relate to the whole or part of the area covered by the application.

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

The application must contain details of any notices given under s. 29 (or under a corresponding provision of a law of a state or territory) of which the applicant is aware that relate to the whole or a part of the area covered by the application.

The application **contains** all details and other information required by s. 62(2)(h).

Schedule I contains details of notices given under s. 29 that relate to the whole or a part of the area covered by the application of which the applicant is aware.

## *Subsection 190C(3)*

### *No common claimants in previous overlapping applications*

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

- (a) the previous application covered the whole or part of the area covered by the current application, and
- (b) the previous application was on the Register of Native Title Claims when the current application was made, and
- (c) the entry was made, or not removed, as a result of the previous application being considered for registration under s. 190A.

The application **satisfies** the condition of s. 190C(3).

A search of the application area against the Register of Native Title Claims (the Register) reveals that the two previous overlapping applications referred to in schedules H and O of the application were dismissed by the Court before the current application was made, such that they were not on the Register when the current application was made. Accordingly these two previous applications do not meet the criteria in either of subparagraphs 190C(3)(b) or 190C(3)(c), notwithstanding that there may be members in common with the current application, due to the fact that they have been dismissed by the Court and are no longer on the Register.

The Geospatial report dated 19 October 2009 shows that there are no other applications which overlap the area covered by the current application.

Therefore, I need not consider the issue of common members and I find that the requirements of this section are met.

## *Subsection 190C(4)*

### *Authorisation/certification*

Under s. 190C(4) the Registrar/delegate must be satisfied that either:

- (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
- (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

Note: The word *authorise* is defined in section 251B.

Section 251B provides that for the purposes of this Act, all the persons in a native title claim group authorise a person or persons to make a native title determination application . . . and to deal with matters arising in relation to it, if:

- a) where there is a process of decision-making that, under the traditional laws and customs of the persons in the native title claim group, must be complied with in relation to authorising things of that kind—the persons in the native title claim group . . . authorise the person or persons to make the application and to deal with the matters in accordance with that process; or
- b) where there is no such process—the persons in the native title claim group . . . authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision-making agreed to and adopted, by the persons in the native title claim group . . . in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.

Under s. 190C(5), if the application has not been certified as mentioned in s. 190C 4(a), the Registrar cannot be satisfied that the condition in s. 190C(4) has been satisfied unless the application:

- (a) includes a statement to the effect that the requirement in s. 190C(4)(b) above has been met, and

- (b) briefly sets out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

I must be satisfied that the requirements set out in either ss. 190C(4)(a) or (b) are met, in order for the condition of s. 190C(4) to be satisfied.

For the reasons below, I am **satisfied** that the requirements set out in s.190C4(b) are met.

***The general requirements of s. 190C(4)***

The application has not been certified under Part 11 by any representative body that could certify the application and cannot meet the condition in s. 190C(4)(a). Therefore, I must consider the application against the requirements of s. 190C(4)(b).

Mansfield J in *Doepel* at [78] described the more onerous task for the Registrar with respect to subparagraph 190C(4)(b). I am required to be 'satisfied of the fact of authorisation by all members of the native title claim group' (*Doepel* at [78]). Further, I cannot be satisfied of that unless the specific requirements of s. 190(C)(5) have also been met.

Schedule R of the application contains a statement to the effect that the two persons who are jointly the applicant are members of the native title claim group and are authorised to make this application and to deal with matters arising in relation to it, thereby complying with s. 190C(5)(a). The application also sets out the grounds on which the Registrar should consider that the requirements in s. 190C(4)(b) have been met, thereby complying with s. 190C(5)(b). It is my view that the application contains the information required by s. 190C(5). It may be, however, that an application which complies with s. 190C(5) is nonetheless insufficient to satisfy the Registrar under s. 190C(4)(b). In reaching the requisite state of satisfaction, my examination is not confined by s. 190C(5), nor is it confined to the statements made in the application or the affidavits accompanying the application: see *Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*) at [57]; *Western Australia v Strickland* [2000] FCA 652 (*Strickland Full Court*) at [77] to [78]; *Martin v Native Title Registrar* [2001] FCA 16 at [17] to [18] and *Doepel* at [78].

In relation to this application, I must be satisfied of two matters; that both of the two persons jointly comprising the applicant, namely Hazel Windsor and Colin Saltmere, are members of the native title claim group and that they are 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.

I note that the Federal Court has emphasised on a number of occasions that authorisation 'is a matter of considerable importance' and that 'it is not a condition to be met by formulaic statements in or in support of applications': see *Strickland* at [57] and *Strickland Full Court* at [78].

***First limb of s. 190C(4)(b) – the applicant is a member of the native title group***

Schedule A of the application describes the native title claim group as the Indjalandji–Dhidhanu people who are the descendants of three identified ancestral lines or have been recruited by adoption under the group's traditional laws and customs. There is a statement in schedule R that the two persons comprising the applicant are both members of the Indjalandji-Dhidhanu native title group. There is reference in Schedule R to the 'significant anthropological research', which

has been undertaken to identify the three descent groups, being those identified in Schedule A, which is in turn supported by the anthropological report by **Person 2**, provided to the Registrar as additional information on 11 November 2009.

Both applicant persons, Hazel Windsor and Colin Saltmere, swore affidavits on 29 September 2009 that they are senior members of the native title claim group and were extensively involved in ensuring that the group's traditionally mandated process of decision making was followed to authorise them to make and deal with the application. I note also that Colin Saltmere is identified in the applicant's additional information as the son of one of the group's elders, **Person 1**, who in turn is identified as the grandchild of the first ancestral line named in schedule A of the application. There is no information before me to suggest that the applicant persons are not members of the native title claim group

Therefore, I am satisfied that the two persons comprising the applicant are members of the native title claim group.

*Second limb of s.190C(4)(b) – the applicant is authorised by all the other persons in the native title claim group*

*Applicant's authorisation information*

The applicant's authorisation information is set out in Schedule R of the application, as well as the s. 62(1)(a) affidavits of Hazel Windsor and Colin Saltmere and the report by the anthropologist, **Person 2**, dated 11 November 2009 and provided to the Tribunal on 11 November 2009 as additional material. (I shall refer to **Person 2's** report as the anthropological report.)

The anthropological report confirms that significant anthropological research has been carried out in relation to both the native title rights and interests asserted in the application area and to identifying the three descent groups, named in Schedule A, as being those who hold the native title rights and interest.

The author of the report, **Person 2**, has also provided a signed statement showing that he has conducted significant research, field work and consultations with members of the native title claim group in order to establish the correct description of the group and the correct area for the application. A meeting, attended by the applicant's legal representative, the anthropologist and members of the native title claim group took place on 20 and 21 April 2009 at Dugalunji Camp. The purpose of this meeting was for discussion and consultation on the description of the native title claim group, the application area, options available for commencement of the application and how the authorisation of an applicant must proceed, having regard to the requirements of s. 251B (see commencement of these reasons for the text of this section).

When having regard to the anthropological research and the consultations with members of the native title claim group, including the eldest living members from each descent group, the application states (at Schedule R) that a process of decision-making under Indjalandji-Dhidhanu law and custom was identified and acknowledged to apply to the authorisation of the persons making the application. That 'traditional decision-making' process requires, consultation by

senior members of the native title claim group amongst themselves about the decision, discussion and debate amongst those senior members with a view to reaching consensus and where consensus is reached, this is followed by the senior members consulting other members of the native title claim group about their decision. The other members of the native title claim group then defer to the traditional authority of senior members to make the relevant decision.

During June and July of 2009, members of the native title claim group were informed of the proposed date and venue for the authorisation meeting, being 4 August 2009 at Dugalunji Camp via Camooweal. Hazel Windsor, in her affidavit, states that in June/July 2009 she consulted, either in person or on the phone, with members of the native title group about the proposed application and also informed them of the above date and meeting venue. Colin Saltmere, in his affidavit, states that in June/July 2009 he consulted, either in person or on the phone, with members of the native title claim group (including with the eldest living members of the three descent groups) about the proposed application and also informed them of the above date and meeting venue. He also arranged for Dugalunji Aboriginal Corporation to send a formal meeting notice together with a draft map of the application area to all those members of the native title claim group for which an address was known.

The authorisation meeting is stated to have taken place on 4 August 2009 at Dugalunji Camp. The application (at Schedule R) and affidavits state that the meeting was attended by members of the native title claim group, including the senior members of the native title claim group, the eldest living members of the three descent groups, the anthropologist and the applicant's legal representative. A summary of what occurred at the meeting is also outlined. This included a presentation from the legal representative, which outlined the proposed application area, description of the native title claim group, an overview of the draft application and the process for authorisation. The application and two supporting affidavits state that in accordance with the traditional decision-making process outlined above, authorisation was given to Hazel Windsor and Colin Saltmere to make the application and to deal with matters arising in relation to it.

In his statement dated 11 November 2009, the anthropologist states that his extensive research in relation to the Indjalandji-Dhidhanu people began in 1980. He consulted with members of the Indjalandji-Dhidhanu native title claim group in relation to the authorisation process outlined in Schedule R. He states his view that a traditional decision-making process must be applied when authorising members of the native title claim group to be the applicant to make a claimant application, and that paragraph (g) of Schedule R accurately describes this traditional decision-making process. This view is based upon his specialised knowledge in relation to anthropology and in particular in relation to the Indjalandji-Dhidhanu people, his training, study and experience. He was present at the authorisation process for this application and his statement is to the effect that the traditional decision-making process was followed and that Hazel Windsor and Colin Saltmere were authorised to make the application and to deal with matters arising in relation to it.

Having regard to the comprehensive and cogent information described above, I am satisfied that the applicant is authorised to make the application and to deal with matters arising in relation to it by the rest of the persons in the native title claim group.

The information provided is sufficient to satisfy me that there are traditional laws and customs that must be followed when authorising an applicant (see s. 251B(a)). In this regard, it appears from the information provided that the group's traditional laws and customs require three tiers of decision making and consultation, including:

- consultation by senior members of the group amongst themselves about the decision proposed to be made;
- discussion and debate amongst the senior members with a view to reaching consensus in relation to the proposed decision;
- when consensus is reached amongst the senior members, consultation with the other members of the group about that decision and acceptance by the other members of that decision, it being the case that the group's traditional laws and customs require the other members to defer to the traditional authority of senior members to make the relevant decision.

The rest of the applicant's authorisation information carefully shows how the group followed this traditionally mandated decision making process, including at a series of meeting involving the senior members, where the requisite consensus was achieved, and then at a wider meeting to which the rest of the members of the group were given notice and invited to attend, where the decision was comprehensively explained to the rest of the members, who deferred to the consensus decision of the senior group members.

For these reasons, I am satisfied that the condition in s. 190C(4) is met.

## Merit conditions: s. 190B

### *Subsection 190B(2)*

#### *Identification of area subject to native title*

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

The application **satisfies** the condition of s. 190B(2).

The application contains a written description of the external boundary and internal boundaries in attachments B and B1. The external boundary in attachment B1 is described by reference to cadastral boundaries and geographic decimal coordinates which allows for the boundary of the application to be located on the earth's surface.

Attachment B contains a generic written description of the internal boundary that excludes from the application any areas subject to a number of acts defined by s. 23B and areas where native title has otherwise been extinguished, except where ss. 47, 47A or 47B apply, such that any extinguishment is to be disregarded. The land covered by a particular parcel, Lot 7 on CP894132, is specifically excluded from the application area. It is also stated that the application does not include any areas covered by three neighbouring native title determination application, which are clearly named in the description. In my view, the written description of the internal boundary is

acceptable as it offers an objective mechanism to identify which areas fall within the categories described.

A map clearly depicting the external boundary is found in Attachment C of the application. The application area is depicted as a large area surrounded by a boldly drawn boundary line. The map contains topographic information such as towns and rivers, pastoral lease labels, a scale bar, north point, coordinate grid and currency and datum notes.

The Tribunal's geospatial assessment dated 19 October 2009 (Reference: 2009/2018) confirms that the written description and map are consistent and identify the application area with reasonable certainty. Since that time, the description and map have not been amended. Therefore, I accept that the assessment remains current and relevant.

For these reasons, I am satisfied that the information and map in the application, required by sections 62(2)(a) and (b), are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular areas of land and waters and the requirements of s.190B(2) are therefore met.

## *Subsection 190B(3)*

### *Identification of the native title claim group*

The Registrar must be satisfied that:

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

The application **satisfies** the condition of s. 190B(3).

Again my task here is informed by the principles enunciated in *Doepel* (at [16]) on the Registrar's general functions under s. 190A to s. 190C of the Act. That task is neither to find the real facts nor to replace the court by adjudicating upon the application for determination. While, I must be satisfied that the 'application enables the reliable identification of the persons in the native title claim group' (*Doepel* at [51]), my focus must be upon the adequacy of the description and not the correctness (at [37])<sup>1</sup>. *Doepel* is also authority for the understanding that for some parts of s. 190B, including subsection 190B(3), the Registrar's consideration will not need to go beyond the application (at [16] and [51]).

Schedule A of the application contains a description of the native title group:

The Native Title Claim Group is comprised of those people known as the Indjalandji-Dhidhanu people. The Indjalandji-Dhidhanu people are those persons who are:

- (a) descended from the following Indjalandji/Dhidhanu ancestors:
  - (i) **Person 3 – name deleted** and his son **Person 4 – name deleted**;
  - (ii) **Person 5 – name deleted** and her son **Person 6 – name deleted**; and

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<sup>1</sup> See also *Wakaman* at [38] where Kiefel J agreed that 'the registration process is concerned with the clarity of the description of persons making up a claim group' in order that it may at some later point be determined whether a person is a member, and *Gudjala* at [33] where Dowsett J took a similar stance .

- (iii) **Person 7 – name deleted** and her spouse **Person 8 – name deleted** and their son **Person 9 – name deleted**; or
- (b) recruited by adoption in accordance with the traditional laws and customs of the Indjalandji-Dhidhanu people

The description provided in the application does not name all of the persons in the native title group. It describes the persons as those who are descended from three named sets of ancestors or those recruited by adoption (in accordance with the traditional laws and customs of the group).

The fact that some factual inquiry may be required to ascertain whether or not a particular person is in a group does not mean that the group is insufficiently described for the purposes of s. 190B(3)(b): *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 at [67]. However, this does not mean that any formula will be sufficient to meet the requirements of s. 190B(3)(b). It is for the Registrar or her delegate to determine whether or not the description is sufficiently clear: see *Ward v Native Title Registrar* [1999] FCA 1732. In my view, s. 190B(3)(b) will be met if there is some objective mechanism to ascertain the members of the group.

The application does not provide the content of the traditional laws and customs relating to recruitment by adoption which may make ascertaining the particular members of the group more difficult. However, in my view, this does not affect the overall sufficiency of the description. I note that a similar formula, including a condition which recognised adoption as an identifier, was approved by Carr J in *Western Australia v Native Title Registrar* [1999] FCA 1591, even in the absence of any qualification indicating whether it was according to traditional laws and customs, Australian law or otherwise.

In my view, a description (as in Schedule A) which relies for identification on a formula which says that the members of the group are the descendants of named persons including those who have been adopted in accordance with traditional law and custom, is sufficiently certain to identify the members of the claim group. A similar formula was approved by the court in *Western Australia v Native Title Registrar* [1999] FCA 93.

I am therefore satisfied that the claim group description is sufficient to meet the requirements of s. 190B(3).

## *Subsection 190B(4)*

### *Native title rights and interests identifiable*

The Registrar must be satisfied that the description contained in the application as required by s. 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.

The application **satisfies** the condition of s. 190B(4).

*Doepel* at [99] is authority for the proposition that what the delegate is required to consider is whether 'the claimed native title rights and interests did meet the requirements of being understandable as native title rights and interests and of having meaning'.

Native title rights and interests are defined in s. 223(1) of the Act as:

The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples in relation to land or waters, where:

- (a) The rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) The Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) The rights and interests are recognised by the common law of Australia.

The description of the claimed native title rights and interests is found in attachment E of the application. I refer to my reasons below at s. 190B(6) for the text of attachment E. I am satisfied that the description is sufficient to allow the native title rights and interests claimed to be readily identified as required by s. 190B(4) because there is a clear and readily understandable description – *Doepel* at [99].

## *Subsection 190B(5)*

### *Factual basis for claimed native title*

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

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

The application **satisfies** the condition of s. 190B(5) because the factual basis provided is **sufficient** to support each of the particularised assertions in s. 190B(5), as set out in my reasons below.

#### *Registrar's task at s. 190B(5)*

The task at s. 190B(5) requires that I be satisfied that there is a proper factual basis on which it is asserted that the native title rights and interests exist (*Doepel* at [128]). Again, I am mindful that this task must be completed in line with the Registrar's general function under s. 190A. That function is to assess whether the requirements of s. 190B and s. 190C have been met 'according to their terms' (*Doepel* at [47]). There is nothing within the legislation to suggest that I, as the Registrar's delegate, should 'embark upon some general fact finding exercise, balancing and weighing conflicting evidence, to determine whether to accept a claim for registration' (*Doepel* at [47]).

There is a correlation between the requirements at s. 62(2)(e) and s. 190B(5), although they do not necessarily entirely correspond. Section 190B(5) is said to reflect the positive requirements of s. 62(2)(e) and the possible differentiation being that of a 'general description' on the one hand and a 'sufficient' description on the other : see Keifel J in *Hutchinson* at [25], *Doepel* at [131] and *Gudjala FC* at [92]. It is, however, important not to overstate this possible distinction. The Full Court in *Gudjala* at [90] to [92] was of the view that a 'general description' (as required by s. 62(2)(e)) could certainly be of a sufficient quality to satisfy the Registrar for the purposes of s. 190B(5).

Following the principles enunciated in *Doepel* and *Gudjala FC*, I understand that the requirement of sufficiency does not elevate this task to being analogous to the evidentiary test which may be applied by the court when making a determination of native title. My role is not to test whether the asserted facts could be proved at a hearing of this matter (*Doepel* at [17]). Instead, I assess the quality of the factual basis asserted by the applicant to support their 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' (*Doepel* at [17]). Furthermore, while each particular assertion outlined in s. 190B(5)(a), (b) and (c) must be supported by the factual basis, Mansfield J *Doepel* at [131] was of the view that this did not extend to the 'equally onerous' task of assessing each of the claimed native title rights and interests separately. Instead, it appears this should be undertaken at s. 190B(6), as discussed in *Doepel* at [132].

#### ***Information before me that addresses the factual basis***

Schedule F contains a general description of the factual basis for the assertion that the claimed native title rights and interests exist. Additional material addressing the requirements of s. 190B(5) was provided by the applicant to the Registrar on 11 November 2009. The additional material contains statements by **Person 1** dated 9 November 2009 and **Person 2** dated 11 November 2009 and a report prepared by **Person 2** titled, 'Overview report of information supporting acceptance of the claimant application for Registration – *Native Title Act 1993* (Cth) ss.190A(6), 190(b)'. (I shall refer to **Person 2's** overview report as the anthropological report.) Further, the affidavits of Hazel Windsor and Colin Saltmere (filed in accordance with s. 62) swear that all of the statements made in the application are true.

#### **Reasons for s. 190B(5)(a)**

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(a) because of my view, explained below, that the material in the application and provided separately by the applicant is sufficient to support the assertion that the native title claim group have, and the predecessors of those persons had, an association with the area.

Dowsett J in *Gudjala* at [52] identified two requirements to be satisfied before the assertion in s. 190B(5)(a) can be said to be sufficiently supported. Firstly, 'that there is an association between the whole group and the area' (at [52]), although not requiring all members at all times to have had such an association. Secondly, the factual basis must support 'such an association between the predecessors of the whole group and the area over the period since sovereignty' (at [52]). That this is what is required to support this particular assertion was not criticised by the Full Court in *Gudjala FC*.

The material I have before in support of this assertion includes:

- the anthropological report which details findings and anthropological research in relation to the group and the claim area and their asserted claim to be the native title holders for that area;
- the statement of **Person 1** in which she describes her association and that of her predecessors with the claim area.
- The applicant's affidavits stating that they are senior members of the Indjalandji-Dhidhanu group and swear to the truth of the statements made in the application, including those contained in Schedule F relating to the factual basis.

Schedule F contains a very comprehensive overview of the factual basis, including support for the assertion that the native title claim group has, and the predecessors of those persons had, an association with the area. In particular, Schedule F asserts that the native title claim group comprises two closely related dialect groups whose members identify as the Indjalandji-Dhidhanu people. It is asserted that traditionally the Indjalandji group lived on and occupied an area on the Upper Georgina River, while the Dhidhanu group lived on and occupied an area along the Buckley River, Templeton River and Mingera Creek. It is said that the application area is the combination of these areas, to the extent these areas falls within the State of Queensland. Schedule F states that many members of the native title claim group and their predecessors, including the Indjalandji-Dhidhanu ancestors in Schedule A, lived and worked, and still live and work, on the application area. It is asserted that this association with the application area dates back to before sovereignty, with the group's three ancestors named in schedule A being descendants of the Indjalandji-Dhidhanu people who lived on and occupied the application area at the time sovereignty was asserted (schedule F para (k)).

At schedule F para (n) it is asserted that Indjalandji-Dhidhanu law and custom, and hence the application area, forms part of a broader cultural bloc that relates to the wider Georgina basin and its extremities. This cultural bloc (the Georgina basin cultural bloc) governs a broader regional Aboriginal society and encapsulates systems of interactions between clans, language and dialect groups of the upper Georgina basin.

The statement of **Person 1** dated 9 November 2009, provides the following information relating to her association, and that of her predecessors, with the application area:

- Under the traditional laws and customs of the Indjalandji-Dhidhanu people, **Person 1** is an acknowledged senior member and elder of the native title claim group – at [1]. She is a member of the claim group through the Indjalandji-Dhidhanu ancestors **Person 3** and his son **Person 4** (**Person 4** was her maternal grandfather)– at [3]. She is also a member of the group as the adopted child of the Indjalandji ancestor, **Person 6** – at [3].
- Her grandmother **Person 10** – **name deleted**, told **Person 1** that **Person 10** and her grandfather (**Person 4**) used to visit **Person 1's** great grandfather, **Person 3** (another ancestor identified in Schedule A), at a place called Ganderiya near Dakalanji. This was a very sacred place for **Person 3** and he passed this place onto **Person 4** – at [5].
- The land and waters covered by the application form part of the traditional country of the Indjalandji-Dhidhanu people under our traditional laws and customs – at [2].

- **Person 1** was born on the application area on Barkly Downs Station in 1933 and soon after she was taken to Camooweal (also on the application area) by her parents where a ceremony was performed so that she could belong to that country – at [16].
- She has spent her entire life, in, on and around Indjalandji-Dhidhanu country – at [17]. She learnt about the traditional laws and customs from her uncle **Person 11 – name deleted**, who was an important boss for Indjalandji-Dhidhanu country. She also learnt from her mother and father and other old Indjalandji-Dhidhanu people – at [19].
- At the age of 11 **Person 1** was initiated at the women’s initiation ground at Lake Francis near Camooweal – at [21].
- From the age of 16 **Person 1** worked at Barkly Downs Station with her mother and aunty. She met her husband there. Although she did not know it at the time, **Person 1** was promised to her husband under their law and custom, as they were the right ‘skin’ for each other – at [24]. They and their children spent time at Barkly Downs Station, Rocklands Station and then moved to Camooweal. All of their children grew up in Indjalandji-Dhidhanu country and most of them continue to live their now – at [24] to [28].
- **Person 1** describes the Indjalandji-Dhidhanu laws and customs – at [29] and the important stories and ceremonies which they acknowledge and observe under their law and custom – at [30] to [34].
- **Person 1** states that their dreamings, stories, songs and ceremonies relate to important places in Indjalandji-Dhidhanu country including, male and female initiation sites on their country. She names many places that are the sites and places for her people –at [35]–[36].
- **Person 1** says that the Indjalandji-Dhidhanu people travel to all parts of the claim area visiting sites and hunting, they camp on the claim area, they collect resources, they make stone tools, boomerangs and other tools and instruments, they look after important places in Indjalandji-Dhidhanu country by, among other things, giving permission to other Aboriginal people to come onto their country – at [37] to [41].
- **Person 1** says that she passes on songs, stories and responsibilities to her children and grandchildren – at [42]. She teaches her children and grandchildren about their traditional laws and customs – at [43]. She performs ceremonies on babies at the women’s place at Lake Francis.

The anthropological report provides the following relevant information in relation to the factual basis for the assertion in subparagraph s. 190B(5)(a):

- A range of evidence has been collected during the anthropological research for the claimant application on the traditional laws and customs acknowledged and observed, and the cultural and spiritual activities being carried out by the claimant group in their traditional country. These traditional laws and customs and activities stem from and reinforce the claimed native title rights and interests and add to their depth of connection to that country – at p 5.
- There is evidence of Indjalandji and Dhidhanu sites and places of significance. The available research to date reveals a distribution of known Indjalandji-Dhidhanu sites (as identified by the claimant group) in all of the areas covered by the application. The claimant group have maintained a strong and profound connection to their country arising from their sacred sites and Dreamings – at p 6.
- In relation to the transmission of laws, customs, rights from the pre-contact normative system including with respect to inheritance of country, **Person 1’s** grandfather, **Person 4**, passed on

his country to her uncle **Person 11**. This land had been handed down to **Person 4** from his father, **Person 3**, who was alive prior to European settlement – at p 42 and 45.

- The anthropologist believes that it can be inferred that the rights and interests claimed in this application appear to be derived from, and have their roots in, the pre-contact normative system of the claimant group. His conclusion is that the claim group's system of rights and interest can be traced back to the ancestor **Person 3** who was alive prior to European arrival in the application area – at p 45.

The anthropological report also details the association that **Person 1** has with the claim area, along with the association her parents, grandparents and her uncle, **Person 11**, had. The report also details the association of **Person 1's** sons, including Colin Saltmere, and that of her grandchildren.

In light of the information I have reviewed above, I am satisfied that the factual basis provided is sufficient to support the assertion that the claim group currently have an association with the application area as a whole. I am also satisfied, based on the material before me, that there is sufficient factual basis to support the assertion that the predecessors of the claim group had an association with the application area.

### **Reasons for s. 190B(5)(b)**

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(b) because of my view, explained below, that the material in the application and provided separately by the applicant is sufficient to support the assertion that there exists traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claimed native title rights and interest.

The language of the assertion in subparagraph (b) nearly mirrors that found in s. 223(1)(a). In my view, I must therefore be satisfied that the factual basis is sufficient to support an assertion that the claimed native title rights and interests find their source in 'traditional' laws and customs. My usage of inverted commas around the word 'traditional' in this statement highlights that its meaning in subparagraph 223(1)(a) is central to an understanding of whether native title rights and interests exist in relation to an area of land or waters. I understand that the legislature intends that the expression 'traditional' in relation to the meaning of native title rights and interests is used uniformly throughout the Act.

Accordingly, as was discussed by Dowsett J in *Gudjala* at [26], the factual basis provided by an applicant must pay attention to the High Court's decision in *Yorta Yorta* and in Full Court decisions since as to what is meant by rights and interests being possessed under 'traditional' laws and customs. This aspect of Dowsett J's decision was not criticised by the Full Court in *Gudjala FC* who noted that one question, amongst others, which needs to be addressed in the factual basis materials is whether 'there was, in 1850–1860, an indigenous society in the area, observing identifiable laws and customs' – at [96].

The following is a brief synopsis of the case law which has developed around the requirement in 223(1)(a) that native title rights and interests must be possessed under 'traditional' laws and customs:

- For laws and customs to be ‘traditional’, they must derive from a body of norms or normative system that existed before sovereignty and which has had a substantially continuous existence and vitality since sovereignty.
- A society is a body of people united in their acknowledgement and observance of laws and customs with normative content.
- The acknowledgement and observance of the laws and customs of the pre-sovereignty normative system must have continued ‘substantially uninterrupted’ in each generation from sovereignty until the present time.
- It is this continuity in the acknowledgement/observance of traditional laws and customs, rather than continuity of a society, which must inform the inquiry as to whether the native title is possessed under ‘traditional’ laws and customs.
- Change or adaptation of traditional law and custom may be acceptable; however, the trial court needs to carefully consider whether it points to a cessation or substantial interruption of the normative system, such that the laws and customs currently acknowledged and observed are no longer traditional; i.e. they are not the laws and customs of the normative system at sovereignty.<sup>2</sup>

Having regard to the authorities, it is my view that the factual basis provided by an applicant to support the assertion in s. 190B(5)(b) needs to address that the traditional laws and customs giving rise to the claim to native title rights and interests have their origin in a pre-sovereignty normative system with a substantially continuous existence and vitality since sovereignty. I note that Dowsett J was of the view in *Gudjala* that the factual basis materials for this assertion must address:

- That the laws and customs currently observed have their source in a pre-sovereignty society and have been observed since that time by a continuing society – *Gudjala* at [63];
- That there existed at the time of European settlement a society of people living according to a system of identifiable laws and customs, having a normative content – *Gudjala* at [65] and see also at [66] and [81];
- That explains the link between the claim group described in the application and the area covered by the application, which process, in the case of a claim group defined using an apical ancestry model, may involve ‘identifying some link between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage’, although the apical ancestors need not themselves have comprised a society – at [66] and [81].

This aspect of Dowsett J’s decision was not criticised by the Full Court in *Gudjala FC* – see [71]–[72] and again at [96].

In my view, there is a detailed explanation of the factual basis for this particular assertion in schedule F of the application. It is said that the native title claim group are descended from a native title community comprising two closely related dialect groups from the same language group – the Indjalandji and Dhidhanu dialect groups, whose members identify as the Indjalandji-Dhidhanu people. It is said that the Indjalandji historically lived on and occupied the country

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<sup>2</sup> The special meaning of the word ‘traditional’ in s. 223(1) was first considered by the High Court in *Yorta Yorta*. What is required under s. 223(1) has been considered in numerous decisions since, including the Full Court decisions of *Northern Territory v Alyawarr*, *Kaytetye*, *Warumungu*, *Wakaya Native Title Claim Group* (2005) 145 FCR 442; [2005] FCAFC 135 (*Alyawarr FC*) and *Bodney v Bennell* (2008) 167 FCR 84; [2008] FCAFC 63 (*Bennell FC*). This synopsis is drawn from *Yorta Yorta HC*, *Alyawarr FC* and *Bennell FC*.

centred on the Upper Georgina River and the Dhidhanu were to their east encompassing country around the Buckley River, Templeton River and Mingera Creek. It is said that the application area covers these combined areas, to the extent that they fall within the State of Queensland.

Paragraph (k) identifies that the Indjalandji-Dhidhanu ancestors identified in schedule A of the application are descendants of the Indjalandji-Dhidhanu people who lived on and occupied the application area when sovereignty was asserted and they themselves lived and worked on the application area, as do current members of the native title claim group—at paragraph (g). It is asserted that the native title claim group acknowledge and observe traditional Indjalandji-Dhidhanu law and custom in the application area and hold native title in that area in accordance with that traditional law and custom.

A detailed description is provided in paragraphs (l) and (m) of the traditional laws and customs said to be acknowledged and observed by the Indjalandji-Dhidhanu people, including those relating to Dreamings for the application area.

Paragraph (n) states that Indjalandji-Dhidhanu traditional law and custom, and hence the application area, forms part of a broader cultural bloc that relates to the wider Georgina basin and its extremities (the Georgina basin cultural bloc). This cultural bloc governs a broader regional Aboriginal society and encapsulates systems between clans, language and dialect groups in the upper Georgina basin. It is asserted that historically, those interactions focussed on the perennial waterholes of the riverine system where trading markets were held accompanied by joint ceremonies generated from interconnecting Dreaming tracks, with associated initiations, kinship and marriage practices and exchanges of duties – see paragraph (n). Paragraph (o) asserts that numerous neighbouring groups (including the Kalkadoon, Waanyi, Alyawarr, Bularnu and other named groups) historically participated and currently participate in the Georgina basin cultural bloc and continue to acknowledge the native title claim group as holding native title rights and interests in the application area.

Schedule F, paragraph (p) asserts that the native title claim group maintains its interaction with those surrounding neighbouring groups and ongoing social interactions continue to occur in terms of ceremony, hunting and other economic practices, site and land management and kinship practices, all employing a range of associated acknowledged traditional laws and observed customs.

**Person 1** provides further factual support for the relevant assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group which give rise to the claimed native title rights and interests:

- **Person 1** describes her relationship with two of the three ancestral lines identified in schedule A and their connection with and asserted traditional ownership of country covered by the application, dating back to the late 19<sup>th</sup> century and early part of the 20<sup>th</sup> century.
- **Person 1** speaks eloquently of the intergenerational transmission and practice of traditional law and custom from the ancestors named in schedule A to the current members of the native title claim group. She has participated in birthing, initiation and burial ceremonies. She describes her relationship with the country covered by the application area, including knowledge of Dreamings and stories and associated places on country and how to approach particular areas in traditional ways, such as letting the water know they are there [29 (a)] and

rules around entering particular places [29(d)]. There are also rules around cooking and hunting that she follows [29(e)–(f)].

- **Person 1** says that they can hunt animals and take plants and stones from their country but have to ask permission to do this on other people's country, just like they have to ask her people's permission to do this on their country – [29 (g)].
- **Person 1** says that they look after important places and this includes giving permission to other Aboriginal people to come onto their country and telling people where they can and cannot camp – at [41]. She passes these things to her children and grandchildren and teaches them their traditional laws and customs – at [43].

The anthropological report provides further support for this assertion elaborating as it does on the linkage between the current laws and customs and the traditional laws and customs of an Indigenous society in the application area at the time of European contact or settlement of the area (as discussed in *Gudjala FC* at [96]) and to the continuity of traditional law and custom since contact by the native title claim group as a whole. I refer generally to the following information in the anthropological report and accompanying statement by **Person 2**:

- The anthropologist has been working as an anthropological consultant in the wider Georgina River basin region since 1980 and specifically as consultant anthropologist for the native title claim group in relation to their native title claims since 2005 and for other members of the group since 1999. He provides details of the extensive work he has undertaken in relation to the group's native title claims at section 3.0 of his report.
- The anthropologist has worked extensively in the region. He notes that there is a paucity of early ethnographic material; however it is his considered view that the application area falls within the traditional country of the Indjalandji-Dhidhanu, and not the Wakaya, as was surmised in the earlier work of Roth and Tindale.
- The anthropologist believes that Wakaya country is significantly to the west of the Indjalandji-Dhidhanu. He believes that this error in the early ethnography arose due to a migration of Wakaya people into Camooweal and to other parts of the Georgina basin because of drought as well as frontier hostilities on the Davenport-Murchison ranges in the 1890s. He also notes that there appears to have been a failure to distinguish the Indjalandji from another group that occupied country in the Gregory basin, called the Indjilindji or Indjalarindji by Roth.
- The work undertaken by the anthropologist has collected a range of evidence on traditional laws and customs acknowledged and observed by, and cultural and spiritual activities being carried out by the group on their country, which stem from and reinforce their native title claim group, as well as adding to their depth of connection to that country. These traditional laws and customs are now documented from interviews with the members of the claim group and stem from:
  - accounts of and belief in sacred histories and dreamings for the Georgina River and knowledge of sacred sites and associated Dreamings, sacred histories and travel routes of ancestral beings;
  - knowledge of and participation in customary songs, dances and rituals;
  - undergoing of male and female initiation ceremonies;
  - passing on of rights and interests to future generations;
  - kinship, skin and totemic names, with accompanying rules relating to modes of address;

- rules and rituals around avoiding places and approaching places in particular ways to avoid harm;
- customary practices when locating and cooking food, promoting speech in children and for healing and for other purposes;
- the requirement that non-Indjalandji-Dhidhanu persons ask permission before taking or using resources from Indjalandji-Dhidhanu country.

The report extensively examines the evidence gathered in relation to the group's traditional activities, usage and practice of law and custom in relation to their country and how that gives rise to the claimed native title rights and interests. Detailed information is provided to show the inter-generational transmission of law and custom from the time of European settlement of the application area and the continuity of that traditional law and custom in relation to the application area by the current members of the native title claim group, as part of the wider Georgina basin cultural bloc. The report provides numerous examples showing how the group acknowledge traditional law and custom around requiring non-Indjalandji-Dhidhanu people to seek permission before entering on and using their country (see, for example, section 7.0 titled 'Freedom of travel and exclusive possession')

Based on the material before me, I am satisfied that the factual basis is sufficient to support an assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claimed rights and interests.

### **Reasons for s. 190B(5)(c)**

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(c) because of my view, explained below, that the material in the application and provided separately by the applicant is sufficient to support the assertion that the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.

In my view, the issue at s. 190B(5)(c) is whether the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the claimed native title rights and interests, by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way. It seems that this is also related to the second element to the meaning of 'traditional' when it is used to describe the traditional laws and customs acknowledged and observed by Indigenous peoples as giving rise to claimed native title rights and interests: see *Yorta Yorta* at [47] and [87].

*Gudjala* indicates that this particular assertion may require the following kinds of information:

- that there was a society that existed at sovereignty that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed to the current claim group;
- that there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement — at [82].

The Full Court in *Gudjala FC* at [96] appears to agree that the factual basis must identify the existence of an Indigenous society at European settlement in the application area observing identifiable laws and customs.

In the application at schedule F it is asserted that the current native title claim group acknowledge the traditional laws and observe the traditional customs of a pre-sovereignty society, as did their apical ancestors, who are identified as having belonged to that society at the time of European settlement of the region.

The material before me describes the inter-generational transmission of laws and customs relating to the sacred stories and Dreamings, practices when on country, ceremonies, language, hunting and foraging. The statement by **Person 1** and anthropological report, discussed above, identifies the relevant society at sovereignty (the Indjalandji and Dhidhanu dialect groups, who are part of a broader regional system or cultural bloc, called the Georgina basin cultural bloc) and that the application area falls within the traditional territory of that pre-sovereignty society. The affidavits and the anthropological report provide examples of how the claim group have continued to observe and acknowledge traditional laws and customs, including those that require non-Indjalandji-Dhidhanu persons to seek permission before entering and using their country under the laws and customs that have been in operation in the application area since before European settlement, and by inference, since before sovereignty.

Having regard to all of these materials, examples of which I have referred to above, I am of the view that there is a sufficient factual basis for the assertion that the native title claim group has continued to hold the claimed native title by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way.

I am **satisfied** that the factual basis provided is sufficient to support an assertion that the native title claim group have continued to hold native title in accordance with the traditional laws and customs of a pre-sovereignty society.

## *Subsection 190B(6)*

### *Prima facie case*

The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.

The application **satisfies** the condition of s. 190B(6) as I consider, prima facie, that all of the native title rights and interests can be established, as explained in the reasons that now follow.

#### ***Registrar's task at s. 190B(6)***

I note the following comments by Mansfield J in *Doepel* in relation to the Registrar's consideration of the application at s. 190B(6):

. . . Section 190B(6) requires some measure of the material available in support of the claim—at [126].

On the other hand, s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s 190B(6)—at [127].

. . . s 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed—at [132].

Following *Doepel*, it is my view that I must carefully examine the asserted factual basis provided for the assertion that the claimed native title rights and interests exist against each individual right and interest claimed in the application to determine if I consider, *prima facie*, that they:

- exist under traditional law and custom in relation to any of the land or waters under claim;
- are native title rights and interests in relation to land or waters (see chapeau to s. 223(1)); and
- have not been extinguished over the whole of the application area.

I elaborate below on these three points:

1. *Right exists under traditional law and custom in relation to any of the land or waters under claim*  
It is my view that the definition of ‘native title rights and interests’ in s. 223(1) and relevant case law must guide my consideration of whether, *prima facie*, an individual right and interest can be established. I refer to my discussion at s. 190B(5) above in relation to the authority provided by *Yorta Yorta* as to what it means for rights and interests to be possessed under the *traditional* laws acknowledged and the *traditional* customs observed by the native title claim group (my emphasis).

It is not my role to resolve whether the asserted factual basis will be made out at trial. The task is to consider whether there is any probative factual material which supports the existence of each individual right and interest, noting that as long as some can be *prima facie* established the requirements of the section will be met. Only those rights and interests I consider, *prima facie*, can be established will be entered on the Register pursuant to s. 186(1)(g). An element of that task requires me to consider whether there is some material which supports the existence *prima facie* of the claimed rights and interests under the traditional laws and customs acknowledged and observed by the native title claim group. See the discussion above in relation to this topic at s. 190B(5).

2. *Right is a native title right and interest in relation to land or waters*  
It is my view that s. 190B(6) requires that I consider whether a claimed right can in fact amount to a ‘native title right and interest’ as defined in s. 223(1) and settled by case law, most notably *Western Australia v Ward* (2002) 213 CLR 1 [2002] HCA 28 (*Ward HC*) that a ‘native title right and interest’ must be ‘in relation to land or waters’. In my view, any rights that clearly fall outside the scope of the definition of ‘native title rights and interests’ in s. 223(1) cannot be established, *prima facie*.

3. *Right has not been extinguished over the whole of the application area*  
I note there is now much settled law relating to extinguishment which, in my view, I do need to consider when examining each individual right. For example, if there is evidence that the application area is or was entirely covered by a pastoral lease, I could not (unless ss. 47–47B applies) consider exclusive rights and interests to be *prima facie* established, having regard to a number of definitive cases relating to the extinguishing effect of pastoral leases on exclusive native title, starting with *Ward HC*.

The description in attachment E of the claimed native title rights and interests claimed is in these terms:

1. For those areas where there has been no prior extinguishment of native title or where the non-extinguishment principle (section 238 of the Native Title Act 1993 (Cth)) applies or for those areas where sections 47, 47A or 47B of the Native Title Act 1993 (Cth) applies, the native title rights and interests claimed are, but for any other rights and interests in those areas, the right to possession, occupation, use and enjoyment of those areas to the exclusion of all others.
2. For all other areas, except Water, the native title rights and interests claimed are non-exclusive rights and interests, to be held, exercised and enjoyed according to the traditional laws and customs of the Native Title Claim Group, to:
  - a. access, be present on and move about, in and on and use the claim area;
  - b. conduct social, cultural, religious, spiritual or ceremonial activities and invite others to participate in those activities;
  - c. pass on (or inherit and succeed to) the native title rights and interests;
  - d. make decisions in accordance with traditional laws and customs concerning use and enjoyment of the claimed area by aboriginal people who are governed by the traditional laws acknowledged, and traditional customs observed by, the Native Title Claim Group;
  - e. hunt, fish and gather for the purpose of satisfying the personal domestic, social, cultural, religious, spiritual, ceremonial and non-commercial communal needs of the Native Title Claim Group;
  - f. live on the claim area, to camp, erect shelters and other structures;
  - g. take, use and enjoy Natural Resources for the purpose of satisfying the personal domestic, social, cultural, religious, spiritual, ceremonial and non-commercial communal needs of the Native Title Claim Group;
  - h. share or exchange Natural Resources from the area for personal, domestic, and non commercial communal purposes;
  - i. maintain and protect from physical harm, by lawful means, places and sites in the claim area of importance or significance to the Native Title Claim Group;
  - j. use and enjoy the claim area and its Natural Resources for the purposes of teaching, communicating and maintaining cultural, social, environmental, spiritual and other knowledge, traditions, customs and practices of the Native Title Claim Group in relation to the claim area; and
  - k. be buried and to bury members of the Native Title Claim Group on the claim area.
3. The native title rights and interests claimed in relation to Water on the claim area are non exclusive rights and interests to:
  - a. hunt, gather and fish on, in and from the Water for the purpose of satisfying the personal, domestic, social, cultural, religious, spiritual, ceremonial or communal needs of the Native Title Claim Group;
  - b. take, use and enjoy the Water for the purpose of satisfying the personal, domestic, social, cultural, religious, spiritual, ceremonial or communal needs of the Native Title Claim Group.
4. In paragraphs 2 and 3 above:
  - a. "Natural Resources" means "animals" as defined in the Nature Conservation Act 1992 (Qld), but not including animals that are the private personal property of another; plants' as defined in the Nature Conservation Act 1992 (Qld); and any clay, soil, sand, gravel, or rock on or below the surface of the Determination Area but does not include minerals as defined in the Minerals Resources Act 1989 (Qld) or petroleum as defined in the Petroleum Act 1923 (Qld) and the Petroleum and Gas (Production and Safety) Act 2004 (Qld).

- b. "Water" means water as defined in the Water Act 2000 (Qld).
5. The traditional laws acknowledged and traditional customs observed by the Native Title Claim Group include the authority as between Aboriginal people to:
  - a. resolve disputes about who is or who is not an Indjalandji-Dhidhanu person;
  - b. determine as between Indjalandji/Dhidhanu persons what are the particular native title rights and interests that are held by particular Indjalandji-Dhidhanu persons in relation to particular parts of the claim area;
  - c. exclude particular Indjalandji-Dhidhanu persons from the exercise of particular native title rights and interests in relation to particular parts of the claim area; and
  - d. resolve disputes between Aboriginal people concerning native title rights and interests in relation to the claim area, with the assistance of native title holders of adjoining areas where such assistance is necessary.
6. To the extent that any part of the claim area is or has been the subject of a previous non exclusive possession act, as defined by the Native Title Act 1993 (Cth), the Native Title Claim Group does not claim possession, occupation, use and enjoyment of the area to the exclusion of all others.
7. The native title rights and interests claimed:
  - a. do not operate exclusive of the Crown's valid ownership of any minerals, petroleum or gas;
  - b. are not claimed in relation to any part of the area covered by the Application where they have been validly extinguished by operation of laws of the State of Queensland or the Commonwealth of Australia; and
  - c. are always subject to and exercisable in accordance with:
    - i. the laws of the State of Queensland and the Commonwealth of Australia, including the common law; and
    - ii. the traditional laws acknowledged and traditional customs observed by the Native Title Claim Group.

Attachment E shows a claim to:

- to the exclusive native title of possession, occupation, use and enjoyment over areas where it has not been extinguished or where any extinguishment must be disregarded;
- to the identified non-exclusive rights where there has been extinguishment of the exclusive native title; and
- other non-exclusive rights over water areas.

1. *For those areas where there has been no prior extinguishment of native title or where the non-extinguishment principle (section 238 of the Native Title Act 1993 (Cth)) applies or for those areas where sections 47, 47A or 47B of the Native Title Act 1993 (Cth) applies, the native title rights and interests claimed are, but for any other rights and interests in those areas, the right to possession, occupation, use and enjoyment of those areas to the exclusion of all others.*

**Outcome:** Prima facie established.

I use the shorthand 'exclusive right' when discussing this right. *Ward HC* is authority that the exclusive right is potentially available to be prima facie established in relation to areas where there has been no previous extinguishment of native title or where extinguishment is to be disregarded as a result of the NTA. The applicant takes account of extinguishment issues by only

claiming this right where there has been no extinguishment or any extinguishment must be disregarded. *Ward HC* states that:

a core concept of traditional law and custom [is] the right to be asked permission and to 'speak for country'. It is the rights under traditional law and custom to be asked permission and to 'speak for country' that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others— at [88].

*Sampi v State of Western Australia* [2005] FCA 777 states:

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—at [1072].

More recently, the Full Court in *Griffiths v Northern Territory* (2007) 243 ALR 7 (*Griffiths FC*) reviewed the case law about what was needed to prove the existence of exclusive native title in any given case and found that it was wrong for the trial judge to have approached the question of exclusivity with common law concepts of usufructuary or proprietary rights in mind:

... the question whether the native title rights of a given native title claim group include the right to exclude others from the land the subject of their application does not depend upon any formal classification of such rights as usufructuary or proprietary. ***It depends rather on consideration of what the evidence discloses about their content under traditional law and custom.*** It is not a necessary condition of the existence of a right of exclusive use and occupation that the evidence discloses rights and interests that "rise significantly above the level of usufructuary rights"—at [71] (*emphasis added*).

*Griffiths FC* indicates at [127] that what is required to prove the exclusive right claimed in this application is to show how, under traditional law and custom, being those laws and customs derived from a pre-sovereignty society and with a continued vitality since then, the group may effectively 'exclude from their country people not of their community', including by way of 'spiritual sanction visited upon unauthorised entry' and as the 'gatekeepers for the purpose of preventing harm and avoiding injury to country'. The Full Court stressed at [127] that 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 (*emphasis added*).

I examined the information provided by the applicant in relation to the asserted factual basis for the claim in my reasons at s. 190B(5) and decided that a sufficient factual basis was provided for the assertion that the claimed native title rights and interests exist and for the particular assertions therein, including, pertinently to the inquiry at s. 190B(6), that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claim to native title rights and interests.

A review of that same material indicates to me that, prima facie, the exclusive right is shown to exist under traditional law and custom over those areas where it has not been extinguished or where any extinguishment must be disregarded. I refer to the following information which in my view prima facie supports the existence of the exclusive right:

- Schedule F states that Indjalandji-Dhidhanu law and customs, and hence the application area, forms part of a broader cultural bloc that relates to the wider Georgina basin and its extremities. Indjalandji-Dhidhanu traditional law and custom include rules and rituals to follow when going around the application area to avoid harm and proscribe who can talk for country. The Georgina basin cultural bloc governs a broader regional Aboriginal society and encapsulates systems of interactions between clans, language and dialect groups of the upper Georgina basin. Neighbouring groups historically and currently participate in this cultural bloc and continue to acknowledge that the Indjalandji-Dhidhanu native title claim group are the holders of native title rights and interests in the application area.
- **Person 1** gives practical expression of how the exclusive right arises as a result of the continuing observance of traditional law and custom dating back to the earliest times of European settlement and by inference back to sovereignty:  
[the application area] forms part of the traditional country of the Indjalandji-Dhidhanu people, under our traditional laws and customs – at [2].

. . . uncle **Person 11**. He was an important boss for Indjalandji-Dhidhanu country, he had responsibility for sacred objects and held a great deal of Indjalandji-Dhidhanu knowledge – at [19].

We have to look after the country and our important places. For example, Queensland Main Roads wanted to construct deep footings for a bridge over the Georgina River but I objected to this very strongly because this would have harmed the Rainbow Serpent that lives there. They eventually acknowledged this and changed the footing design to ‘pad’ footings – at [29(b)].

There are places that we cannot go to in our country because of their powerful nature. For other places it depends on what you know about that place or whether you are a man or a woman. If we do not follow these rules in relation to powerful places where may be consequences such as nightmares, sickness, accidents, other problems or death – at [29(d)].

We can hunt animals and take plants and stones from our country but we have to ask permission to do this in other peoples’ country just like they have to ask permission to those things in our country – at [29(g)].

We look after important places in Indjalandji-Dhidhanu country with examples being by:

- (a) Giving permission to other Aboriginal people to come onto Indjalandji-Dhidhanu country and to take things from it.
  - (b) Directing people where they can and cannot camp.
  - (c) Objecting to the construction of deep footings for the bridge over the Georgina River.
  - (d) Asking Main Roads not to take water from Lake Francis – at [41].
- The anthropological report provides further information to support the prima facie establishment of the exclusive right. It provides an account of the investigations and research that the author and others have undertaken in relation to the broader Georgina basin region over many years which establishes that the application area forms part of the traditional country of the Indjalandji-Dhidhanu people. The report discusses the exclusive right at section 7.0 under the heading ‘freedom of travel and exclusive possession’. The report refers to the account by **Person 1** of the trespass of the Kalkadoon people in Indjalandji country during the early and pre-contact period. She is recorded to say, ‘When Kalkadoon came in

and steal women, our fellows track them up and kill them to get women back.’ The anthropological report states that **Person 1** is referring to customary notions of trespass on other tribal groups’ lands. The report also discusses the evidence of the applicant, Colin Saltmere, that ‘sacred sites keep people back’, referring to people having to avoid sacred sites due to the potential danger involved. He is also quoted as saying that, ‘Proper law people come and ask permission to visit country.’ Examples of this are provided on pp. 20–21 of the report. Colin is recorded as saying that this is a law that dates back to the earliest times and has been passed to current members of the group, including by the group’s ancestors named in schedule A.

To conclude, and having regard to all of this information, I am satisfied that, prima facie, the exclusive right can be established.

I now consider the rest of the claimed native title rights and interests in paragraphs 2 and 3 of attachment E. As noted previously, these are of a non-exclusive nature. To assist the reader, I identify at the outset the particular right that am considering and I have grouped together those rights where similar issues arise or similar factual information is provided to support that they can be established, prima facie.

2. For all other areas, except Water, the native title rights and interests claimed are non-exclusive rights and interests, to be held, exercised and enjoyed according to the traditional laws and customs of the Native Title Claim Group, to:
  - a. access, be present on and move about, in and on and use the claim area;
  - b. conduct social, cultural, religious, spiritual or ceremonial activities and invite others to participate in those activities;
  - c. pass on (or inherit and succeed to) the native title rights and interests;
  - e. hunt, fish and gather for the purpose of satisfying the personal domestic, social, cultural, religious, spiritual, ceremonial and non-commercial communal needs of the Native Title Claim Group;
  - f. live on the claim area, to camp, erect shelters and other structures;
  - g. take, use and enjoy Natural Resources for the purpose of satisfying the personal domestic, social, cultural, religious, spiritual, ceremonial and non-commercial communal needs of the Native Title Claim Group;
  - h. share or exchange Natural Resources from the area for personal, domestic, and non commercial communal purposes;
  - j. use and enjoy the claim area and its Natural Resources for the purposes of teaching, communicating and maintaining cultural, social, environmental, spiritual and other knowledge, traditions, customs and practices of the Native Title Claim Group in relation to the claim area; and
  - k. be buried and to bury members of the Native Title Claim Group on the claim area.
3. The native title rights and interests claimed in relation to Water on the claim area are non exclusive rights and interests to:
  - a. hunt, gather and fish on, in and from the Water for the purpose of satisfying the personal, domestic, social, cultural, religious, spiritual, ceremonial or communal needs of the Native Title Claim Group;

- b. take, use and enjoy the Water for the purpose of satisfying the personal, domestic, social, cultural, religious, spiritual, ceremonial or communal needs of the Native Title Claim Group.

**Outcome:** I consider all of these rights to be prima facie established.

I propose to consider all of these rights together as they relate to the group's access to and use of the area covered by the application and its resources, including Water (defined in paragraph 4).

In my view there is ample material to prima facie establish the observance of traditional law and custom giving rise to rights and interests of this nature in relation to the application area. I refer particularly to the statement of **Person 1** and the anthropological report that rights of this nature are currently exercised by the group and this is based on the pre-contact normative system. On the basis of the information reviewed extensively by me in relation to the establishment of the exclusive right and also in relation to the factual basis condition in s. 190B(5), I am satisfied that these rights and interests are prima facie established.

Numerous and specific examples are found throughout the material to show that these are rights that currently exist under the traditional laws and customs of the native title claim group, by which the group access the area, live there, camp on it, erect shelters, exist there, move about it, hunt, fish, use its natural resources, gather its products, conduct ceremony, conduct burials and participate in cultural and other traditional activities.

- d. make decisions in accordance with traditional laws and customs concerning use and enjoyment of the claimed area by aboriginal people who are governed by the traditional laws acknowledged, and traditional customs observed by, the Native Title Claim Group;

**Outcome:** prima facie established.

Although there is some uncertainty about the ability to claim a non-exclusive right to 'make decisions about use and enjoyment' since the Full Federal Court's decision in *Northern Territory v Alyawarr* (2005), it has subsequently been included in a number of consent determinations in Queensland (e.g. *Mundraby v Queensland*). In my view, the way that it is framed here indicates that it is limited only to Aboriginal people who recognise themselves as governed by the traditional law and custom acknowledged and observed by the native title claim group. There is some support for such a right in the context of the asserted cultural bloc which governs the native title claim group and neighbouring groups, discussed in schedule F of the application. I am therefore prepared to find that such a right is prima facie established.

- i. maintain and protect from physical harm, by lawful means, places and sites in the claim area of importance or significance to the Native Title Claim Group;

**Outcome:** prima facie established.

The statement by **Person 1** describes her objections to the construction proposed for a bridge over the Georgina River, because it would harm the Rainbow serpent that lived there. The anthropological report also provides numerous examples as to how this right exists under the traditional laws and customs of the Indjalandji-Dhidhanu people, including those relating to

location of sacred sites and the responsibility of looking after and protecting those areas (see, for example, section 8.0).

### **Conclusion**

As I consider that, prima facie, all of the claimed native title rights and interests can be established, the requirements of this section are met. I direct that entirety of the description in attachment E, including the explanations and qualifications at paragraphs 4 to 7 be entered on the Register of Native Title Claims.

## *Subsection 190B(7)*

### *Traditional physical connection*

The Registrar must be satisfied that at least one member of the native title claim group:

- (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or
- (b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:
  - (i) the Crown in any capacity, or
  - (ii) a statutory authority of the Crown in any capacity, or
  - (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

The application **satisfies** the condition of s. 190B(7).

I have taken the phrase 'traditional physical connection' to mean a physical connection in accordance with the particular traditional laws and customs relevant to the claim group, being 'traditional' as discussed in *Yorta Yorta*. I note also that at [29.19] of the explanatory memorandum to the Native Title Amendment Act 1998, it is explained that the connection described in s. 190B(7) 'must amount to more than a transitory access or intermittent non-native title access'.

In my view, there are numerous and specific references to current and previous members of the native title claim group throughout the statement of **Person 1** and the anthropological report which provides satisfactory evidence of the requisite traditional physical connection by members of the native title claim group.

The material refers to members of the group accessing the areas covered by the application pursuant to their traditional laws and customs, including by hunting, foraging for food, visiting sites and observing traditional law and custom. See for example the extensive information about **Person 1** and her family members who have all lived in the application area and the inter-generational transmission of traditional knowledge that stretches back to the earliest times of European contact and settlement of the application area.

On the basis of this material, I am satisfied that there are members of the native title claim group (including **Person 1** and her family) who currently have or previously had a traditional physical connection with a part of the land or waters covered by the application.

## *Subsection 190B(8)*

### *No failure to comply with s. 61A*

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s.61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

Section 61A provides:

(1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.

(2) If :

(a) a previous exclusive possession act (see s. 23B) was done, and

(b) either:

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

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

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

(3) If:

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

(b) either:

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

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

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

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

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

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

The application **satisfies** the condition of s. 190B(8). I explain this in the reasons that follow by looking at each part of s. 61A against what is contained in the application and accompanying documents and in any other information before me as to whether the application should not have been made.

#### *Reasons for s. 61A(1)*

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

In my view the application **does not** offend the provisions of s. 61A(1) because the Tribunal's geospatial report dated 19 October 2009 confirms that there are no determinations of native title covering the application area.

#### *Reasons for s. 61A(2)*

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

In my view the application **does not** offend the provisions of s. 61A(2) because in Attachment B the applicants specifically exclude any land or waters that is or have been covered by a previous exclusive possession act as defined in s. 23B of the *Native Title Act*.

*Reasons for s. 61A(3)*

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

In my view, the application **does not** offend the provisions of s. 61A(3) because of the statement in paragraph 6 of attachment E that there is no claim to possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done.

## *Subsection 190B(9)*

### *No extinguishment etc. of claimed native title*

The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:

- (a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
- (b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
- (c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss. 47, 47A or 47B.

I consider each subparagraph under s. 190B(9) in turn and I come to a combined result below.

The application **satisfies** the subparagraph 190B(9)(a). Schedule Q states that the application does not make any claim for ownership of minerals, petroleum or gas wholly owned by the Crown and the native title rights and interests claimed in schedule E similarly do not reveal any such claim.

The application **satisfies** the subparagraph 190B(9)(b). The application is located inland of the coastline and does not extend to offshore places.

The application **satisfies** the subparagraph 190B(9)(c). Paragraph 3 of attachment B identifies that the application excludes land or waters where the native title rights and interests have been otherwise extinguished.

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

[End of reasons]

# Attachment A

## Summary of registration test result

Application name	Indjalandji-Dhidhanu
NNTT file no.	QC09/3
Federal Court of Australia file no.	QUD243/09
Date of registration test decision	27 November 2009

### Section 190C conditions

Test condition	Subcondition/requirement	Result
s. 190C(2)		Aggregate result: met
	re s. 61(1)	met
	re s. 61(3)	met
	re s. 61(4)	met
	re s. 62(1)(a)	met
	re s. 62(1)(b)	Aggregate result: met
	s. 62(2)(a)	met
	s. 62(2)(b)	met
	s. 62(2)(c)	met
	s. 62(2)(d)	met
	s. 62(2)(e)	met
	s. 62(2)(f)	met
	s. 62(2)(g)	met

Test condition	Subcondition/requirement		Result
		s. 62(2)(ga)	met
		s. 62(2)(h)	met
s. 190C(3)			met
s. 190C(4)			Overall result: met
	s. 190C(4)(a)		NA
	s. 190C(4)(b)		met

#### Section 190B conditions

Test condition	Subcondition/requirement		Result
s. 190B(2)			met
s. 190B(3)			Overall result: met
	s. 190B(3)(a)		NA
	s. 190B(3)(b)		Met
s. 190B(4)			met
s. 190B(5)			Aggregate result: met
	re s. 190B(5)(a)		met
	re s. 190B(5)(b)		met
	re s. 190B(5)(c)		met
s. 190B(6)			Met
s. 190B(7)(a) or (b)			met
s. 190B(8)			Aggregate result: met
	re s. 61A(1)		met

<b>Test condition</b>	<b>Subcondition/requirement</b>	<b>Result</b>
	re ss. 61A(2) and (4)	met
	re ss. 61A(3) and (4)	met
<b>s. 190B(9)</b>		<b>Aggregate result:</b> met
	re s. 190B(9)(a)	met
	re s. 190B(9)(b)	met
	re s. 190B(9)(c)	met

[End of document]