APPENDIX K

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N126

National Native Title Tribunal

Edited Reasons - Registration test decision

Application name	Juru People application
Name of applicant	Margaret Smallwood, Tracey Lampton, Loretta Prior, Raymond Gaston, Andrew Morrell, Janet Lymburner, Lenora Aldridge, Iris Glenbar, Elsie Pryor Lymburner.
NNTT file no.	QC2013/010
Federal Court of Australia file no.	QUD554/2010
Date application made	15 December 2010
Date application last amended	12 November 2013

I have considered the claim made in the application 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 190C are met. I accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

Date of decision: 4 March 2014

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Jessica Di Blasio

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 30 July 2013 and made pursuant to s. 99 of the Act.

Reasons for decision

Introduction

[1] This document sets out my reasons, as the delegate of the Native Title Registrar (the Registrar), for the decision to accept the claim made in the amended Juru People application (the application) for registration pursuant to s. 190A of the Act.

[2] 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 and background

[3] I note the following events have occurred which resulted in the Registrar of the Federal Court of Australia (the Court) giving to the Registrar a copy of the amended application on 26 November 2013, pursuant to s. 64(4) of the Act:

- On 1 November 2013, Justice Rares of the Federal Court made an order pursuant to section 64(2) that proceedings QUD554/2010 and QUD7/2012 be combined and the combined Juru application be conducted as one application and continue under file QUD554/2010.

- On 8 November 2013, Justice Rares made an order pursuant to s. 64 (1C) that the description of the native title claim group in schedule A of the application be amended to include the name 'Rosie Wake'.

- On 12 November 2013, the applicant filed an amended application combining the two previous Juru People applications (in proceedings QUD554/2010 and QUD7/2012), as ordered on 1 November 2013 and also incorporating the amendment of the claim group description ordered on 8 November 2013.

[4] The referral by the Court to the Registrar of the amended application filed on 12 November 2013, has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act. I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply as the nature of the amendments, being a combination of two previously separate applications and an amendment to the description of the persons in the native title claim group, are not envisaged by the circumstances in either ss. 190A(1A) or 190A(6A).

[5] Therefore, in accordance with subsection 190A(6), I must accept the claim for registration if it satisfies all of the conditions in ss. 190B and 190C of the Act. This is commonly referred to as the registration test.

[6] I note that the Juru people combined application was affected by two s. 29 notices at the time of filing. Section 29 notice EPM25157 ended notification on 14 December 2013, despite the use of best endeavours, I was unable to make a registration test decision by that date. Section 29 notice EPM25189 ends notification on 28 February 2014, again despite the use of best endeavours, I have been unable to make a decision within that timeframe.

Registration test

[7] 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.

[8] 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.

Information considered when making the decision

[9] 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.

[10] 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.

[11] I have had regard to the following documents in my consideration of the application for the purposes of the registration test:

- Form 1 and all attachments;
- geospatial assessment and overlap analysis dated 9 December 2013;
- the QC2010/005—Juru people—QUD554/10 claimant application accepted for registration on 27 May 2011;
- the QC2012/001—Juru People #2—QUD0007/12 claimant application accepted for registration on 11 April 2012; and

- an anthropological report 'Response to a Preliminary Assessment' dated 30 March 2011 and provided as additional material in support of the QC2010/005—Juru People—QUD554/10 claimant application.

[12] 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 of the Act.

[13] Also, I have not considered any information that may have been provided to the Tribunal in the course of mediation in relation to this or any other claimant application.

Procedural fairness steps

[14] As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are made in a fair, just and unbiased way. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication—*Hazelbane v Doepel* [2008] FCA 290 at [23] to [31]. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

[15] On 5 December 2013 the case manager with carriage of this matter wrote to the Queensland government informing them of the Registrar's receipt of the combined application, outlining that the full registration test would need to be applied and provided a timeframe in which the Registrar proposed to complete the registration test. The same letter invited submissions regarding the registration testing of the amended application from the Queensland government. No submissions have been received at the date of testing.

[16] On 3 February 2014 I caused the case manager to write to the State of Queensland (the State) informing it that I intended to again have regard to the anthropological report previously supplied and considered when registration testing the two pre-combination applications. On the same day the State responded noting that information. No further comment or submission has been received in relation to this or any other matter concerning the registration testing of this combined application from the State as at the date of this decision.

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.

[17] The claim 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.

[18] In reaching my decision for the condition in s. 190C(2), I understand that this condition is procedural only and 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. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s. 190C(2)— *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 *(Doepel)* at [16] and also at [35] to [39]. In other words, does the application contain the prescribed details and other information?

[19] It is also my view that I need only consider those parts of ss. 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s. 190C(2)). I therefore do not consider the requirements of s. 61(2), as it imposes no obligations of this nature in relation to the application. I am also of the view that I do not need to consider the requirements of s. 61(5). The matters in ss. 61(5)(a), (b) and (d) relating to the Court's prescribed form, filing in the Court and payment of fees, in my view, are matters for the Court. They do not, in my view, require any separate consideration by the Registrar. Paragraph 61(5)(c), which requires that the application contain such information as is prescribed, does not need to be considered by me under s. 190C(2). I already test these things under s. 190C(2) where required by those parts of ss. 61 and 62 which actually identify the details/other information that must be in the application and the accompanying prescribed affidavit/documents.

[20] Below I consider each of the particular parts of ss. 61 and 62, which require the application to contain details/other information or to be accompanied by an affidavit or other documents.

Native title claim group: s. 61(1)

[21] In *Doepel*, Mansfield J confined the nature of the consideration for this requirement to the information contained in the application—at [37] and [39]. I therefore understand that I should consider only the information contained in the application and should not undertake any form of merit assessment of the material when considering whether I am satisfied that 'the native title claim group as described is in reality the correct native title claim group'—*Doepel* at [37].

[22] If the description of the native title claim group in the application were to indicate that not all persons in the native title group were included, or that it is in fact a subgroup of the native title claim group, then in my view, the relevant requirement of s. 190C(2) would not be met and the claim could not be accepted for registration—*Doepel* at [36].

[23] There is a description of the claim group included at Schedule A of the application.

[24] There is nothing on the face of the application which suggests that the application is not brought on behalf of all members of the native title claim group, I am therefore satisfied that the native title claim group as described in Schedule A meets the requirements of s. 61(1).

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

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

[26] The name and address for service of the applicant is contained at Part B of the application

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

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

[28] I understand that this provision is 'a matter of procedure' and does not require me to consider whether the description is 'sufficiently clear', merely that one is in fact provided—*Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 *(Gudjala 2007)* at [31] and [32]. I am not required or permitted to be satisfied about the correctness of the information in the application naming or describing the native title claim group—*Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198—at [34].

[29] The native title claim group is described at Schedule A of the application.

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

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

[31] Section 62(1)(a) requires an affidavit from the applicant to accompany the application. The affidavit must speak to each of the matters in s. 62(1)(a)(i) to (v).

[32] The Court ordered on 1 November 2013 that the Juru People and Juru People #2 applications be combined and conducted as one application. As a consequence of this order the applicant now comprises all of the persons who formerly comprised the applicant for either or both of the pre-combined applications, namely, Margaret Smallwood, Tracey Lampton, Loretta Prior, Ray Gaston, Andrew Morrell, Janet Lymburner, Lenora Aldridge, Iris Glenbar and Elsie Pryor Lymburner.

[33] The issue for me is whether I can be satisfied under s. 190C(2) that the application is accompanied by the affidavit required by s. 62(1)(a) when the amended application is accompanied by copies of affidavits which accompanied the pre-combined QUD544/2011 Juru People application (these are the affidavits made in 2011 by Margaret Smallwood, Tracey Lampton, Loretta Prior, Ray Gaston, Andrew Morrell, Janet Lymburner and Lenora Aldridge) and the pre-combined QUD7/2012 Juru People # 2 application (these are the affidavits by Iris Glenbar and Elsie Pryor Lymburner).

[34] In *Drury v Western Australia* [2000] FCA 132 (*Drury*) French J discussed whether or not it was necessary for the applicant to file fresh affidavits in the circumstances of an application being amended. His Honour stated:

> Section 62, insofar as it deals with accompanying affidavits in subs 62(1), is dealing with the position at the point of filing of the application. It is not, in my opinion, intended to cover amendment of applications… Section 62 does not, either expressly or by implication, convey a requirement that fresh affidavits have to be filed on the occasion of every amendment—at [11]

[35] I note also, however, that French J made some suggestions around the types of amendments or instances where it may be appropriate for fresh affidavits to be included with the filing of amended applications, and I consider that these statements could still be relevant despite the 2007 legislative changes to s. 64(5). He states the following:

> The absence of any statutory obligation to file fresh s 62(1)(a) affidavits in support of any amended application does not mean that the Court may not direct affidavit evidence in support of amendments to be filed in an appropriate case. Thus an amendment which involves the addition of applicants, while not covered by the requirements of s 64(5), might well attract a direction for the filing of affidavits going to the authorisation of the additional applicants. Where two applications are combined and they do not have precisely the same applicants, it may be thought appropriate to file affidavits by all applicants addressing the matters required to be addressed under s 62(1)(a) for the area of the combined application. These examples are not proposed as necessary conditions of the classes of amendment mentioned. They are ultimately within the discretion of the Court. However, advisors to applicants seeking amendments of applications should consider these matters in determining what material to submit in support of the proposed amendment—at [14].

[36] Although French J specifically highlights combined applications where the people who comprise the applicant are not identical as an example of when fresh affidavits may be necessary, I understand him to be saying that this is not a category of amendment where fresh affidavits will always be required and that it is ultimately a decision to be made by the Court when it gives leave to amend an application.

[37] I note that in this case the Federal Court order, dated 1 November 2013, granting leave to amend to combine the Juru applications, states:

> Pursuant to section 64(2) of the *Native Title Act 1993* (Cth), proceedings QUD554/2010 and QUD7/2012 be combined and the combined Juru application be conducted as one application and continue under file QUD 554/2010.

[38] The Court did not require the filing of fresh affidavits, it is therefore my view, that the Court has followed the statutory regime and not exercised its discretion to require fresh affidavits be filed with the combination application.

[39] I further note that the order dated 8 November 2013 provides for the amendment of the application at Schedule A to include a new apical ancestor as part of the claim group description. Again no order requiring the filing of fresh affidavits was made.

[40] On the occasion of filing both of the pre-combination applications were accompanied by compliant affidavits. These same affidavits now accompany the combined application, however they are not *fresh* affidavits, in the sense that they refer to previous authorisation meetings to demonstrate the authority of the people comprising the applicant to bring the application and deal with matters relating to it.

[41] It is my view that amending an application, including to combine it, or to amend the claim group description at Schedule A, may be taken to be encompassed by the authority granted to the people who comprise the applicant to deal with matters arising in relation to it. Given that all of the people who comprised the applicant for either or both of the pre-combination applications now comprise the applicant for the combined application, and that affidavits which include the required statements, have been filed from each of them, it is my view that there is no legislative basis upon which to insist that these affidavits be fresh, especially in light of the fact that the Court appears not to have exercised a discretion such that, in this instance, no order was made for the filing of new affidavits.

[42] I am of the view that in these circumstances it is appropriate for me to consider these affidavits for the purpose of s. 190C(2). The affidavits were previously found to comply with s. 62(1)(a) by a delegate of the Registrar and I am also of the view that they comply with this requirement.

[43] The application is accompanied by the affidavits required by s. 62(1)(a).

Details required by s. 62(1)(b)

[44] Subsection 62(1)(b) requires that the application contain the details specified in ss. 62(2)(a) to (h), as identified in the reasons below.

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

[45] Schedule B is a written description of the application area. Part (a) describes areas covered by the application and part (b) describes areas excluded from the application.

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

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

[47] Schedule C refers to Attachment C which is an A4 copy of an A3 colour map of the external boundaries of the application area.

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

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

[49] Schedule D states that '[n]o searches have been carried out'.

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

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

[51] A description of the native title rights and interests claimed by the native title claim group in relation to the application area is included at Schedule E.

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

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

[53] Information relevant to the asserted factual basis for the claim in the application is contained at Schedule F of the application. I am of the view that I need only consider whether the information regarding the claimants' factual basis addresses in a general sense the requirements of s. 62(2)(e)(i) to (iii). I understand that any 'genuine assessment' of the sufficiency of the factual basis is to be undertaken by the Registrar when assessing the application for the purposes of s. 190B(5), and I am of the view that this approach is supported by the Court's findings in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [92].

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

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

[55] Schedule G describes the activities currently carried out by the native title claim group as being those that are consistent with the rights and interests claimed in Schedule E.

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

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

[57] Schedule H states that '[t]here are no other applications to the High Court, Federal Court or a recognised State or 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 a determination of compensation in relation to native title.'

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

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

[59] Schedule HA states '[n]il' which I take to mean that the applicant is not aware of any s. 24MD(6B)(c) notices in relation to the application area

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

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

[61] Schedule I states that '[i]nformation is provided and labeled "Attachment I".'

[62] Attachment I is a Geospatial overlap analysis completed by the Tribunal's Geospatial services and dated 24 July 2013. The analysis notes that there was one s. 29 notice which fell within the external boundary of the combined application as at 24 July 2013. Details of this notice are provided.

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

Conclusion

[64] The application contains the details specified in ss. 62(2)(a) to (h), and therefore contains all details and other information required by s. 62(1)(b).

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.

[65] This requirement is concerned to ensure that the Registrar is satisfied that no person included in the native title claim group for the current application is a member of the native title claim group for any previous application.

[66] I understand that this requirement only arises if the conditions specified in subsections (a), (b) and (c) are all satisfied— *State of Western Australia v Strickland* [2000] FCA 652. I therefore must first consider if there are any previous claims that overlap the application area, that were on the Register when the current application was made, and that remain on the register at the date of this decision. If there is no such claim, then there will be no 'previous overlapping application' for the purposes of this requirement.

[67] The Tribunal's Geospatial services prepared an overlap analysis dated 9 December 2013 which identifies two applications which overlap the current application area, being the Juru

People application and the Juru People #2 application. Both are currently on the Register of Native Title Claims.

[68] It is evident from the Register Extracts for the Juru People and Juru People #2 applications that there are claimants in common with the current application. The claim group description for the two pre-combination claims is identical to the current application with the exception of the apical ancestor Rosie Wake who has been added to the claim group description following recent amendments to the combined application.

[69] It is my view that neither of these applications constitute 'previous overlapping applications' for the purposes of s. 190C(3) as they are both the pre-combination applications that comprise the current combined application that I am considering.

[70] Subsection (b) requires that no overlapping claim be on the Register at the time the current application is *made*. It is my view, that like amended applications, a combined application can be taken to be made at the date that the first of the pre-combination applications was filed, or in the alternative, at both of the dates that the pre-combination applications were first filed.

[71] In this case the first Juru People application was filed on 15 December 2010 and the second application, being Juru People #2, was filed over a separate and not overlapping area on 5 January 2012. At the date of both filing and registration for both of the pre-combination applications there were no other overlapping claims, and therefore no previous applications for the purposes of s. 190C(3) for either of the pre-combination claim areas.

[72] Therefore there were no registered native title applications overlapping either the Juru people or Juru People #2 applications when they were made and there continue to be no other registered native title claims overlapping the combination claim area as at the date of this decision.

[73] It is therefore my view that there is no 'previous application' for the purposes of s. 190C(3).

[74] The claim satisfies the condition of s. 190C(3).

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.

Under s. 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

[75] 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.

[76] For the reasons set out below, I am satisfied that the requirements set out in s. 190C(4)(a) are met because the application has been certified by each representative Aboriginal/Torres Strait Islander body that could certify the application.

[77] As above in my reasons for s. 190C(3), I have taken the view that a combination application is not a new native title claim but a continuation of two prior pre-combination applications, such that the pre-combination applications and the current combined application are in fact one and the same, or more specifically, a version of an amended application.

[78] The combined application filed on 12 November 2013, at Attachment R, includes a certification from North Queensland Land Council (NQLC) dated 7 December 2010. This certificate originally accompanied the Juru People application.

[79] I understand that my role at s. 190C(4) is not to 'look behind' the certification or enquire as to the merits of the certification, all the task requires of me is that I am 'satisfied about the fact of certification by an appropriate representative body'—*Doepel* at [78].

[80] Kiefel J considered the issue of certification in the case of an amended application where the certificate from the pre-amended application was filed in support of the amended application in *Wakaman; People 2 v Native Title Registrar and Authorised Delegate* (2006) 155 FCR 107 (*Wakaman*). Her Honour accepted that it is 'part of the delegate's function under the NTA to consider whether the certification is of the particular application under consideration', however, she noted that this would necessarily involve consideration of the applicant's intention—*Wakaman* at [31] to [33].

[81] Her Honour said that to reject a certification on the sole ground that it was given in relation to an earlier version of the application would be 'unduly technical' and 'inappropriate to procedures under the Act'—at [33]. The fact that the original certification had been filed with the amended application indicated, in Her Honour's view, that the applicant and the representative body 'clearly intended' the certification to apply to the amended application—at [34]. Her Honour also explains that in the case before her, there had been no change to the content of the amended application and that it referred to the same lands and the same authorisation process for making the application. In the circumstances of the amended claim being considered in *Wakaman*, the claim group description was the primary amendment—at [33].

[82] In the circumstances of this application I note that the substance of the claim is no different from the substance of the two pre-combination applications, except for the amendment to include a new apical ancestor as part of the claim group description, and that the area covered by the combined application is simply a joining of the two areas covered by the pre-combination

applications. In this instance though, only the certificate relating to the Juru People application has been filed, the certification, it could be argued, relates to a smaller area than currently being considered and refers to only some of the applicant people who now comprise the applicant for the combination application (being, Margaret Smallwood, Tracey Lampton, Loretta Prior, Ray Gaston, Andrew Morrell, Janet Lymburner, and Lenora Aldridge). The question therefore arises, is the certificate of the particular application being considered?

[83] Despite these differences, it is my view that the authority of *Wakaman*, being that the intention of the applicant is relevant to the delegate's satisfaction that the certificate relates to the particular application under consideration is applicable. It is my view that the certificate filed with the combination application is intended to demonstrate certification of the combined application as filed and it is that certificate that I have therefore considered against the requirements of s. 190C(4).

[84] I note however, that should I be wrong in my interpretation of the authority in *Wakaman*, the Juru People #2 application was nevertheless certified and although that certificate was not filed with the combination application it is in almost identical terms to the certificate which was filed and it is therefore my view that it is also complaint with the requirements of s. 190C(4). This certificate when read together with the original Juru People certificate, clearly reflects, in my view, NQLC's intention to have certified the making of both Juru People pre-combination applications and, therefore, the current combination application over the entire area covered by the combination application.

[85] I have had regard to the Geospatial assessment dated 9 December 2013 which identifies the NQLC as the only representative body responsible for the area covered by the application. The NQLC is therefore the only body that could certify the application.

[86] Section 203BE(4) sets out particular statements that must be included in a certification for a native title determination application. Namely that the representative body must be of the opinion that the requirements of ss. 203BE(2)(a) and (b) have been met, their reasons for being of that opinion and where applicable set out what the body has done to meet the requirements of s. 203BE(3). The necessary opinions at ss. 203BE(2)(a) and (b) relate to authorisation of the claim by members of the native title claim group and that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

Section 203BE(4)(a)

[87] This provision requires a statement from the representative body that they are of the opinion that the requirements set out in s. 203BE(2)(a) and (b) have been met.

[88] The certificate contains the required statements.

Section 203BE(4)(b)

[89] This provision requires the representative body to set out their reasons for being of the opinion required at s. 203BE(4)(a).

[90] The certificate provides the following relevant information with regard to the authorisation of the applicant:

- A meeting of the claim group was organised for the purposes of authorisation. The meeting was called for 3 December 2010 in Townsville.
- Discussion of the issues were had in family groups prior to the meeting and representatives of the family groups discussed the issues at the meeting itself.
- Family representatives at the meeting consulted with their elders and the general discussion continued until there was consensus.
- Once a decision was reached, through consultation with and by the elders, a clearly worded statement reflecting the general consensus was read to the meeting and the wider group then endorsed the decisions. There was no dissent to these endorsements.
- Members of the wider group confirmed that sufficient notice was given of the meeting for the purposes of making a decision about authorisation
- members of the wider group also confirmed that the meeting was representative of members of their family who were unable to attend; that their family and elders were aware of the meeting and had been consulted about the issues discussed; and that the persons in attendance had represented the views of their family members and elders not in attendance
- Having regard to their traditional laws and customs the meeting authorised the applicant persons to make the application and deal with matters arising in relation to it.

[91] The certificates provide the following relevant information with regard to the making of all reasonable efforts to ensure the application describes or otherwise identifies all of the other persons in the native title claim group:

- The identification of the claim group involved a consultant anthropologist who has undertaken extensive research in the region, including specifically on the identity of the claim group, using interviews with knowledgeable elders and considering secondary resources.
- The claim group considered the description and gave instruction to legal representatives regarding it.
- An expert anthropological report in respect of the claim group has been prepared.

[92] The certificate contains the required information pursuant to s. 203BE(4)(b).

Section 203BE(4)(c)

[93] This provision requires that, where applicable, the representative body briefly set out what it has done to meet the requirements of s. 203BE(3), namely that the representative body make all reasonable efforts to reach agreement between any overlapping claimant groups and to minimise the number of overlapping applications in relation to the application area. Section 203BE(3) further provides that a failure to comply with this subsection does not invalidate any certification of the application by a representative body.

[94] The certification states that '[t]he area covered by the Application is not also covered, in part or in whole by any other application.' And that '[t]he NQLC does not intend to lodge any overlapping claim nor is it aware of any other person's intent to do so.'

[95] In my view the certification meets the requirement of s. 203BE(4)(c).

My decision

[96] For the above reasons I am satisfied that the application has been certified under Part 11 by the only representative body that could certify the application and I am satisfied that it complies with s. 203BE(4).

[97] For the reasons set out above, I am satisfied that the requirements set out in s. 190C(4)(a) are met because the application has been certified by each representative Aboriginal/Torres Strait Islander body that could certify the application.

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.

[98] A description of the application area is provided at Schedule B of the application.

[99] Schedule B is divided into two parts. Part A, titled 'external boundary description', contains a metes and bounds description that refers to native title determination application boundaries, the Burdekin River, Euri Creek, road reserves, lot on plan and coordinate points to six decimal places.

[100] Included in the external boundary description is the specific exclusion of any land and waters subject to the QC1998/012—Birriah People—QUD6244/1998 native title determination application and the QC1997/019— Juru (Cape Upstart) People—QUD6249/1998 native title determination.

[101] Part B provides details of areas within the external boundaries not covered by the application. This is a list of general exclusions.

[102] Schedule B also refers to Attachment B which is a list of non freehold land tenure in the application area, produced by the Tribunal's Geospatial services, as at August 2010.

[103] Schedule C refers to Attachment C which contains an A4 copy of an A3 colour map titled 'Combined Juru People' prepared by the Tribunal's Geospatial services on 24 July 2013. The map includes:

- the application area depicted by a bold blue outline and stipple fill;
- the Juru (Cape Upstart) People determination area shown as a dashed orange outline with orange stipple fill;
- a land tenure background with selected allotments labeled with lot on plan identifiers;
- major towns shown and labeled;
- a locality plan;
- scalebar, northpoint, coordinate grid; and
- notes relating to the source, currency and datum of data used to prepare the map.

[104] Section 190B(2) requires that the information provided in the boundary description and map be sufficient for the Registrar to be satisfied that it can be said with reasonable certainty

whether the native title rights and interests are claimed in the particular land and waters covered by the application. That is, the written description and map should be sufficiently clear and consistent.

[105] I have had regard to the Geospatial assessment provided by the Tribunal's Geospatial Services on 9 December 2013. The Geospatial assessment states that the area covered by the application includes the area covered by the pre-combination Juru People and Juru People #2 applications and that the area does not include any areas which have not previously been claimed in the original applications.

[106] The Geospatial assessment further concludes that the description and map are consistent and identify the application area with reasonable certainty. Having also considered the map and boundary description contained in the application, I agree with that conclusion.

[107] Given the above, I am satisfied that the information and map 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.

[108] The applications satisfies the conditions of s. 190B(2).

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.

[109] The application contains a description of the native title claim group. Thus, I must consider whether 'the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.'

Description of the native title claim group

[110] The native title claim group is described as follows:

> Membership of the Juru People's group is in accordance with the traditional laws acknowledged and the traditional customs observed by them and is based upon descent from an acknowledged Juru antecedent.
>
> The Juru People comprise all those persons who are descended from the following ancestors:
>
> - Emil Pickard;
> - Con Lymburner
> - Nellie Steel/Stell;
> - Lena Taylor;

- William Morrell and his wife Bessie Rook;
- Jinnie Ross;
- Eliza Lampton (Mother of Arthur Lampton); and
- Rosie Wake – Schedule A

The requirements of s. 190B(3)(b)

[111] The nature of the task at s. 190B(3)(b) is for the Registrar to focus upon the adequacy of the description to facilitate the identification of the members of the native title claim group, rather than upon its correctness—*Doepel* at [37] and [51].

[112] It may be that determining whether any particular person is a member of the native title claim group will require 'some factual inquiry' however 'that does not mean that the group has not been described sufficiently.'—see *Western Australia v Native Title Registrar* [1999] FCA 1591 at [67] *(WA v NTR).*

[113] In *WA v NTR*, Carr J found that a claim group description which described the group according to descent from, or adoption by, identified ancestors and their descendants was sufficiently clear to satisfy the condition of s. 190B(3)(b). Carr J found that it was possible to begin with a particular person, and then through factual inquiry, determine whether that person fell within one of the criteria identified in the description—at [67]. For the same reasons I am satisfied that the criteria for membership to the native title claim group, being descent from an apical ancestor, (as described above) is sufficient for the purposes of s.190B(3)(b).

[114] The application satisfies the condition 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.

[115] Mansfield J, in *Doepel*, stated that it is a matter for the Registrar to exercise 'judgment upon the expression of the native title rights and interests claimed'. His Honour considered that it was open to the decision-maker to find, with reference to s. 223 of the Act, that some of the claimed rights and interests may not be 'understandable' as native title rights and interests—at [99] and [123].

[116] Primarily the test is one of 'identifiability', that is, 'whether the claimed native title rights and interests are understandable and have meaning'—*Doepel* at [99].

[117] The following list of native title rights and interests claimed in the application area is included at Schedule E:

Exclusive rights and interests
Where exclusive native title can be recognised possession, occupation, use and enjoyment of the land and waters to the exclusion of all others is claimed.

Non-exclusive rights and interests
Where exclusive native title cannot be recognised the following non-exclusive rights and interests are claimed including the right to conduct activities necessary to give effect to them:

(a) the right to hunt and fish, to gather and use the resources of the land such as food and medicinal plants and trees, tubers, charcoal, ochre, stone and wax and to have access to and use of water on or in the land;
(b) the right to live on the land, to camp, erect shelters and other structures, and to travel over and visit any part of the land and waters;
(c) the right to do the following activities on the land:
    a. engage in cultural activities
    b. conduct ceremonies;
    c. hold meetings;
    d. teach the physical and spiritual attributes of places and areas of importance on or in the land and waters; and
    e. participate in cultural practices relating to birth and death, including burial rights;
(d) the right to have access to, maintain and protect places and areas of importance on or in the land and waters, including rock art, engraving sites and stone arrangements;
(e) the right to make decisions about access to the land and waters by people who acknowledge the traditional laws and customs of the native title claimants other than those exercising a right conferred by or arising under a law of the State or the Commonwealth in relation to the use of the land and waters;
(f) the right to make decisions about the use and enjoyment of the land and waters and the subsistence and other traditional resources thereof, by people who acknowledge the traditional laws and customs of the native title claimants other than those exercising a right conferred by or arising under a law of the State or the Commonwealth in relation to the use of the land and waters; and
(g) the right to share or exchange subsistence and other traditional resources obtained on or from the land and waters.

[118] It is my view that the native title rights and interests as described above are understandable and have meaning. I am satisfied that the description contained in the application is sufficient to allow the native title rights and interests to be readily identified.

[119] The application satisfies the condition of s. 190B(4).

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 nature of the task at s. 190B(5)

[120] The nature of the Registrar's task at s. 190B(5) was the subject of consideration by Mansfield J in *Doepel*. It is to 'address the quality of the asserted factual basis' but 'not to test whether the asserted facts will or may be proved at the hearing, or assess the strength of the evidence...' I am to assume that what is asserted is true and then consider whether 'the asserted facts can support the claimed conclusions'—*Doepel* at [17].

[121] The Full Court in *Gudjala FC* agreed with Mansfield J's characterisation of the task at s. 190B(5). The Full Court also said that a 'general description' of the factual basis as required by s. 62(2)(e), provided it is 'in sufficient detail to enable a genuine assessment of the application by the Registrar under s. 190A and related sections, and [is] something more than assertions at a high level of generality', could, when read together with the applicant's affidavits swearing to the truth of the matters in the application, satisfy the Registrar for the purpose of s. 190B(5)—at [83] to [85] and [90] to [92].

[122] The above authorities establish clear principles by which the Registrar should be guided when assessing the sufficiency of a claimants' factual basis:

- the applicant is not required 'to provide anything more than a general description of the factual basis'—*Gudjala FC* at [92];
- the nature of the material provided need not be of the type that would prove the asserted facts—*Doepel* at [47]; and
- the Registrar is to assume the facts asserted are true, and to consider only whether they are capable of supporting the claimed rights and interests—*Doepel* at [17].

[123] It is, however, important that the Registrar consider whether each particularised assertion outlined in s. 190B(5)(a), (b) and (c), is supported by the claimant's factual basis material. Dowsett J in *Gudjala [2007]* and *Gudjala People #2* [2009] FCA 1572 (*Gudjala [2009]*) gave specific content to each of the elements of the test at s. 190B(5)(a) to (c). The Full Court in *Gudjala FC*, did not criticise generally the approach taken by Dowsett J in relation to each of these elements in *Gudjala [2007]*[1], including his assessment of what was required within the factual basis to support each of the assertions at s. 190B(5). His Honour, in my view, took a consonant approach in *Gudjala [2009]*.

[124] In line with these authorities it is, in my view, fundamental to the test at s. 190B(5) that the claim provide a description of the basis upon which the claimed native title rights and interests are alleged to exist. More specifically, this was held to be a reference to rights vested in the claim group and further that 'it was necessary that the alleged facts support the claim that the identified

[1] See *Gudjala FC* [90] to [96]

claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)'—*Gudjala [2007]* at [39].

[125] The following information is relevant to my consideration of this requirement:

- Schedule E;
- Schedule F;
- affidavits of **[Ancestor 1 – name deleted]** sworn 3 December 2010 and 16 December 2011; and
- anthropological report 'Response to a Preliminary Assessment' dated 30 March 2011 and provided as additional material in support of the Juru People claimant application.

[126] I will consider the content of the application along with these reports against each of the three assertions necessary for the requirement of s. 190B(5) below.

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

[127] Dowsett J observed in *Gudjala [2007]* (not criticised by the Full Court on appeal), with respect to this aspect of the factual basis, that the applicant must demonstrate:

- that the claim group as a whole presently has an association with the area, though not all members must at all times;
- that there has been an association between the predecessors of the whole group and the area over the period since sovereignty—at [52]; and
- that there is information which supports that the claim group is associated with the 'area as a whole'—*Gudjala [2009]* at [67].

[128] I also note that broad statements about association with the application area that do not provide geographic particularity may not provide the requisite factual basis for this section—*Martin v Native Title Registrar* [2001] FCA 16 at [26].

The applicant's factual basis material

[129] Schedule F of the application provides some general assertions that speak to the requirements of s. 190B(5)(a):

1. Prior to 26 January 1788, Juru People had rights and interests in relation to an area which includes the land and waters subject to the application.

2. The members of the native title claim group are descendants of persons who were present in the application area as Juru People prior to and as at 26 January 1788.

3. From prior to 26 January 1788 to the present day, members of the native title claim group and their ancestors have from time to time been present on, used and enjoyed the area subject to this application, in accordance with the laws acknowledged, and the customs observed, by the Juru People.

4. The traditional connection of the Juru People with the application area and the native title rights and interests which derive from their traditional laws and customs, were inherited from their ancestors in accordance with those traditional laws and customs.

5. Material evidence of the physical connection of the ancestors of the Juru People to the application area exists in the application area and surrounding country. It is illustrated by the presence of archaeological evidence of their occupation of the area both pre-contact and post-contact. The claim group members' knowledge of sites in the application area demonstrates the systemic and extensive occupation and use by Aboriginal people of the claim area both before and after the acquisition of sovereignty by the British, and at the time of first contact with Europeans—at [A].

[130] I note that the combined application is accompanied by two affidavits from **[Ancestor 1 - name deleted]**, one sworn 3 December 2010 and the other sworn 16 December 2011. These two affidavits are in substantially the same terms. The more recent affidavit, being the one sworn 16 December 2011, has in some places more detail regarding place names or expanded information regarding cultural practices. Therefore, for the purposes of my consideration throughout this decision, I will refer to information contained in the 16 December 2011 affidavit unless otherwise stated.

[131] **[Ancestor 1 - name deleted]** states that:

> I was born in Bowen on 11 January 1940. My father was **[name deleted]**, the son of **[name deleted]** and **[name deleted]**. My mother was **[name deleted]**. My parents both lived at Euri Creek and both went to Euri Creek School, which is in the claim area. They lived in Juru country all of their lives—at [4]

[132] **[Ancestor 1 - name deleted]**'s affidavit details the extent of Juru country. He states that '[t]he northern boundary is the Burdekin River, to the South is the Don River up to Mount Gordon, to the West are the ranges, and East is to the *[sic]* out to the sea.'—at [14]. Further **[Ancestor 1 - name deleted]** provides a list of place names that have 'language names', he provides the 'language names' for Mt Roundback, Salisbury Plains and surrounding wetlands and Creeks—at [17]. I understand that all of these places fall within the combined application area.

[133] **[Ancestor 1 - name deleted]** talks of places that he can and cannot go according to traditional law and custom, of his obligation to protect sacred sites and burial sites across the application area and also details the many places he and his family fish and hunt. In many instances **[Ancestor 1 - name deleted]** talks of having been taught about these places and the traditional laws and customs associated with them by his father and how he now teaches his grandchildren about them. Some examples are as follows:

> We can go to most of the places on our country, but there are some places where it is not good for us to go. My father told me that you get a bad feeling around Curlewis Hill, which is near Commencement Point—at [20];
>
> Corroboree place is in Bowen near where the High School is now.
>
> Where Bells Gully comes off the Don River and around Round Back mountain are important sites as they are where some Juru people lived.
>
> I know Cape Upstart was a meeting place and also there are burials there too.—at [21] to [23].

[134] And;

> We have always, and still do, fish and crab all through the Abbot Point area, Euri creek, waterholes near Euri Creek, Spring Creek, the Don River, the Elliot River, outside of camp island, Nobbies Creek near Mine Island, Cape Creek, Mollongle Creek and out to sea. My father and uncles taught me how to fish and crab when I was young. Now I take my grandchildren out onto country during their school holidays.—at [39]

[135] The anthropological report submitted with the Juru People application in response to a preliminary assessment by a delegate of the Registrar dated 30 March 2011 (the report) also provides a great deal of information regarding the association of the claim group and their predecessors with the application area.

[136] The report asserts that the Juru traditional boundaries can be summarised as follows:

> The northern boundary is most likely located at the Burdekin River, primarily on its southern side. The Southern boundary is most likely located in the vicinity of Bowen, at and around the Don River, or to the immediate south of Bowen. The eastern boundary is most likely to include the offshore waters and may include the associated islands and waters that are adjacent to the mainland from Bowen in the south to the mouth of the Burdekin River (southern side) in the north. The western boundary for Juru territory most likely extends from Mt Pleasant in the southwest, running northwest past Mt Abbot to the Burdekin River (north of Millaroo), and running north from here following the Burdekin through Kirknie to Home Hill—at [8].

[137] The report argues that there is pre-historic evidence of Aboriginal occupation of the Abbott Point area. This includes archaeological surveys and excavations in and around the Abbot Point area which have revealed shell middens, tools made of stone and lithic tools for gathering and resource production. The report notes that these materials demonstrate a presence by Aboriginal people in the area long before British sovereignty.

[138] The report also links these archaeological remnants to the Juru People's cosmology being that they have inherited the right to use and possess the land that forms their 'country' from their ancestors through the passing on of traditional law and custom:

> To the Juru People, Abbott *[sic]* Point constitutes an ancestral and totemic landscape, and archaeological remains found here provide evidence to the Juru People supporting their belief system and associated practices—at [11].

[139] The report also refers to early European contact with the Juru people and documentation of this contact. The report discusses the observations of the crew of sailing vessels that entered the area in 1839 and 1843. In particular the report discusses the records kept by **[name deleted]** a ship wreck survivor who lived with various local Aboriginal groups between Townsville, the Burdekin River and Bowen for approximately 17 years from 1846 to 1863. Juru was one of the groups document by **[name deleted].** He detailed the language, fishing, hunting and gathering practices, medicines, marriage practices and culturally specific ceremonies as well as the cosmological or belief system that informed the practices of the Aboriginal people in this region:

> These accounts indicate that the lower Burdekin River and Bowen regions (including Cape Upstart) were exploited and occupied by Aboriginal people from before initial contact with European people, "and by inference, from before this time" (Pannell 2009, p121). Further, these early accounts explain that organized local 'tribal' groups existed, that these groups spoke dialects of an un-named language, and that ceremonies, life-cycle events and gathering between neighbouring 'tribes' were part of their life-worlds—at [14]

[140] I understand that since the beginning of observation or research into Aboriginal people in the Abbot Point area various terminologies have been employed to label or refer to the group or tribe occupying the area. According to the report the language-based 'tribal' name Juru is often thought to have been introduced by Tindale in a work published in 1974, however, further research has established that 'Juru' is phonetically similar to other earlier employed terms such as Euronbba and Yurokappa which were recorded as far back 1886. The report argues that

> The "phonetic similarity" between Euronbba, Yurokappa, and 'Juru', "suggests that 'Juru' is a term that has its socio-linguistic origins in a pre-sovereignty Aboriginal linguistic landscape, rather than just originating with the publication of Tindale's work"—at [19]

[141] I therefore understand that there have been ongoing observations since the point of very early European contact of a continuing tribal group that is now commonly referred to as 'Juru'. The report states that Juru is a collective social identity that is linked with a connection to place or places of traditional country based on descent from ancestors and that the term denotes a social unit or larger group than simply 'family'.

[142] In addition to the historical information regarding the existence of a group of Juru People associated with the application area back to and before the point of British sovereignty, the report also speaks to the current association of claim group members with the area today.

[143] The report references **[Ancestor 1 – name deleted]**'s affidavit stating that it 'explains clearly that claimants engage in activities such as hunting, gathering, maintenance, and cultural

heritage surveying and native title negotiations.' The report also asserts that **'[Ancestor 1 – name deleted]** and his son **[Applicant 1 – name deleted]** have intimate knowledge of locations in and around Abbot Point that are significant to their family and to Juru people' these sites, the report states include burial sites and rock art sites—at [31].

[144] In addition to referencing the information provided by **[Ancestor 1 - name deleted]** in his affidavit the report speaks of another Juru elder, **[name deleted]** whose 'bloodline' connection is through the Juru apical ancestor **[name deleted]** According to the report '[a]s a recognized elder with sacred traditional knowledge **[name deleted]** regularly performs smoking ceremonies as well as performing welcome to country ceremonies on Juru Country'. The report states that **[name deleted]** grew up in Bowen and has extensive knowledge of Abbot Point and Cape Upstart areas and has been involved in the reburial of skeletal remains of Juru ancestors in Home Hill and Bowen—at [32].

My consideration

[145] The information before me, examples of which I have extracted above, references many places throughout the application area. The report details the existence of an Aboriginal community in the application area at first European contact and by inference before British sovereignty. I am satisfied that the factual basis is sufficient to support an assertion that the Juru people are the tribal group to which these historical accounts refer to as being associated with the application area both physically and spiritually.

[146] Examples of the Juru people's current association with the area are provided in **[Ancestor 1 - name deleted]**'s affidavit. The report also asserts that the Juru people as a group continue to be associated with the application area and have an intimate knowledge of the sacred sites and important cultural places on the application area. As outlined above **[name deleted]** and **[Ancestor 1 - name deleted]** and their knowledge of the application area and continued presence on it are provided as examples of the claim group's current association with the application area.

[147] There is, in my view, sufficient information to establish a factual basis for the claim group, and their predecessors, having an association with the application area. A great degree of geographic particularity, information about the passing on of cultural place specific knowledge through the generations, as well historical and archaeological accounts and observations of cultural association with the land the subject of the application have been provided.

[148] For these reasons I am satisfied that there is a sufficient factual basis for the assertion that the native title claim group have, and the predecessors of those persons had, an association with the application area.

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

[149] Dowsett J in *Gudjala [2007]* linked the meaning of 'traditional' as it appears in s. 190B(5)(b) with that at s. 223(1) in relation to the definition of 'native title rights and interests'. This idea of 'traditional' necessarily requires consideration of the principles derived from *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta*). This aspect of Dowsett J's decision was not criticised by the Full Court on appeal—*Gudjala FC* at [90] to [96].

[150] Dowsett J's examination of *Yorta Yorta* lead him to conclude that a necessary element of this aspect of the factual basis is the identification of a relevant society at the time of sovereignty, or at least, first European contact—*Gudjala* [2007] at [26]. I understand that a sufficient factual basis needs to address that the traditional laws and customs giving rise to the claimed native title have their origins in a pre-sovereignty normative society with a substantially continuous existence and vitality since sovereignty.

[151] Dowsett J stated in *Gudjala* [2007] that the facts necessary to support this aspect of the factual basis 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—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— at [65]; and see also at [66] and [81]; and
- the link between the claim group described in the application and the area covered by the application, which, 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'—at [66] and see also at [81].

The applicant's factual basis material

[152] Schedule F of the application outlines that the Juru People abide by the traditional laws and customs inherited from their ancestors through spiritual beliefs, in particular it states that the Juru People are part of a wider regional system of laws and customs and it is their observation of these laws and customs that give rise to the claimed native title rights and interests:

> Anthropological research relevant to the claim group and application area, is consistent with the view that the application area is the traditional country of the Juru People. Such research and the life histories of the claimants, and of the ancestors known to them, indicate that the claimants continue to adhere to traditional beliefs which have been passed down to them by their ancestors, and to observe traditional practices. This traditional transmission of knowledge of their laws and customs provides the on-going source of the rights and interests that Juru People possess in relation to the claimed land and waters…

> Juru People are one of the groups of local Aboriginal people that fit within the regional system of Birri Gubba laws and customs
>
> Through their ongoing observation of Birri Gubba laws and customs the native title claim group has continued to possess and pass on to their descendants the native title rights and interests which have as their source Birri Gubba traditional laws and customs—at [11], [16] and [17].

[153] The report discusses the Birri Gubba regional system of laws and customs in somewhat more detail and provides further information about the spiritual beliefs from which the Juru people derive the claimed native title rights and interests.

> *Juru* is a language-labeled group that falls within the larger regional society called 'Birri Gubba'. Within this regional society are 10 localized land-holding groups, of which *Juru* is one. The other groups are *Bindal, Gia, Ngaro, Yuipera, Jannga, Birri, Wirri, Barada Barna, and Ilba*. These landholding groups are further divided into 2 geographical cultural categories, the coastal or saltwater people, and the freshwater or inland people (Pannell 2009). The significance of the Birri Gubba Regional Society being the regional system of law and custom, defined by Pannell (2009) as 'Birri Gubba Law', means that the law and customs of the 10 land-holding groups are collectively held in this one body at the regional level. Furthermore, rights and interests also derive from this regional system of laws and customs. The 10 landholding groups identify with, acknowledge, and observe the laws and custom of the Birri Gubba Regional Society at the localized level (eg. In relation to group names, oral traditions, tribal territory, dialect etc.) However, all members of the 10 landholding groups acknowledge the wider system of Birri Gubba Society, the laws and customs that derive from this, and their membership as 'Birri Gubba People' within this regional system (Pannell 2009, p141)—at [23].

[154] According to the report, the Juru People derive their association with the application area and the continuation of their claimed native title rights and interests in it arise as a result of the 'bloodline law'. This is the idea that Juru people inherit the cultural legacy of their ancestors through descent from those ancestors.

> The 'bloodline law' as stated by Juru People explains that a person is a traditional owner (or not), establishes their status as a Juru persons, and provides the basis for their obligations to the landholding group. Significantly, 'bloodlines' explicate a link between descent, ownership of land, group membership, and rights and interests—at [28].

[155] It is asserted in the report that the application area is regarded as a totemic landscape by the Juru people and that according to Juru mythology this landscape is part of a dreaming track created in the Dreamtime by the **[Dreaming being – name deleted]**. **[Dreaming being - name deleted]** and its journey is understood as part of creation mythology for the Juru People and is significant to their spiritual understanding of how the landscape, features, islands, rivers and mountains, came to be. It is asserted that it is the **[Dreaming being - name deleted]** totem that provides the Juru People with a unique social identity and associated with this belief are a

number of rules. The **[Dreaming being - name deleted]** rules provide for the use of land, access to places and use of resources across Juru country. I understand that it is asserted that the entitlement to possession of and use of the land the subject of the application area arises as a direct result of the **[Dreaming being - name deleted]** totemic mythology— [29] and [30].

[156] The report discusses at some length the importance of Juru People protecting their country and the sacred sites and places of archeological significance as central to the continuation of the Juru traditional laws and customs.

[157] In addition to the information in the report, the affidavit of **[Ancestor 1 - name deleted]** details the many traditional cultural laws and customs he learnt from his father, continues to practice today, and teaches to his grandchildren. It is asserted in both the report and the affidavit that the Juru People have a strong oral tradition of passing on traditional law and custom from generation to generation. **[Ancestor 1 - name deleted]** talks in detail of the cultural practices of fishing, hunting, camping, collecting and eating bush tucker and the use of bush medicines. Some examples of the customary practices relating to fishing undertaken today by **[Ancestor 1 - name deleted]** and of their passing between older and younger generations are as follows:

> My father used to make fishing nets; he taught us how to do this too. Us kids used to go down the creek at high tide, put the net across and at low tide we used to drag it up the creek. It would be full by the time we pulled it out.
>
> We used to catch red brim in the mangroves. They like the places under the mangrove roots. My father taught me how to catch them by hand. We stick our hand down slowly underneath the mangrove and tickle the red brim under their stomach, they roll over and you grab them—at [34] to [35];
>
> My father and uncles taught me how to fish and crab when I was young. Now I take my grandchildren out onto country during their school holidays. I show them how to go fishing and crabbing just like I was taught by my father. My father took me fishing all around Juru Country—at [39].

[158] A further example from **[Ancestor 1 - name deleted]**'s affidavit of the Juru People's customary practices around fishing is as follows;

> We roast fish on the coals. You put the fish under the sand and the coals, and light the fire again. You wrap the fish up and when you take off the wrapping all the scales and skin come off and you just have the flesh. We cook crabs on a camp fire, we boil them with or without the shell. You can also roast a crab. With prawns we just boil them in water for a few minutes. My father taught me how to cook fish, crabs and prawns—at [47].

[159] **[Ancestor 1 - name deleted]** also details the traditional practices of hunting and the way he was taught about hunting by his father. He states that the Juru people hunt a number of different

animals including, scrub turkey, wild pigs, whiptails, wallabies, kangaroo, kangaroo rats, bandicoot, topknot pigeons, hornbills, goanna, squatter pigeons and ducks. He states:

> My father taught me much about hunting too. He taught me how to get possums out of trees. The first thing you do is get a stick, poke it in the hole, if no fur comes out on the end of the stick, you don't put your hand down there because it could be a snake. If fur comes out, you put your hand down and get a possum—at [50].

[160] He also discusses eating short neck turtles and turtle eggs, but not long neck turtles. **[Ancestor 1 - name deleted]** talks of the need to protect turtles now as they are endangered, he states that they are 'an important part of our country'.

[161] **[Ancestor 1 - name deleted]** states that in addition to learning about hunting from his father he was taught to track by his grandmother Bessie.

[162] Many more examples like those relating to hunting and fishing are provided with regard to camping, collecting bush tucker and bush medicine. Again it is asserted that these traditional practices are primarily learnt from **[Ancestor 1 - name deleted]**'s father, in some instances, in particular with regard to a women's bush medicine used to induce abortion, he talks of his sister being taught by his grandmother.

[163] **[Ancestor 1 - name deleted]** provides detailed information about the types of foods that the Juru People eat, the traditional ways they source those foods and prepare them or cook them. He talks of treating mosquito bites, dysentery and fevers with bush medicines and of the importance of sharing food with other Juru people and protecting sacred sites, especially burial sites and a rock painting site he learnt about from his father.

[164] With regard to the existence of a pre-sovereignty society, or at least a society that existed at first European contact living according to an identifiable system of laws and customs, I refer to my reasons above at s.190B(5)(a). In particular I note that the report provides detail about the observations of sailors in the 19th Century, especially the observation of shipwreck survivor **[name deleted].** It is asserted that **[name deleted]** documented language, fishing, hunting and gathering practices, medicines, marriage and culturally specific ceremonies. The report asserts that the society **[name deleted]** observed and the laws and customs he wrote about are that of the Juru people. It is asserted that these activities arise as a result of the traditional laws and customs of the Birri Gubba regional society and the report asserts that the Juru people today have inherited this system of law and custom and continue to exercise their native title rights in much the same way as their ancestors did.

My consideration

[165] The material before me provides a great deal of information that supports a factual basis that there exist traditional laws acknowledged by, and traditional customs observed by the native title claim group that give rise to the claimed native title rights and interests.

[166] The factual basis material asserts that there was an Aboriginal society abiding by identifiable laws and customs prior to British sovereignty, details of the observations of Europeans throughout the 19th Century support this assertion. The report makes it clear that there is a regional system of laws and customs known as the Birri Gubba laws that include a tribal group being the Juru people, predominately associated with Abbot Point and surrounding regions.

[167] I understand that the **[Dreaming being - name deleted]** Dreaming story is central to the identity of the Juru people specifically and that this mythology dictates a set of rules around the use of land and access to places that are taught to generations of Juru people through the passing of cultural knowledge by oral tradition.

[168] It is asserted that the laws and customs to which **[Ancestor 1 - name deleted]** subscribes and details in his affidavits, that his father taught him, and that he teaches his grandchildren, are substantially the same laws and customs that have been passed through generations back to the point of creation of the **[Dreaming being - name deleted]** time.

[169] It is my view that all of the information before me provides a sufficient factual basis for the assertion that the traditional laws and customs acknowledged and observed by the Juru people today have their origins in a pre-sovereignty normative society with a substantially continuous existence since that time. It is clear that there is a rich tradition with respect to the use of land, especially around the use of the resources of the land such as the way that food is collected, hunted and prepared, as well as a responsibility for protecting sacred sites and culturally significant areas across the claim area.

[170] **[Ancestor 1 - name deleted]** explains that his grandparents are apical ancestors listed in Schedule A at the claim group description, similarly **[name deleted]** who is an elder discussed in the report derives his understanding of Juru law and custom from his ancestor, **[name deleted]**, also a listed apical ancestor. I understand that the 'bloodline law' of inheritance of cultural practice through descent from ancestors is central to the social organisation of the Juru People and research indicates that this 'bloodline law' establishes group membership from which Juru people derive the right to conduct traditional cultural activities on country, including the application area.

[171] It is my view that the material before me is sufficient to establish a factual basis necessary for the requirement at s. 190B(5)(b) to be met.

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

[172] I am of the view that this requirement is also necessarily referrable to the second element of what is meant by 'traditional laws and customs' in *Yorta Yorta*, being that, the native title claim group have continued to hold their native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way—at [47] and also at [87].

[173] *Gudjala [2007]* 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; and
- 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].

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

[175] In addressing this aspect of the factual basis Dowsett J in *Gudjala [2009]* considered that, should the claimants' factual basis rely on the drawing of inferences, it was necessary that a clear link be provided between the pre-sovereignty society and the claim group:

> Clear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs may justify an inference of continuity—at [33].

[176] As discussed in my reasons above there is a great deal of information regarding the existence of an Aboriginal society at the time of first European contact (likely around the early 19th Century when contact with sailors occurred) and by inference back to British Sovereignty.

[177] I am satisfied, as discussed above, that there existed in the early to mid 1800s a society of Aboriginal people, abiding by a system of traditional laws and customs. There is also substantial information both in the report and **[Ancestor 1 - name deleted]**'s affidavit that detail the current cultural practices of the claim group. As detailed above these current practices have been taught to the claim group by their predecessors and a rich pattern of teaching laws and customs is demonstrated in the material. Also the current claim group, through the example of **[Ancestor 1 - name deleted]** and **[name deleted]** are able to be linked directly to some of the named apical ancestors for the group. It is my view that the strong link between the apical ancestors and the current claim group members, the pattern of intergenerational transmission of key cultural practices and the historical information regarding the society that existed at the time of first

European contact can be read together as demonstrating a sufficient factual basis for the assertion that that the native title claim group have continued to hold the native title in accordance with their traditional laws and customs.

Conclusion

[178] 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).

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.

[179] The pertinent question at this requirement is whether or not the claimed rights and interests can be prima facie established. Mansfield J, in *Doepel,* discussed what 'prima facie' means stating that, 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'—at [135]. It is accepted that the Registrar may be required to undertake some 'weighing' of the material or consideration of 'controverting evidence' in order to be satisfied that this condition is met—at [127].

[180] In undertaking this task I am of the view that I must have regard to the relevant law as to what is a native title right and interest as defined in s. 223(1) of the Act. I must therefore consider, prima facie, whether the rights and interests claimed:

- exist under traditional law and custom in relation to the land or waters in the application area;
- 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.

[181] The 'critical threshold question' for recognition of a native title right or interest under the Act 'is whether it is a right or interest' in relation to land or water'—*Western Australia v Ward* [2002] HCA 28 (*Ward HC*), Kirby J at [577]; remembering '[t]hat the words 'in relation to' are of wide import'—(*Northern Territory of Australia v Wlyawayy, Kaytetye, Wurumunga, Wakaya Native Title Claim Group* [2005] FCAFC 135 (*Alyawayy FC*).

[182] The claimed native title rights and interests that I consider can be prima facie established are identified in my reasons below. Where certain rights and interests are similar or rely on similar factual basis material I have grouped them together.

Exclusive rights and interests

Where exclusive native title can be recognised possession, occupation, use and enjoyment of the land and waters to the exclusion of all others is claimed.

[183] In *Ward HC* the majority considered that the 'expression "possession, occupation, use and enjoyment...to the exclusion of all others" is a composite expression directed to describing a particular measure of control over access to land' and conveys 'the assertion of rights of control over land'—at [89] and [93].

[184] Further, it was held 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 posses, occupy, use and enjoy land to the exclusion of all others—at [88].

[185] The Court in *Griffiths v Northern Territory of Australia* [2007] FCAFC 178 (*Griffiths FC*) examined the requirements for proving that the right to exclusive possession is vested in the native title claim group, finding that:

> ... 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.—at [71].

[186] I therefore understand that in order for this right to be established, prima facie, the material before me must provide a factual basis for the native title claim group exercising some level of control of access and use of the land the subject of the application.

[187] It is my view that the material before me does not speak to the claim group exercising control or exclusive possession over the claim area. It is my view that there is insufficient information before me to establish this right, prima facie.

[188] **Outcome:** not established, prima facie.

Non-exclusive rights and interests

(a) The right to hunt and fish, to gather and use the resources of the land such as food and medicinal plants and trees, tubers, charcoal, ochre, stone and wax and to have access to and use of water on or in the land;

[189] I refer to my reasons at s. 190B(5) above regarding the kinds of information in **[Ancestor 1 - name deleted]**'s affidavit that speaks to him exercising his traditional right to in particular, fish, hunt, collect bush tucker and bush medicines.

[190] Some further examples include:

> My father used to take us out fishing at Spring Creek. We would catch lots of perch here. We also get perch down near the train bridge at Euri Creek. We used to take a tin down there with us and get shrimp, which we'd boil up and eat—at [40]
>
> We also get blackberries, wild figs, wild passionfruit and hibiscus flower. We eat those fruits. We also eat wild gherkins, yams, onions, stalks of water lilies and pig weed—at [60]

[191] And;

> We us *[sic]* the leaves of the *cyderchusis* for dysentery. We also use the sinews from the Poplar Gum, but don't swallow it or else you get constipated, just chew it—at [64].

[192] As discussed in my reasons above the report also provides an example of claim group elder **[name deleted]** being involved in resource hunting and gathering.

[193] It is my view that the above examples provide a sufficient factual basis for me to be satisfied, prima facie, that this is a right held by the claim group, pursuant to traditional law and custom.

[194] **Outcome:** established, prima facie.

(b) The right to live on the land, to camp, erect shelters and other structures, and to travel over and visit any part of the land and waters;

[195] It is clear from the information in **[Ancestor 1 - name deleted]**'s affidavit that he has travelled extensively across the application area, in order to hunt and fish in particular, however he also briefly discusses visiting burial and other sacred sites throughout the application area that he has learnt about and is responsible for protecting.

[196] Similarly, the information in the report concerning **[name deleted]** indicates that he travels across the application area visiting different sites for cultural heritage purposes, hunting and gathering and to perform ceremonies—at [32].

[197] Finally **[Ancestor 1 - name deleted]** talks of camping all across the application area with his whole family;

> We camped all around Juru country, to name a few places, I camped at Normanby, Mollongle creek, Saltwater creek, the Elliot River, Campy Island, Euri Creek, Meatworks creek, Jackson's Gully, Cattle Creek. There is reef along the coast between Abbot Point and Cape Upstart. We catch fish here. My whole family used to go camping too. We'd put a big fly sheet up. There were no eskies in those days. We had to eat everything we caught or put it in a wet sack bag to keep it cool—at [56].

[198] It is my view that the material demonstrates that this right exists, prima facie.

[199] **Outcome:** established, prima facie.

(c) The right to do the following activities on the land:

- *Engage in cultural activities*
- *Conduct ceremonies*
- *Hold meetings*
- *Teach the physical and spiritual attributes of places and areas of importance on or in the land and waters; and*
- *Participate in cultural practices relating to birth and death, including burial rights;*

[200] It is my view that the material does not disclose evidence in support of this right existing, prima facie, pursuant to traditional law and custom.

[201] The report speaks in detail about the spiritual affiliation of the Juru people to the application area and of the land tenure system and extent of Juru country but it is my view that it does not discuss the conducting of ceremonies or holding of meetings or other things relevant to establish this right, prima facie. The report references some burial sites and the performance of 'welcome to country' and smoking ceremonies by **[name deleted]**, but these are passing references only and do not provide any information for me to be satisfied that this right exists, prima facie, pursuant to traditional law and custom.

[202] Similarly, **[Ancestor 1 - name deleted]**'s affidavit references being taught how to hunt and fish and collect bush tucker by his father and also mentions that he now teaches his grandchildren about these activities. These references are not in the same level of detail as other information regarding traditional rights and interests and, in my view, do not disclose a prima facie basis upon which this right is held, pursuant to traditional law and custom.

[203] **Outcome:** not established, prima facie.

(d) The right to have access to, maintain and protect places and areas of importance on or in the land and waters, including rock art, engraving sites and stone arrangements;

(e) The right to make decisions about access to the land and water by people who acknowledge the traditional laws and customs of the native title claimants other than those exercising a right conferred by or arising under a law of the State or the Commonwealth in relation to the use of the land and water;

(f) The right to make decisions about the use and enjoyment of the land and waters and the subsistence and other traditional resources thereof, by people who acknowledge the traditional laws and

customs of the native title claimants other than those exercising a right conferred by or arising under a law of the State or the Commonwealth in relation to the use of the land and waters; and

(g) The right to share or exchange subsistence and other traditional resources obtained on or from the land and waters.

[204] It is my view that the material does not disclose enough information regarding the existence of any of the above rights, for me to be satisfied that these rights exist, prima faice, pursuant to traditional law and custom.

[205] **Outcome:** not established, prima facie.

Conclusion

[206] The application satisfies the condition of s. 190B(6).

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.

[207] I understand the phrase 'traditional physical connection' to mean a physical connection with the application area in accordance with the traditional laws and customs of the group as discussed in the High Court's decision in *Yorta Yorta—Gudjala [2007]*—at [89].

[208] Mansfield J in *Doepel* considered the Registrar's task at s. 190B(7) and stated that it requires the Registrar 'to be satisfied of particular facts' which will necessarily require the consideration of evidentiary material, however, I note that the role is not the same as that of the Court at hearing, and in that sense the focus is a confined one—at [18].

[209] Mansfield J stated:

> The focus is upon the relationship of a least one member of the native title claim group with some part of the claim area. It can be seen, as with s 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration—*Doepel* at [18].

[210] As I am required to be satisfied that at least one member of the native title claim group has, or previously had, a traditional physical connection with any part of the land or waters

covered by the application I have chosen to concentrate my attention on the factual basis provided pertaining to one member of the claim group, namely **[Ancestor 1 - name deleted]**.

[211] Much of the relevant information provided in **[Ancestor 1 - name deleted]**'s affidavit has been extracted or referred to in my reasons above at both s. 190B(5) and s. 190B(6).

[212] **[Ancestor 1 - name deleted]** states that he is a member of the Juru claim group through his father **[name deleted]** and his parents **[name deleted]** and **[name deleted]**—at [5].

[213] I understand that **[Ancestor 1 - name deleted]** has lived and worked his whole life on the claim area and that that is true of the last four generations of his family—at [5]. **[Ancestor 1 - name deleted]** states that 'all my family grew up in Bowen and in the Abbot Point area. I have been told a lot of stories about our family history and the people of this area; that we belong to this land'—at [11].

[214] Further, **[Ancestor 1 - name deleted]** states that his uncles lived around Abbot Point and he and his family would visit there often to camp, fish and crab. **[Ancestor 1 - name deleted]** states that his family owned some land near Euri Creek that has been handed from his grandparents through the generations to his uncles—at [12].

[215] It is clear from **[Ancestor 1 - name deleted]**'s affidavit that there are many places across the application area with which he is familiar. He details at [17] many places that have 'language' names and provides the meaning of these language names. For example 'the wetlands are *Bobbawabba*, which means large swamp in our language'.

[216] **[Ancestor 1 - name deleted]** is also able to speak of the significant ceremonial sites, burial sites and sacred sites such as rock art paintings across the application area, of how he visits and protects those and how he learnt about them from his father.

[217] It is clear from the information provided in **[Ancestor 1 - name deleted]**'s affidavit that he has a current physical connection with the application area. I am also satisfied that the material can be said to be 'traditional' as it is clear that the connection **[Ancestor 1 - name deleted]** has with the area and the laws and customs he acknowledges and observes in relation to the area have been taught to him by his father and other family members and that they are rooted in a belief that their country and the laws and customs to which the claim group adhere have been passed through the generations from their ancestors.

[218] For these reasons I am satisfied that the material is sufficient to support an assertion that **[Ancestor 1 - name deleted]** currently has, and previously had, a traditional physical connection with the application area.

[219] The application satisfies the condition of s. 190B(7).

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 in relation to an area; 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 provision 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 in relation to an area; 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 provision 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 claimed confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.
(4) However, subsection (2) or (3) does not apply to an application if:
(a) the only previous exclusive possession act or previous non-exclusive possession act concerned 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 section 47, 47A or 47B, as the case may be, applies to it.

[220] In the reasons below, I look 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.

Section 61A(1)

[221] 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.

[222] The geospatial assessment and my own searches of the Tribunal's mapping database, iSpatialView, confirm that the application area is not covered by an approved determination of native title.

[223] In my view the application does not offend the provision of s. 61A(1).

Section 61A(2)

[224] 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.

[225] Schedule B expressly excludes 'any area in relation to which a 'previous exclusive possession act', as defined in section 23B of the *Native Title Act*, was done'.

[226] In my view the application does not offend the provision of s. 61A(2).

Section 61A(3)

[227] 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.

[228] Schedule E states that exclusive native title, being possession, occupation, use and enjoyment of the land and waters to the exclusion of all others is only claimed where such a right can be recognised.

[229] In my view, the application does not offend the provision of s. 61A(3).

Conclusion

[230] In my view the application does not offend any the provisions of ss. 61A(1), 61A(2) and 61A(3) and therefore the application satisfies the condition of s. 190B(8).

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.

[231] I consider each of the subconditions of s. 190B(9) in my reasons below.

Section 190B(9)(a)

[232] Schedule Q states that there is no claim by the native title claim group for the ownership of minerals, petroleum or gas wholly owned by the Crown.

[233] The application satisfies the subcondition of s. 190B(9)(a).

Section 190B(9)(b)

[234] Schedule P of the application states that 'no claim is made by the native title claim group for exclusive possession of all or part of an offshore place.'

[235] The application satisfies the subcondition of s. 190B(9)(b).

Section 190B(9)(c)

[236] The application does not disclose, and I am not otherwise aware, that the native title rights and interests have otherwise been extinguished.

[237] The application satisfies the subcondition of s. 190B(9)(c).

Conclusion

[238] In my view the application does not offend any of the provisions of ss. 190B(9)(a), (b) and (c) and therefore the application meets the condition of s. 190B(9).

[End of reasons]

146°30'E 146°45'E 147°0'E 147°15'E 147°30'E 147°45'E

19°15'S 19°30'S 19°45'S 20°0'S

CORAL SEA

GREAT BARRIER REEF MARINE PARK

CAUTION: THIS MAP IS NOT TO BE USED FOR MARITIME NAVIGATION PURPOSES
Refer to the appropriate hydrographic chart for depth information

CAUTION: THIS MAP IS NOT TO BE USED FOR MARITIME NAVIGATION PURPOSES
Refer to the appropriate hydrographic chart for depth information

TOWNSVILLE

THURINGOWA

BOWLING GREEN BAY NATIONAL PARK

Commencement Point

QUD80/2005
Gudjala People
(QC2005/006)

Gudjala People
Determination
Areas

QUD6244/1998
Birriah People
(QC1998/012

Juru
Determination
Areas

Schedule Extract Attachment
QUD503/2016 (QC2016/005)
Map of Application Area,
Attachment C of the Application
Page 1 of 1, A4, 01/07/2016

National
Native Title
Tribunal

Native Title Determination Application

Bindal People

Legend

Bindal People

Native Title Determination

Abutting Claims

QUD6244/1998 Birriah People

QUD80/2005 Gudjala People

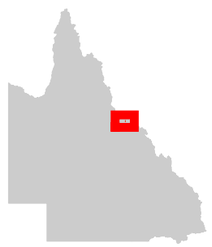
0 10 20
Kilometres

Geocentric Datum of Australia 1994

Prepared by:
Geospatial Services, National Native Title Tribunal
23 March 2016

Data Sources:
Application boundary compiled by National Native Title Tribunal based on information or instructions provided by the applicants.
Determination boundary compiled by National Native Title Tribunal based on information or instructions provided by the State.

Topographic image data is © Commonwealth of Australia and is used under licence from Geoscience Australia, 2008.
NOTE: Topographic images should be used as a guide only.



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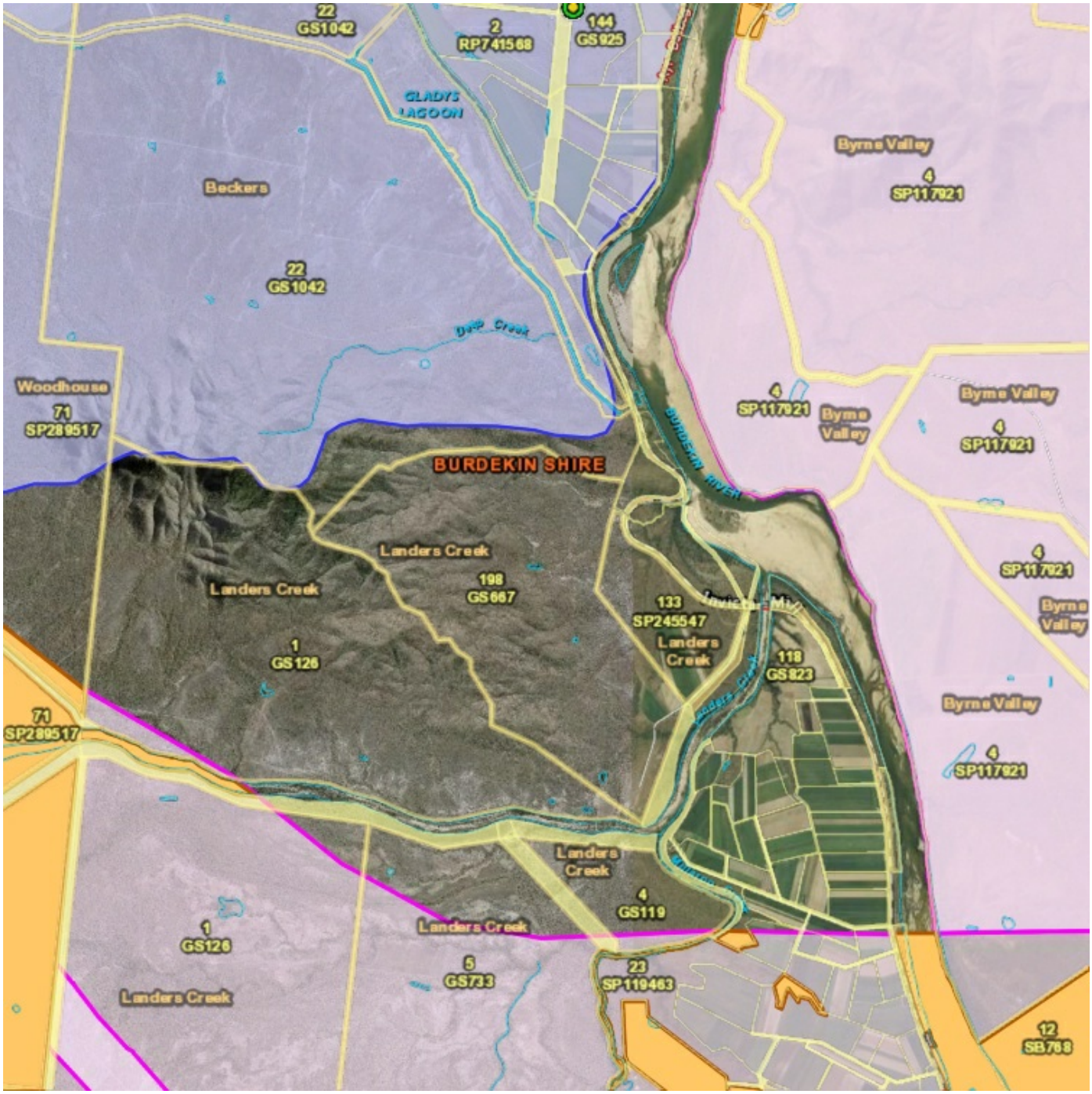
Geotrack Number: GT2016/0335

Native Title

Claims, Determinations and ILUAs - 28 April 2019

19°52'43"S 147°8'4"E 19°52'43"S 147°16'47"E



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A product of Queensland Globe

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Print Date: 28/4/2019
Paper Size: A4

Imagery

Queensland Government

Native Title

Claims, Determinations and ILUAs - 28 April 2019

Legend

Coastline

Lake

Reservoir

Canal area

Watercourse line

- Minor Watercourse
- Major Watercourse
- Minor Culvert
- Major Culvert

Watercourse area

- Perennial
- Non Perennial

Water area edge

Railway

Land parcel label - gt 10 ha

Road

- Highway
- Main
- Local
- Private

Road parcel

Land parcel - gt 10 ha

- Parcel

Property

Local government

Cities and Towns

Datum GDA94 fixed by GNSS

- Datum datum
- Datum derived
- Datum no height

Register of native title claims

Attribution

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