National Native Title Tribunal

Registration test decision

Application name	Barada Kabalbara Yetimarala People
Name of applicant	Sam Dallachy, Vanessa Cotherstone, Norman Ross, Margaret Hornagold, Anthony Henry, Elizabeth Doyle, Davina Tilbaroo
NNTT file no.	QC2013/004
Federal Court of Australia file no.	QUD383/2013
Date application made	2 July 2013
Date application last amended	21 August 2014 (leave to amended granted 20 August 2014)

I have considered this claim for registration against each of the conditions contained in s 190B (which deals mainly with the merits of the claim) and s 190C (which deals with procedural and other matters) of the *Native Title Act 1993* (Cth). [1]

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 Act.

Date of decision: 29 September 2014

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Lisa Jowett

Delegate of the Native Title Registrar (Registrar) pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 8 August 2014 and made pursuant to s 99 of the Act.

[1] All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cth) 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.

Reasons for decision

Introduction

[1] The Registrar of the Federal Court of Australia (the Court) gave a copy of the Barada Kabalbara Yetimarala People amended native title determination application ('BKY claim' or 'BKY application') to the Native Title Registrar (the Registrar) on 22 August 2014 pursuant to s 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A—see subsection 190A(1).

Application overview and background

[2] The Barada Kabalbara Yetimarala People native title determination application was first made on 2 July 2013. As the Registrar's delegate, I considered the claim made in that application for registration and on 27 September 2013, I decided that the BKY claim satisfied all of the conditions of ss 190B and 190C. The claim was accepted for registration under s 190A(6) and included on the Register of Native Title Claims (Register). I provided a written statement of the reasons for this decision on 27 September 2013.

[3] This decision was the subject of a judicial review application made by an overlapping claimant group, Barada Barna People (QUD380/2008)—see *Budby on behalf of the Barada Barna People v Queensland* [2013] FCAFC 149 (*Budby*). As a consequence of those proceedings the Court ordered my decision to register the BKY claim be set aside and on 31 July 2014 the Register was amended accordingly to remove the claim.

[4] On 20 August 2014 the Court ordered, pursuant to s 66B, the replacement of the applicant and then on 21 August 2014, granted leave to amend the application. Schedule S of the amended application details the amendments which have resulted in a significant reduction to the area covered by the application:

- Schedule B – Amendment to northern external boundary description;
- Schedule C – Removal of reference to 'Map 2' and 'Map 1';
- Attachment B – amendments to northern external boundary description as amended at [date obscured by stamp] 2014 by QSNTS; and
- Attachment C – Removal of Map prepared by "National Native Title Tribunal"; Amended Map prepared by National Native Title Tribunal.

[5] Other amendments made are to the names of the persons comprising the applicant (reflecting the s 66B order), the heading of the proceeding on the cover page of the Form 1 and filing and service details.

[6] The reduction in the area covered by the application removes the area of overlap that existed between the claim area of the earlier application and the area covered by the Barada Barna application. This has reduced the area of the BKY claim by some 9000 sq kms and the area of the application now covers approximately 7531 sq kms. The claim is located in southern Queensland, just south of Middlemount and extending east almost to Marlborough.

The registration test

[7] Sections 190A(1A), (6), (6A) and (6B) set out the decisions available to the Registrar under s 190A. Subsection 190A(1A) provides for exemption from the registration test for certain amended applications and s 190A(6A) provides that the Registrar must accept a claim (in an amended application) when it meets certain conditions. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (which deals mainly with the merits of the claim) and s 190C (which deals with procedural and other matters). Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B and 190C.

[8] Section 190A(1A) (which provides for an exemption to a further consideration under s 190A where the amendment is ordered by the Court under s 87A) does not apply, because the order giving leave to amend was not made under that provision. I am also of the view that s 190A(6A) (which provides that the Registrar must accept an earlier registered claim for registration, without considering it again against all of the conditions of ss 190B and 190C, if certain criteria are met) does not apply. In my view, the amended BKY application does not meet the requirement set out in subsection 190A(6A)(b),[2] in light of the decision by Logan J in *Budby*, which set aside my decision to accept the claim for registration.

Statement of reasons for decision of the earlier BKY application

[9] As noted above, my decision to accept the earlier BKY claim for registration was the subject of judicial review by the Court in *Budby* which set that decision aside. For the purposes of context, the Court dealt only with the issue of authorization, finding:

> ...there was nothing in the material before the native title registrar upon which she might reasonably have been satisfied that the claim as contained in the BKY application had been authorised. That is because the evidence before the native title registrar did not provide a basis for a conclusion that there was, as to area claimed, correspondence between that authorised by Resolution 5 and the claim as described in the application filed in Court. Brief though the grounds contemplated by s 190C(5)(b) need be, they must at least provide such a basis. There must also be an evidenced correspondence between the area identified and considered for the purposes of satisfying the native title registrar about the merits of the claim (materially, s 190B(2) of the NTA) and the area in respect of which a claim is authorised.
>
> This was not a case where the native title registrar had no jurisdiction to consider the BKY application. Rather, it was a case where it was not reasonably possible, on the material before

[2] Subsection 190A(6A)(d) provides that the Registrar must have accepted the earlier claim for registration under subsection 190A(6).

her, for the native title registrar to be satisfied that the claim in that application met the requirements of s 190C(4)(b) of the NTA. It is for this reason that the registration decision of 27 September 2013 must be set aside—at [53] to [54].

[10] In now considering the (amended) claim afresh against all of the conditions of ss 190B and 190C, it has been useful to consider the statement of reasons for my earlier decision dated 27 September 2013. I understand that I must consider afresh the entirety of the amended application against each registration test condition. I understand also that my earlier decision that the claim satisfied the condition of s 190C(4) was set aside in *Budby*. Further, there has been a change to the composition of the applicant, which I must take into account when considering the claim against the authorisation condition of s 190C(4).

[11] However, where the claim has not been changed in a way material to a particular condition in ss 190B or 190C and/or where there is no new information before me to indicate any change to the circumstances which prevailed when I made my first decision, I have simply stated that the application satisfies the particular condition for the reasons set out in my statement of reasons dated 27 September 2013. Further, where it is my view that the law in relation to a particular condition has not changed, I refer to and rely on my earlier statement of reasons for an explanation of the relevant law. Where I have relied on my earlier statement of reason in this way, I state this at the outset of my consideration of the claim against a particular condition.

[12] My decision, for the reasons that follow, is that the claim satisfies all of the conditions of ss 190B and 190C and it must therefore be accepted for registration—see s 190A(6).

Information considered when making the decision

[13] Section 190A(3) sets out the information to which the Registrar must have regard in considering a claim under s 190A and provides that the Registrar 'may have regard to such other information as he or she considers appropriate'.

Subsection 190A(3)(a): Application and other documents provided by the applicant

[14] As required by s 190A(3)(a), I have had regard to information in the amended application. I have also had regard to additional information provided by the applicant on 11 September 2014. These consisted of correspondence comprising 5 pages and 7 attachments:

- 1. Table 1. Barada Kabalbara Yetimarala people – Apical Ancestors
- 2. Map 1. Application Area with birthplaces of Apical Ancestors
- 3. Genealogy A. Descendants of Kitty Eaglehawk [schematic];
- 4. Genealogy B. Descendants of Alick Smith (and his wife Topsy Barron/Barren) [schematic];
- 5. Table 2. Summary of evidence regarding law and custom at first contact;
- 6. Table 3. Summary of laws and customs acknowledged and observed by present-day claimants; and
- 7. Table 4. Informants to Sackett Report.

[15] I have also had regard to the earlier BKY application and its accompanying documents and the certain additional information provided by the applicant for the purposes of that application's consideration under s190A:

- the earlier BKY application filed 2 July 2013 and accompanying material; and
- *Barada Kabalbara Yetimarala Native Title Claim: Application Report*, Dr Lee Sackett, prepared at the request of Queensland South Native Title Services, Brisbane, Queensland, July 2013.

Subsection 190A(3)(b): Searches conducted by the Registrar of State/Commonwealth interest registers

[16] There is no information before me of the kind identified in s 190A(3)(b).

Subsection 190A(3)(c): Information supplied by Commonwealth/State

[17] The State of Queensland has not provided any submissions in relation to the application of the registration test.

Section 190A(3): other information to which Registrar considers it appropriate to have regard

[18] I have had regard to information contained in an overlap analysis and geospatial assessment by the Tribunal's Geospatial Services dated 28 August 2014 (the geospatial report) and to a topographic map produced 2 September 2014 overlaying the area covered by the earlier application with that of the amended application. I have also had regard to my statement of reasons for decision in relation to the earlier BKY application, dated 27 September 2013.

Procedural fairness steps

[19] As noted above, I have had regard to additional material provided by the applicant in relation to both the earlier and amended applications. In this regard, I wrote to the State of Queensland (the state government) on two separate occasions. Firstly on 28 August 2014 to advise that I would have regard to Dr Sackett's report which was provided by the applicant as additional information in relation to the earlier BKY application; and secondly on 16 September 2014 to advise that the applicant had provided additional material to the Registrar on 11 September 2014. On both occasions I confirmed that I would rely on this information in my application of the registration test and provided the state government an opportunity to comment on the material. On 17 September 2014 the Tribunal's case manager for the matter received confirmation from the state government that it did not wish to review the additional material of 11 September 2014. The state government has made no comments or submissions in relation to the earlier or present additional material provided by the applicant.

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

[20] In assessing the claim in the amended application against s 190B(2), I am required to be satisfied that the information provided by the applicant for the purposes of ss 62(2)(a) and 62(2)(b) is sufficient for the particular land and waters, over which native title rights and interests are claimed, to be identified with reasonable certainty. In reaching the required level of satisfaction, it is to the terms of the application itself that I am to direct my attention—*Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*) at [16] and [122].

Description of the area covered by the application

[21] Schedule B refers to Attachment B which is titled 'Barada Kabalbara Yetimarala People—External Boundary (as amended August 2014)'. It contains a metes and bounds description prepared by the National Native Title Tribunal on 17 April 2014, (with exclusions updated by Queensland South Native Title Services, 5 August 2014). The description references rivers, creeks, native title determination application boundaries, cultural heritage areas, drainage sub-basins, lot on plan and coordinate points to 6 decimal places (referenced to the Geocentric Datum of Australia 1994 (GDA94)).

[22] Attachment B specifically excludes all the land and waters subject to:

- QUD380/2008 Barada Barna People as accepted for registration 13 August 2013.
- QUD439/2013 Barada Kabalbara Yetimarala People #2 as accepted for registration 23 August 2013.
- QUD6131/1998 Darumbal People as accepted for registration 23 November 2012.
- QUD229/2013 Western Kangoulu People as accepted for registration 13 June 2013.
- QUD644/2012 Bidjara People #7 as accepted for registration 24 January 2013.
- QUD400/2012 Gaangalu Nation as accepted for registration 15 November 2012

[23] Schedule B lists general exclusions to describe those areas not covered by the application.

Map of the area covered by the application

[24] Attachment C contains a map prepared by the National Native Title Tribunal (dated 24 April 2014) titled "Native Title Determination Application—QUD383/2013 (QC2013/004) Barada Kabalbara Yetimarala" that includes:

- the application area depicted as a solid dark blue outline;

- non-Freehold tenure shown with relevant allotments labelled;
- major rivers and creeks relevant to the application area shown and labelled;
- major towns and roads shown and labelled;
- a locality diagram;
- scalebar, northpoint, coordinate grid; and
- notes relating to the source, currency and datum of data used to prepare the map.

Consideration

[25] The information in relation to the external boundaries of the area covered by the application allows me to identify the location of those external boundaries on the surface of the earth. The specific exclusion of the land and waters subject to the 6 claims listed at Attachment B provide added certainty to the identification of the boundaries.

[26] In respect of those areas not covered by the application and described by general exclusion statements, a generic or class formula to describe the internal boundaries of an application is acceptable if the applicant has only a limited state of knowledge about any particular areas that would so fall within the generic description provided—see *Daniels & Ors v State of Western Australia* [1999] FCA 686—at [32]. The exclusions in this case are described as any areas where a previous exclusive possession act (PEPA) was done or where native title has otherwise been extinguished. For the purposes of meeting the requirements of this section the general exclusion statements at Schedule B are, in my view, sufficient to offer an objective mechanism by which to identify areas that would fall within the categories described.

[27] The geospatial report confirms that the area covered by the application has been amended and reduced and does not include any areas which have not previously been claimed in the original application. It also makes the assessment that the description and the map are consistent such that the area covered by the application is readily identifiable. I agree with that assessment. I am therefore satisfied that the external boundary is identifiable and, along with the general exclusions that set the internal boundary, that it can be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

[28] The application satisfies the condition 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.

[29] The description of the persons in the native title claim group has not been amended since it was last considered for registration in 2013. I remain of the same views I held in my decision of

27 September 2013 in respect of the law and the Registrar's task at this condition. I therefore rely on my statement of reasons at paragraphs [88] to [93] and remain satisfied that the description at Schedule A of the amended application is sufficient to enable the identification of any particular person in the native title claim group.

[30] 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.

[31] The description of the claimed native title rights and interests has not been amended since it was last considered for registration in 2013. I remain of the same views I held in my decision of 27 September 2013 in respect of the law and the Registrar's task at this condition. I therefore rely on my statement of reasons at paragraphs [94] to [98] and remain satisfied that the description at Schedule E of the amended application is sufficient to allow the native title rights and interests to be readily identified.

[32] 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

[33] The information contained in the application at Schedules F, G and M has not been amended since it was last considered for registration in 2013.

[34] The Registrar is required at this condition to be satisfied that a sufficient factual basis is provided to support the assertion that the claimed native title rights and interests exist and to support the particularised assertions in paragraphs (a) to (c) of s 190B(5). On this I refer to my discussion of the legal principles governing this registration test condition in my statement of reasons dated 27 September 2013, including my reference to the decisions in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; (2002) 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*); *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 07*); *Gudjala # 2 v*

Native Title Registrar [2008] FCAFC 157 (*Gudjala FC*) and *Gudjala #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 09*).

[35] I remain of the same view that the Registrar's task at s 190B(5) is not to evaluate the factual basis as if it were evidence provided in support of the claim and that the applicant is not required to provide evidence of the type which would prove all of the facts necessary to succeed in their native title claim—*Gudjala FC* at [92]. I also remain of the view that the Registrar is to assume that the facts asserted are true, and to consider only whether they are capable of supporting the claimed rights and interests. That is, to consider whether the factual basis is sufficient to support each of the assertions at ss 190B(5)(a) to (c)—*Doepel* at [17].

Information considered

[36] As noted earlier in these reasons, I have had regard to the earlier application and my statement of reasons dated 27 September 2013; the report prepared by Dr Lee Sackett, provided in relation to the earlier application, and the additional material provided by the applicant on 11 September 2014 in relation to this amended application. All of this material is listed in detail at Attachment B.

The area of the application

[37] As I have noted at the outset of these reasons, the area covered by the amended application is now significantly reduced. In the additional material later provided to the Registrar on 11 September 2014, the applicant states that 'the traditional lands of the pre-sovereignty society were more extensive than the area being claimed by the Barada Kabalbara Yetimarala claim group'—at p. 4. I therefore consider all of the information before me against the backdrop of a core or wider Barada Kabalbara Yetimarala society, whose traditional laws and customs are acknowledged and observed by the native title claim group for this application. It is in this way that I understand that rights to the area covered by the application are asserted to be held by the members of the native title claim group.

Reasons for s 190B(5)(a)

[38] In relation to the requirements of this assertion, I refer to paragraph [106] of my statement of reasons dated 27 September 2013. It was my view that the earlier application provided a factual basis that showed the history of the association that those members of the claim group have, and that their predecessors had, with the application area—see *Gudjala [2007]* at [51]. I was satisfied that the material demonstrated that a link exists between the current claim group and its predecessors' and their association with the application area.

[39] It was my preliminary view that the amended application did not provide sufficient or particular detail as to the association of the native title claim group and its predecessors with the more confined area to which the application has been reduced. Dr Sackett's report provided relatively broad detail that, in my view, supports an association with many areas that no longer

fall within the area covered by this amended application. Upon my preliminary assessment provided to the applicant that the application may not meet the requirements of s 190B(5), the applicant submitted additional information for my consideration. While it appears that for the most part the material has been extracted from Dr Sackett's report, it is information that has been distilled from that report and does contain some further detail as to the areas of association of the native title claim group and its predecessors.

Association of the predecessors of the native title claim group with the application area

[40] I refer to and rely on my statement of reasons dated 27 September 2013, specifically at paragraphs [107] to [112] where I set out the information regarding the association of the predecessors of the native title claim group with the area. In addition to the material in the earlier application and in Dr Sackett's report, I have the benefit of some further details specific to the areas within the reduced area.

[41] Dr Sackett's report and the additional information assert the date of 'practical sovereignty' of the area covered by the BKY traditional lands to be 1846, with first European contact occurring when Ludwig Leichhardt explored the area, followed by the gradual establishment of the pastoral stations and further sustained settlement. The applicant has provided in its additional information the approximate birth dates of the apical ancestors named in the application. The earliest is recorded in 1857, followed by 1860-1870 with the majority born after 1890.

[42] The additional material sets out some general assertions which essentially repeat the information in Dr Sackett's report that the Barada Kabalbara Yetimarala apical ancestors were born in or firmly associated with the area covered by the application which is the traditional country of those ancestors. It is asserted that Barada Kabalbara Yetimarala people have maintained a continuity of occupation, connection and association with the area since pre contact times.

[43] The additional information elicits the following relevant details: Kitty (aka Kitty Eaglehawk) and Yatton Boney were Topsy Barron's grandparents. Alick Smith Snr (Topsy's husband), Ada/Ina Cotherstone and Daisy Wilson were siblings. The area of primary association for these named ancestors and their descendents is in the southern reaches of the claim area, in and around Barwon Park Station. Croydon Station, the upper McKenzie River and Lotus Creek (all within the application area) are asserted to be the birthplaces of four other named ancestors. The remaining ancestors and their descendents are associated with areas that fall outside the area of the amended application but within the lands traditionally associated with the BKY, though notably, in my view, with people who identify as Barada.

[44] There is also further detail in relation to some of these ancestors and their immediate descendents:

- Over the course of their lives Alick and Topsy moved around their traditional country, from one pastoral station to another within the Application area;

- The children of Alick Smith Snr and Topsy Barron (being the descendants of Kitty Eaglehawk and Yatton Boney) were born and grew up on the stations covered by the application (Clive Station, May Downs Stations), and are associated with places like Lotus Creek, Barwon Park, as well as those areas outside of the application area but within the traditional boundary of Kabalbara country at page— at pp. 4 to 5.

Current association

[45] I refer to and rely on my statement of reasons dated 27 September 2013, specifically at paragraphs [113] to [115] where I set out the information regarding the native title claim group's association with the area.

[46] The additional material reaffirms what is said in Dr Sackett's report that 'working and residing on their traditional lands enable the Barada Kabalbara Yetimarala people to maintain an intimate relationship with their country, and to visit and care for places of significance'—at p. 5. Details are provided about one member of the claim group who has 'maintained both a physical and spiritual connection to the south-eastern parts of the Application Area through regular visits and exercise of native title rights, in particular hunting and fishing in the area over many years'. He has travelled throughout his life with his father, aunties and uncles, along the original pathways of the rivers and creeks. His aunties and uncles passed down stories to him of their lives and their parents' lives and of working and living on the stations in the area covered by the application—at pp. 4 to 5.

Consideration

[47] I refer to my statement of reasons dated 27 September 2013 at paragraphs [116] to [117] and remain of the same view that, although not strong, the factual basis supports the claim group's asserted association with the land and waters of the application area and this appears to have its origins in the preceding generations' association with the area. The applicant's additional material has provided further details particular to the Barada Kabalbara Yetimarala native title claim group and some of its predecessors and this, in my view, provides further to support for this assertion.

[48] I am satisfied that the factual basis is sufficient to support the assertion that the native title claim group has and its predecessors had an association with the area.

Reasons for s 190B(5)(b)

[49] This subsection requires that I be satisfied that the material before me provides a sufficient factual basis for the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group and that these give rise to the native title rights and interests it claims. I continue to rely on my statement of reasons dated 27 September 2013 and the key propositions arising from the case law in respect of this condition—at [118] to [122].

[50] It was my view in relation to the earlier application that, based on the information before me, the society of which the Barada Kabalbara Yetimarala People are a part continues to be governed by a normative system that observes and acknowledges traditional laws and customs that have existed since before the acquisition of sovereignty in the area of the application. I considered then and remain of the same view now, that the information before me in respect of the traditional laws and customs acknowledged and observed by the native title claim group was largely inconclusive, was not particularized or well articulated, and was not demonstrated specifically by members of the claim group—at [132] to [139]. Those reasons set out why I found it difficult to be satisfied that that the material provided by the applicant supported the assertion that there was a society at sovereignty in respect of the claim area, defined by its recognition of laws and customs, and from which the claim group's current traditional laws and customs are derived (*Gudjala 09* at—[66]). In this respect, I continue, however, to be of the view that it is not the purpose of the registration test to come to definitive conclusions about what in fact was the society at sovereignty, only whether the factual basis can support the assertion that the society at sovereignty has continued a vital existence (largely uninterrupted) since that time to the present.

[51] The additional material at Table 3 provides some further detail not found in Dr Sackett's report that sets out the traditional laws and customs acknowledged and observed by the native title claim group. The table details those rights and interests claimed to exist under those laws and customs, providing examples of the activities undertaken in their exercise. This adds support to Dr Sackett's findings and supporting research, and I am of the view that the material before me is sufficient to support the assertion at this condition. I remain of the same view that the material in Dr Sackett's report relays sufficient information pertaining to family and ancestors, rules and responsibilities in relation to land and belonging to the area, special places and stories, spirits and the religious life, hunting, fishing and foraging and the passing on of traditional and cultural knowledge. In this way the factual basis supported the claim made in the earlier application and in my view continues to support the asserted existence of traditional laws and customs in relation to such things as the native title claim group's identity, its stories and cultural knowledge, its rights and responsibilities in relation to country and places of significance.

[52] I am therefore satisfied, as I was in relation to earlier application, that the factual basis is sufficient to support the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group and that these give rise to the native title rights and interests it claims

Reasons for s 190B(5)(c)

[53] This subsection requires that I be satisfied that the material before me provides a sufficient factual basis for the assertion that the native title claim group have continued to hold the native title in accordance with their traditional laws and customs. I continue to rely on my statement of

reasons dated 27 September 2013 and the key propositions arising from the case law in respect of this condition—at [140].

[54] I decided in relation to the earlier application that the material in Dr Sackett's report sufficiently demonstrated that the native title claim group has continued in such matters as its cultural practices and use of the natural resources of the land and that this knowledge has been passed down from their ancestors and continues to be passed down to successive generations. I was of the view that this material was sufficient to support the assertion that the Barada Kabalbara Yetimarala community continues to acknowledge and observe the traditional law and custom of their ancestors. Again, the details provided in Table 3 of the additional information provided by the applicant add weight to the information in Dr Sackett's report.

[55] I am therefore satisfied that the factual basis is sufficient to support the assertion that the native title claim group continues to hold native title in accordance with its traditional laws and customs

Conclusion

[56] The claim 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.

[57] I have reviewed the decision I made when I considered the application against this registration test condition and my statement of reasons dated 27 September 2013. I remain of the same views expressed in my explanation of the law surrounding this condition as outlined in at paragraphs [147] to [148]. I confirm that no amendments have been made in relation to the claimed rights and interests as detailed in Schedule E.

[58] I found the following rights and interests claimed in the earlier application to be established prima facie:

> 1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s. 238, ss. 47, 47A or 47B apply), the Barada Kabalbara Yetimarala People claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group
> 2. Over areas where a claim to exclusive possession cannot be recognised, the Barada Kabalbara Yetimarala People claim the following rights and interests:
> (a) To access, be present on, move about on and travel over the area

(b) To camp on the area and for that purpose, erect temporary shelters on the area

(c) To hunt, fish and gather on the land or waters of the area for personal, domestic and non-commercial communal purposes.

(d) To have access to, take and use natural resources from the land and waters of the area for personal, domestic and non-commercial communal purposes

(e) To hold meetings in the application area

(f) To conduct ceremonies in the area

(g) To maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places

(h) Teach on the area the physical and spiritual attributes of the area

(i) To be buried or bury native title holders on the area

(j) To live on the application area

(k) To move about the application area

(n) To transmit the cultural heritage of the native title claim group including knowledge of particular sites

[59] I was of the view that two of the rights claimed in the earlier application could not be established prima facie:

(l) To speak authoritatively about the application area among other Aboriginal People in accordance with traditional laws & customs

(m) To make decisions about the use and enjoyment of the area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged and observed by the native title holders

[60] I refer to my statement of reasons dated 27 September 2013 at [173] to [178] and remain of the same views in respect of the law as it pertains to a claim to such rights. As mentioned earlier in these reasons, the applicant provided additional information in respect of the factual basis for the claim made in the application. The additional material, though relevant to my consideration of the rights claimed in the amended application, did not alter my views.

[61] I am satisfied that some of the rights and interests claimed in this application can be established, prima facie.

[62] The claim 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.

[63] I have reviewed the decision I made when I considered the application against this registration test condition and my statement of reasons dated 27 September 2013. I refer to my reasons at paragraphs [184] to [185] as to the law surrounding this requirement. I remain of the same view regarding the scant particularity of detail and refer to my reasons at [186] and [188].

[64] The additional material however, does provide information in relation to one member of the claim group who traces his descent to Kitty Eaglehawk and Yatton Boney. It is asserted that his knowledge of the south-eastern part of the area covered by the application has been passed down to him by his father, uncle and aunties and the generations before them, and he continues now to actively pass on this knowledge bestowed upon him about the significance of places and land in his part of the country and the broader BKY traditional lands—at pp. 4 to 5. He (as did his ancestors in the preceding generations) has maintained physical and spiritual connections through regular visits to his country and the exercise of rights and interests such as hunting and fishing. This information, in my view, provides support for my view that at least one member of the native title claim group has a traditional physical connection with a part of the land and waters of the area covered by the application.

[65] The claim 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 s61A (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.

[66] 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)

[67] 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. The geospatial report dated 28 August 2014 and a search that I made of the Tribunal's geospatial databases on the day of my decision reveals that there are no approved determinations of native title over the application area

Section 61A(2)

[68] 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. Schedule B at (1) states that the application does not cover any area where a previous exclusive possession act was done.

Section 61A(3)

[69] 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. I refer to my statement of reasons dated 27 September 2013 at [193] to [194] and given that the amendments to the application do not include any changes to the statements relevant to this condition, I remain of the same view.

Conclusion

[70] In my view the application does not offend the provisions of ss 61A(1), 61A(2) and 61A(3) and therefore the claim 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.

[71] No amendments were made to the schedules to which these conditions apply. I remain of the same view I held in 2013 that the application does not offend the provisions of ss 190B(9)(a), (b) and (c) and rely on my statement of reasons at paragraphs [196] to [200].

[72] The application meets the condition of s 190B(9).

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.

[73] Section 190C(2) is a procedural condition which 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)—*Doepel* at [16] and also at [35] to [39]. In other words, does the application contain the prescribed details and other information?

[74] In my view 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. 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.

[75] I have come to the conclusion that the amended application satisfies the requirements of s 190C(2), because it contains all of the details and other information and documents required by ss 61 and 62. Below I consider each of the particular parts of ss 61 and 62, and set out the reasons for my view that the prescribed details and other information are contained in this amended application.

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

[76] Section 61(1) sets out who may make a native title determination application:

> A person or persons authorized by all the persons (native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group—at s 61(1).

[77] Section 61 'ensures that the claim, on its face, is brought on behalf of all members of the native title claim group'. In the context of s 190C(2) the Registrar is 'to consider whether the application sets out the native title claim group in the terms required by s 61'—*Doepel* at [35] and [36]. Particularly:

> If the description of the native title claim group were to indicate that not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group, then the relevant requirement of s 190C(2) would not be met and the Registrar should not accept the claim for registration—*Doepel* at [36].

[78] The details relevant to my consideration at this condition are set out in the amended application at Part A, 1 and 2 and at Schedules A and R. The native title claim group is described as being comprised of the descendants of 9 descent lines and is stated to have authorised the applicant to make this application. In my view, there is nothing on the face of the application that suggests that the application is not brought on behalf of all members of the native title claim group. I am therefore satisfied that the application meets the requirements of s 61(1)

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

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

[80] Part B of the application states on page 18 the name and address for service of the persons who are the applicant.

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

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

[82] Schedule A provides a description of the native title claim group that includes a list of the apical ancestors in 9 descent lines from which the claim group is said to descend.

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

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

[84] The affidavits meeting the requirements of this condition were filed in the Court on 2 September 2014, replacing those that accompanied the amended application when it was filed on 21 August 2014[3]. I consider the application to be accompanied by these affidavits. They are signed and witnessed and variously dated 29 August, 1 and 2 September 2014.

[85] Each of the seven persons who comprise the applicant have signed an affidavit swearing or affirming, in full, to all the statements required of this section.

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

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

[87] 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)*

[88] Schedule B lists those areas not covered by the application and Attachment B to the application contains a description of the external boundaries of the area covered by the application.

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

[89] Schedule C refers to Attachment C being a map showing the external boundaries of the area covered by the application.

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

[90] Schedule D states that no searches have been carried out by the applicant.

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

[91] A description of the native title rights and interests claimed in relation to the area covered by the application is contained in Attachment E.

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

[92] Schedule F refers to Attachment F and M that together comprise a general description of the factual basis for the claim made in the application.

[3] The affidavits filed with the application did not, in my view, meet the requirements of this section as they did not make the statement required of s 62(1)(a)(iv). I advised the applicant on 28 August 2014 of my preliminary view, and subsequently the further set of affidavits were filed.

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

[93] Schedule G lists the activities the claim group currently carries out in relation to the area covered by the application and refers to Attachment F and M for further information.

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

[94] Schedule H states that there are no current native title determination applications over the area the subject of this application.

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

[95] Schedule HA states that the applicant is aware of one such notice and provides the relevant details.

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

[96] Schedule H states that the applicant is aware of two such notices and provides the relevant details of the notices as of 25 May 2013.

Conclusion

[97] 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.

[98] The requirement that the Registrar be satisfied in the terms set out in s 190C(3) is only triggered if there is a previously registered claim, as described in ss 190C(3)(a), (b) and (c)—see *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*) at [9]. Section 190C(3) relates to ensuring there are no common native title claim group members between the application currently being considered for registration ('the current application') and any overlapping 'previous application' that is a registered application when the current application was made in the Court.

[99] The Tribunal's geospatial report confirms that no native title determination applications fall within the external boundaries of the current application.

[100] As the BKY amended application is not overlapped by any other applications in the sense discussed in s 190C(3)(a) to (c), there is no requirement that I consider the issue of common claim group membership.

[101] The application 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.

[102] For the condition of s 190C(4) to be satisfied, I must be satisfied that the requirements set out in either ss 190C(4)(a) or (b) are met. *Doepel* discusses the differing functions under the two alternative limbs of s 190C(4):

> Section 190C(4) indicates clearly the different nature of the conditions imposed upon the Registrar . . . The contrast between the requirements of subs (4)(a) and (4)(b) is dramatic. In the case of subs (4)(a), the Registrar is to be satisfied about the fact of certification by an appropriate representative body. In the case of subs (4)(b), the Registrar is required to be satisfied of the fact of authorisation by all members of the native title claim group— at [78].

[103] Schedule R of the amended application refers to Attachment R which is entitled *Certification of native title determination application Barada Kabalbara Yetimsarala People "unoverlapped claim area"*. As the application purports to be certified by the representative body for the area, the relevant consideration for me is at s 190C(4)(a).

The nature of the task at s 190C(4)(a)

[104] Section 190C(4)(a) imposes upon the Registrar conditions which, according to Mansfield J, are straightforward—*Doepel* at [72]. All that the task requires is that I be 'satisfied about the fact of certification by an appropriate representative body' which necessarily entails:

- identifying the relevant native title representative body (or bodies) and being satisfied of its power under Part 11 to issue the certification; and
- being satisfied that the certification meets the requirements of s 203BE—*Doepel* at [80] and [81].

[105] Pursuant to s 203BE(4), a written certification by a representative body must:

- include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs of s 203BE(2)(a) and (b) have been met;
- briefly set out the body's reasons for being of that opinion; and
- where applicable, briefly set out what the representative body has done to meet the requirements of s 203BE(3) in relation to any overlapping applications.

[106] Pursuant to s 203BE(2), a 'representative body must not certify ... an application for a determination of native title unless it is of the opinion that':

- all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and
- 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.

Identification of the representative body

[107] The Tribunal's geospatial report of 28 August 2014 confirms that Queensland South Native Title Services Ltd (QSNTS) is the only representative body for the whole of the area covered by the application. QSNTS is funded to perform all the functions of a representative body in southern and western Queensland pursuant to s 203FE. It is therefore the only body that could certify the application under s 203BE.

[108] The certificate is dated 2 July 2013 and signed by the Chief Executive Officer of QSNTS. The certificate states that he has been delegated the function given to QSNTS under the Act to certify the application in accordance with s 203BE and s 203FEA.

Does the certificate meet the requirements of 203BE

[109] For the purposes of s 203BE(4)(a), the certification contains statements at paragraphs 2 and 3 in relation to the requirements of paragraphs 203BE(2)(a) and (b), that is:

- all the persons in the claim group have authorised the applicant to make the application and to deal with the matters arising in relation to it; and
- all reasonable efforts have been made to ensure the application describes or otherwise identifies all the persons in the native title claim group.

[110] For the purposes of s 203BE(4)(b), paragraph 4 briefly sets out the reasons for QSNTS being of that opinion, namely:

- an authorisation meeting was held on 13 April 2013 for which extensive public notice was given—through advertising in media publications and radio announcements, direct mail outs to members of the BKY claim group and information sessions;
- the meeting of 13 April 2013 was well attended, minutes and outcomes were recorded; and
- all necessary steps and processes were followed in accordance with the requirements of the Act and the decision-making processes and instructions of the native title claim group.

[111] In my view, the statements made in the certificate, as summarised above, briefly set out the reasons for QSNTS being of the opinion that the requirements of s 203BE(2)(a) and (b) have been met.

[112] For the purposes of s 203BE(4)(c), the representative body must also briefly set out how it has met the requirements of s 203BE(3). That subsection provides for a representative body's obligations to make all reasonable efforts to reach agreements between any overlapping claimant groups and to minimise the number of overlapping applications. In my view, as there are no other applications that cover the area of the BKY amended application, (confirmed by the geospatial report) there is no requirement for the certificate to address this requirement. Paragraph 5 of the certificate states that QSTNS 'has done nothing to meet and has not met the requirements of s 203BE(3)'.

Consideration

[113] This certification was provided in relation to the earlier BKY application, filed 2 July 2013. There has been no fresh certification of the amended application before me. As noted above, the Registrar's consideration under s 190C(4)(a) is limited to ensuring that the certifying body has power under Part 11 to make the certification and that the certification complies with s 203BE(4)—*Doepel* at [78], [80] and [81]. In other words, the only task for the delegate at s 190C(4)(a) is to be satisfied about the fact of certification under s 203BE(4) by an appropriate representative or s 203FE funded body. The delegate is not required to go beyond the procedural requirements of s 203BE, nor to be satisfied about the fact of the applicant's authority by the rest of the native title claim group. This approach was approved by Justice Kiefel in *Wakaman; People 2 v Native Title Registrar and Authorised Delegate* (2006) 155 FCR 107; [2006] FCA 1198 (*Wakaman*) at [32] and [34].

[114] In that decision Kiefel J said that the rejection of 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]. Kiefel J decided that because the application in the matter before her had been certified and the applicant and representative body 'clearly intended' the certification to apply to the amended application, the delegate was not required or permitted under s 190C(4)(a) to be satisfied about the correctness of the certification. This is because 'certification means that the function has been carried out by the representative body and there is no basic function for the Registrar to carry out'—at [34]. Kiefel J concluded at [34] that the earlier certification in that case should be treated as applying to the later application.

[115] The application before me has been amended to significantly reduce the size of the area covered by the application and is brought on behalf of a different applicant. However, given the authorities of *Doepel* and *Wakaman*, it is my view that I am not required to consider or be satisfied of anything other than the fact of certification of the BKY application. It is clear to me that the certificate is intended to apply to the amended application before me. The certificate is made by an appropriate representative s 203FE funded body and makes the statements required by s 203BE(4).

[116] For the above reasons, I am satisfied that the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, thereby complying with s 190C(4)(a)

[End of reasons]