National Native Title Tribunal

Registration test decision

Application name	Wakka Wakka People #4
Name of applicant	Florence Bell, Michael Bond, Patricia Bond, Robert Bond, Cynthia Button, Adam Chapman, Garry Cobbo, Cecilia Combo, Sam Hill, Robert Lacey, Arnold Murray, Stephen Pickering, Cheryl Smith, Carl Simpson, Debbie West
NNTT file no.	QC2012/003
Federal Court of Australia file no.	QUD91/2012
Date application made	10 February 2012
Date application last amended	13 May 2016

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

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

Date of decision: 19 July 2016

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Radhika Prasad

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the ***Native Title Act 1993*** (Cth) under an instrument of delegation dated 20 November 2015 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 (Registrar), for the decision to accept the amended native title determination application made on behalf of the Wakka Wakka People (the application) for registration pursuant to s 190A of the Act.

[2] Note: 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.

Application overview

[3] On 10 February 2012, the original Wakka Wakka People #4 application was filed in the Federal Court of Australia (the Court). A delegate of the Registrar accepted this application for registration because it satisfied all of the conditions set out in ss 190B and 190C.

[4] On 21 March 2016, the Registrar of the Court granted leave to amend the application.

[5] On 5 May 2016, the amended application was filed with the Court. A further amended application was filed with the Court on 13 May 2016. The amendments to the application include the following:

- the persons who comprise the applicant have been altered;
- the details of the authorisation meeting have been altered in Item 2 (Authorisation), Part A of the Form 1;
- Schedule A has been changed to revise the list of apical ancestors;
- Schedule H has been amended to confirm there are no overlapping applications;
- Part B has been amended to reflect changes to the applicant's address for service.

[6] On 13 May 2016, the Registrar of the Court gave a copy of this application to the Registrar pursuant to s 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

Information considered when making the decision

[7] 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.

[8] 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.

[9] I understand s 190A(3) to stipulate that the application and information in any other document provided by the applicant is the primary source of information for the decision I make. Accordingly, I have taken into account the following material in coming to my decision:

- the information contained in the amended application and accompanying documents;
- the information contained in the documents accompanying the application filed in February 2012 and additional information provided by the applicant;
- the Geospatial Assessment and Overlap Analysis (GeoTrack: 2016/0729) prepared by the Tribunal's Geospatial Services on 26 May 2016 (geospatial assessment); and
- the results of my own searches using the Tribunal's mapping database.

[10] 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. 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 claimant application.

Procedural fairness steps

[11] 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. Those rules seek to ensure that decisions are made in a fair, just and unbiased way. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication—*Hazelbane v Doepel* [2008] FCA 290 at [23] – [31]. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

- On 23 May 2016, a letter was sent to the State of Queensland (the State) enclosing a copy of the application summary which shows details of the application as amended. That letter informed the State that any submission in relation to the registration of this claim should be provided by 10 June. No submissions were provided.
- Also on 23 May 2016, a letter was sent to inform the applicant that any additional information should be provided by 10 June 2016. No additional material was provided.

Requirements of s 190A

[12] My consideration of the application is governed by s 190A of the Act. Section 190A(6) requires the Registrar to consider whether a claim for native title satisfies the conditions in ss 190B and 190C, known as the registration test. The test is triggered when a new claim is referred to the Registrar under s 63 or in some instances when a claim in an amended application is referred under s 64(4). The test will not be triggered when an amended application satisfies the conditions of ss 190A(1A) or (6A). For the following reasons, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to this claim:

- subsection 190A(1A) does not apply as the application was not amended because an order was made under s 87A by the Court; and

- subsection 190A(6A) does not apply because the effect of the amendments to the native title determination application, which includes changes to the composition of the native title claim group, fall outside the exceptions to undertaking a full registration test set out in subparagraphs 190A(6A)(d)(i) to (v).

[13] I must therefore apply the registration test to this amended application. In accordance with s 190A(6), I must accept the claim for registration if it satisfies all of the conditions in ss 190B and 190C of the Act. If those conditions are not satisfied then, under s 190A(6B), I must not accept the claim for registration.

[14] 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 requirements of s 190C 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.

[15] In making this decision in relation to the application, it has been useful to consider the statement of reasons that I prepared for my decision dated 2 June 2012 in relation to the Wakka Wakka People #3 application. I understand that I must consider the entirety of the current application afresh against each registration test condition. However, I note the following relevant matters:

- the native title claim group is the same in the current application and the Wakka Wakka People #3 application;
- the area covered by this application adjoins the northern boundary of the Wakka Wakka People #3 application area;
- the claim made within each application is essentially the same with some schedules in each Form 1 being identical;
- the material relied upon by the applicant in each application is the same;
- there is no new information before me to indicate any change to the circumstances/material which prevailed when I made my earlier decision.

[16] In these circumstances and in the interests of brevity, after considering the conditions afresh and where I form the view that the conclusions are correct, I have simply stated that the application satisfies the particular condition for the same reasons that I provided when making my Wakka Wakka People #3 decision. 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 statement of that law within the reasons for my earlier decision.

[17] As discussed in my reasons below, I consider that the claim in the application does satisfy all of the conditions in ss 190B and 190C and therefore, pursuant to s 190A(6), it must be accepted for registration. Attachment A contains information that will be included in the Register of Native Title Claims (the Register).

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.

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

[19] In coming to this conclusion, I understand that the condition in s 190C(2) 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 go beyond the information in the application itself nor undertake any merit or qualitative assessment of the material for the purposes of s 190C(2) — see observations of Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112; [2003] FCA 1384 (*Doepel*) at [37] and [39]; see also [16], [35] and [36]. Accordingly, the application must contain the prescribed details and other information in order to satisfy the requirements of s 190C(2).

[20] 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. I do not consider they require any separate consideration by the Registrar. Paragraph 61(5)(c), which requires the application contain such information as is prescribed, does not need to be considered by me separately under s 190C(2), as I already test these 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.

[21] I now turn to each of the particular parts of ss 61 and 62:

Native title claim group: s 61(1)

[22] Schedule A of the application provides a description of the native title claim group. The application indicates that the persons comprising the applicant are included in the native title claim group — see s 62(1)(a) affidavits of the persons comprising the applicant. There is nothing on the face of the application that causes me to conclude that the requirements of this provision, under s 190C(2), have not been met.

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

Name and address for service: s 61(3)

[24] Part B of the application contains the name and address for service of the applicant's representative.

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

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

[26] I consider that Schedule A of the application contains a description of the persons in the native title claim group that appears to meet the requirements of the Act.

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

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

[28] The application is accompanied by affidavits sworn by each of the persons who comprise the applicant. The affidavits contain the statements required by s 62(1)(a) (i) to (v), including details of the process of decision making complied with in authorising the applicant.

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

Details required by s 62(1)(b)

[30] Subsection 62(2)(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)

[31] Attachment B contains information that allows for the identification of the boundaries of the area covered by the application. This attachment and Schedule B contain information of areas within those boundaries that are not covered by the application.

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

[32] Attachment C contains a map showing the external boundary of the application area.

Searches: s 62(2)(c)

[33] Schedule D provides that the applicant has not conducted any tenure searches to determine the existence of any non-native title rights and interests in relation to the land and waters in the area covered by the application.

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

[34] A description of the native title rights and interests claimed by the native title claim group in relation to the land and waters of the application area appears at Schedule E. The description does not consist only of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

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

[35] Attachment F&M contains information pertaining to the factual basis on which it is asserted that the rights and interests claimed exist. I note that there may also be other information within the application that is relevant to the factual basis.

Activities: s 62(2)(f)

[36] Schedule G contains a list of the activities currently undertaken by members of the claim group on the land and waters of the application area.

Other applications: s 62(2)(g)

[37] Schedule H provides that the area covered by the application is not covered by another application.

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

[38] Schedule HA states that the applicant is not aware of any notifications given under s 24MD(6B)(c).

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

[39] Schedule I contains details of a notice issued under s 29 of the Act.

Conclusion

[40] 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.

[41] It is my view that the statement of the law relevant to the condition at s 190C(3) as set out in my Wakka Wakka #3 decision at pp 7 and 8 is still correct. In the interests of brevity, I do not restate any analysis of the law and simply refer to and rely on it for this fresh consideration of the current application against this provision.

[42] The geospatial assessment does not identify a previous application that covered the whole or part of the area covered by the current application except this application being the current application.

[43] I have also undertaken a search of the Tribunal's mapping database and am of the view that there is no previous application that covered the whole or part of the area covered by the current application. I note that my search confirms that no real overlaps with the current application exist on the ground.

[44] I am therefore satisfied that there is no previous application to which ss 190C(3)(a) to (c) apply. Accordingly, I do not need to consider the requirements of s 190C(3) further.

[45] 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.

[46] 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.

[47] Schedule R indicates that a copy of the certificate of the representative Aboriginal body accompanies the application at Attachment R. Accordingly, I am of the view that it is necessary to consider whether the requirements of s 190C(4)(a) are met.

[48] It is my view that the statement of the law relevant to the conditions at s 190C(4) as set out in my Wakka Wakka #3 decision at pp 9 to 11 is still correct. In the interests of brevity, I do not restate any analysis of the law and simply refer to and rely on it for this fresh consideration of the current application against this provision.

Identification of the representative body and its power to certify

[49] Attachment R is titled 'Certification of Native Title Determination Application — Wakka Wakka People #4' (certification). It is dated 15 December 2011 and signed by the Chief Executive Officer of Queensland South Native Title Services Ltd (QSNTS). This certificate accompanied the original Wakka Wakka People #4 application.

[50] The certificate states that QSNTS is a body funded under s 203FE(1) of the Act for the purpose of performing the functions of a representative body. The certificate also provides that the application has been certified pursuant to ss 203BE and 203FEA of the Act — see note to s 190C(4)(a) which allows an application to be certified under s 203BE.

[51] If a body is funded under s 203FE(1) to perform the functions, including the certification in s 203BE of a representative body over an area, then that body will have the power to certify an application under Part 11.

[52] The geospatial assessment identifies QSNTS as the only representative body for the area covered by the application.

[53] Having regard to the above information, I am satisfied that QSNTS was the relevant s 203FE funded body for the application area and that it was within its power to issue the certification.

The requirements of s 203BE

[54] I must consider whether the certification meets the requirements of s 203BE, the relevant subsection being (4).

Subsection 203BE(4)(a)

[55] This provision requires a statement from the representative body confirming that they hold the opinion that the conditions at subsections (2)(a) and (2)(b) have been met.

[56] Subsection 203BE(2) sets out that a representative body must not certify an application for a determination of native title unless it is of the opinion that:

(a) 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

(b) 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.

[57] The certification contains the statement required by s 203BE(4)(a) — at [2] and [3].

Subsection 203BE(4)(b)

[58] Pursuant to s 203BE(4)(b), the certification must also briefly set out the body's reasons for making the required statements under s 203BE(4)(a).

[59] In that regard, the certification sets out details pertaining to the authorisation of the applicant, including that:

- The authorisation meeting was extensively advertised with notices placed in the Gladstone Observer on 3 and 24 September 2011, The Courier Mail on 3 and 4 September 2011, South Burnett Times on 6 and 23 September 2011, and the Koori Mail on 21 September 2011.
- Letters were sent to members of the Wakka Wakka People whose contact details are held by QSNTS.
- The public notice was also placed on the QSNTS website.

- The authorisation meeting held in Gayndah on 1 October 2011 was well attended. Attendance records, meeting procedures and outcomes were taken and kept by QSNTS staff who attended the meeting.
- QSNTS is of the opinion that through the holding of the authorisation meeting all necessary steps and processes have been followed in accordance with the requirements of the Act and the instructions of the native title claim group.
- QSNTS is satisfied that all 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 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 — at [4].

[60] I am of the opinion that the certificate meets the requirement of s 203BE(4)(b).

Subsection 203BE(4)(c)

[61] This subsection applies where the application area is covered by an overlapping application for determination of native title.

[62] The certificate states that QSNTS 'has done nothing to meet and has not met the requirements of section 203BE(3) of the Act' — at [5].

[63] I note that the certificate must address the requirements of s 203BE(3). QSNTS' statement that it has done nothing to meet these requirements, in my view, constitutes failure to address this subsection in the certification. However, in my view, failure by QSNTS to comply with this subsection does not render the certification invalid.

[64] I also do not consider that any application currently overlaps the application area — see my statement of reasons at s 190C(3) above. In my view, the requirements of s 203BE(3) are therefore not applicable to the area covered by this application.

[65] I am of the view that the requirements of s 203BE(4) of the Act have been satisfied and accordingly find that the criteria under s 190C(4)(a) have been met. Having been so satisfied, I am not required to address the remaining conditions of s 190C(4).

[66] The application **satisfies** the condition of s 190C(4).

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.

[67] Attachment B is titled 'Wakka Wakka #4 – External Boundary Description' and is prepared by QSNTS on 27 January 2012. It contains a metes and bounds description of the application area referencing topographic features, land parcels, local government boundaries, coordinate points and native title determination applications. Schedule B lists general exclusions.

[68] Attachment C is a copy of a map titled 'Native Title Determination Application – Wakka Wakka People #4' prepared by the QSNTS on 19 January 2012. The map includes:

- the application area depicted by a bold outline;
- surrounding native title determination applications;
- topographic background;
- water catchment boundaries and local government authority boundaries;
- scalebar, northpoint, coordinate grid, legend and locality map; and
- notes relating to the source, currency and datum of data used to prepare the map.

Consideration

[69] The geospatial assessment identifies a number of typographical errors but states that notwithstanding these errors the description and map of the application area are consistent and identify the application area with reasonable certainty. I agree with this assessment.

[70] In light of the above information, I am satisfied that the description and the map of the application area, as required by ss 62(2)(a) and (b), are sufficient for it to be said with reasonable certainty that the native title rights and interests are claimed in relation to particular land or waters.

[71] 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.

[72] This definition of the native title claim group has been changed from that contained in the original application. However, I note that the definition is now identical to the definition in the Wakka Wakka #3 application, which I had decided on 2 June 2016 satisfied this condition of the registration test — see my reasons at pp 14 – 16. I also note that as this condition requires that I be satisfied on the basis of the material contained in the application, I have been informed by the information contained in Attachment F&M which is the same as that in the Wakka Wakka #3 application.

[73] I have read the material again and have afresh decided, for the reasons outlined in my Wakka Wakka #3 decision, that I am satisfied that the description of the native title claim group contained in the application is such that, on a practical level, it can be ascertained whether any particular person is a member of the group. Accordingly, focusing only upon the adequacy of the description of the native title claim group, I am satisfied of its sufficiency for the purpose of s 190B(3)(b).

[74] 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.

[75] The description of the native title rights and interests claimed is found in Schedule E of the application and is essentially identical to the description I considered when making my Wakka Wakka #3 decision. There is no new information before me which would cause me to change that decision. Having reconsidered the information afresh, for the same reasons that I provided for my decision dated 2 June 2016, I remain satisfied that the description of the claimed native title rights and interests is clear and understandable.

[76] 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.

[77] It is my view that the statement of the law relevant to this condition at p 19 of my Wakka Wakka #3 decision is still correct. I also agree with my statement of the law relating to the three

particular assertions at pp 19, 23, 25, 26, 27 and 29 of my decision dated 2 June 2016. In the interests of brevity, I do not restate any of the analysis of the law and simply refer to and rely on it for this fresh consideration of this amended application against s 190B(5).

[78] The information within the application at Attachments F&M and M1 are relevant to the factual basis and appear to be the same as that contained in the Wakka Wakka #3 application. I note that Attachment M1 is an affidavit by [name deleted] of 14 January 2012 which is essentially the same as his affidavit of 16 November 2011 which was provided by the applicant in relation to the pre-combined applications subject to the Wakka Wakka #3 application.

[79] I consider that the anthropological report dated March 2000 (report) that was provided by the applicant in relation to the original application and also in relation to the Wakka Wakka #3 application is also relevant to the factual basis.

[80] I extensively reviewed this material in the statement of reasons I provided for my decision dated 2 June 2016. I have considered this material and my reasons and believe that I accurately related the contents of the material in my decision — see my statement of reasons at pp 19 – 30. In the interests of brevity, I do not propose to again set out the contents of that material in this decision and simply refer to and rely on my earlier reasons in this fresh consideration of the assertions at s 190B(5).

[81] I also note, however, that I will consider s 190B(5)(a) in full and do not propose to rely on my consideration of this subsection in my Wakka Wakka #3 decision as the area covered by this application is different, although it adjoins the Wakka Wakka #3 application area. I note however that the factual material extracted in my Wakka Wakka #3 decision is pertinent to my consideration here as the extracted facts are also relevant to the claim group's association of the area covered by this application. I do not intend to restate all those facts, but instead rely on those facts as well as the statement of law regarding s 190B(5)(a) whilst making a full consideration of this subsection below.

[82] I note that I will consider each of the three assertions set out in the three paragraphs of s 190B(5) in turn in my reasons below.

Reasons for s 190B(5)(a)

[83] The report contains extensive factual material about the native title claim group. I refer to only some of that information in my consideration of s 190B(5). In particular, the report contains the following relevant information about the association of the claim group and that of their predecessors with the application area:

- 'Effective sovereignty', or first European contact, in the application area occurred around the 1840s — at [41].
- Early accounts from the mid to late 1800s located the Wakka language around or near the northern and southern regions of the application area — at [49], [52], [55] and Table 4.1.
- Articles from the 1930s and 1940s place the Wakka Wakka People in the area around the northern region — at [71] and Table 4.1.
- Of relevance to the association of some of the apical ancestors identified in Schedule A and their descendants, the report includes the following information:

- The daughter of Jenny and David Carlo was born around 1870 within the central region and one of their grandchildren was born there in 1888 — at [623]. Jenny Carlo was most likely from this area and born around 1850 — at [623]. David Carlo may have been born in 1845 and originated from the same area as his daughter. He would have likely been in possession of parts of the application area before the time of effective sovereignty — at [624].
- Maggie Hart's country was within and around the southwestern and central regions where she lived, worked and where she and one of her children are buried — at [637] – [638] and [642]. She was born around 1863 and her son was born around 1883 within the southwestern region — at [640]. Her grandson was born around 1905 within the central region — at [639]. Maggie was removed from the southwestern region to south of the application area in 1920 but later moved back — at [640]. It is likely that Maggie's mother was born at or prior to effective sovereignty and is likely to have originated from the area around or near the southwestern region — at [643].
- Tommy Dodd was born in 1870, originated from near the southwestern region and worked around that area — at [653]. His daughter was born around that region in 1907. His mother was likely born around 1850 and associated with that area — at [659]. They both identified as being from the Wakka Wakka language group — at [657].
- Mimi's country was around or near the southwestern region — at [675]. Some of his children were born in the southern region and some died proximate to the southwestern region. The family was connected with the southern regions of the application area — at [675] and [679]. One of his sons was born in the mid-southern region in 1873, which means Mimi may have been born around the early 1850s or late 1840s — at [678]. The descendants of apical ancestor Mimi continue to identify with their ancestral country and find the southern region of significance to their family — at [390].
- John Bond travelled the country, visiting the mid-southern region where he had children as well as country proximate to the southwestern region — at [687].
- Boubijan Cobbo was from around the southern region and was born around the early 1860s — at [709], [714] and [719].
- Stockman Bligh was also from the southern region and born about 1868 — at [730] and [732].
- Chlorine McKenzie was born about 1902 proximate to the southwestern region where her father was from — at [753]. Her grandson says that she spoke the Wakka Wakka language and spoke of her country around or proximate to the southwestern region — at [751].

- Current claimants continue to use the country for its natural resources — at [794]. One claimant says that he has lived in the southern region all of his life and goes fishing in the river there — at [806].
- The claim group members have knowledge of the dreaming stories, including one around the southern region — at [213] – [218]. They have knowledge of the mythic beings and continue to believe that their country is imbued with spiritual presence such as at a spring around the eastern region — at [207] – [210].

[84] The affidavit of a claimant provides information about his association as well as his predecessor's association with the application area:

- He is a descendant of apical ancestors King Billy, Maria of Boondooma and Maggie West — at [1].
- He was born in 1942 in the central region and was raised with his siblings around or proximate to the northwestern/western regions — at [2]. In 1952, they were moved south of the application area but he moved back near the northwestern/western regions in 1959 to work with his father and uncle.
- His parents were married in 1936 near the western/southwestern region — at [3].
- His mother was born in 1923 around or near the southwestern boundary and her sister was born around or near the northwestern/western boundary in 1907 — at [4].
- His father was born around the northwestern/western region, possibly about 1895 and worked there as a stockman — at [15]. He died within the central region in about 1967. His father's mother was Maggie West who was from around or near the southwestern region — at [16]. His father's father is buried near or around the northwestern/western region — at [17].
- Elders told him that his country includes the area around the northwestern/western and southwestern regions — at [20].
- His uncles and aunts lived within or near the central and southern regions — at [30].

Consideration

[85] I note that in my consideration of this subsection below, when I refer generally to the factual basis, I am referring to my views in relation to not only the information that I have extracted above but also to the information extracted in my Wakka Wakka #3 decision dated 2 June 2016. I proceed with my assessment of the sufficiency of this material in supporting the assertion at subsection (a) below.

[86] I consider that the factual basis must provide information pertaining to the identity of the native title claim group, the predecessors of the group and the nature of the group's association with the area covered by the application. In that regard, I consider that the factual basis material identifies the native title claim group and acknowledges the relationship the Wakka Wakka People have with their country, being both of a physical and spiritual nature. The factual basis reflects the knowledge claim group members have of traditional Wakka Wakka land and waters including places relating to their predecessors and mythical and spiritual sites as well as areas belonging to different Wakka Wakka families.

[87] There is also, in my view, a factual basis that goes to showing the history of the association that members of the claim group have, and that their predecessors had, with the area covered by the application — see *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [51]. The factual basis contains references to the presence of the predecessors within the application area prior to the date of 'effective sovereignty', which I understand from the factual basis to have occurred around the 1840s.

[88] The asserted facts indicate that David Carlo was likely to have been born around 1845 and apical ancestor Mimi around the late 1840s within the application area, from which I infer that their predecessors were associated with the application area prior to effective sovereignty. The asserted facts also indicate that at least some of the other apical ancestors were associated with the application area. There are also references to the descendants of the apical ancestors, including their children and grandchildren, being born or present on the application area and surrounding areas. Subsequent generations of Wakka Wakka families all have knowledge of the boundaries of their traditional country and they have all been present on the application area at various times. For instance, the descendants of King Billy, Maria of Boondooma and Maggie West have lived and been present in the northwestern, central, western, southwestern and surrounding regions of the application area. The descendants of Mimi find the southern regions of significance.

[89] The factual basis is also sufficient to support the assertion that the Wakka Wakka People have a spiritual association with the application area and is sufficient to show the history of that association. The Wakka Wakka People have knowledge of the myths, spiritual beings and sacred sites on country. The asserted facts indicate that their country and specific places within it is occupied by spiritual beings. The claimants are taught traditional laws and customs from their immediate predecessors so that the younger generations continue to have a spiritual association with their country. In my view, this transfer of knowledge and belief system demonstrates the history of the spiritual association the Wakka Wakka People have with the application area.

[90] For the purposes of s 190B(5)(a), I must also be satisfied that there is sufficient factual material to support the assertion of an association between the group and the whole area. In my view, the factual basis is sufficient to support the assertion that there is an ancestral system of landholding, which current members continue to acknowledge by remaining associated with it or identifying with it. The material indicates that ancestors Maggie West, Jenny and David Carlo, Maggie Hart, Tommy Dodd, Mimi, John Bond, Boubijan Cobbo, Stockman Bligh and Chlorine McKenzie were associated with the northwestern, western, central and/or the southern regions. Their descendants have remained associated with these areas and other regions within the application area by being born, raised, residing or working there. There are also references to a mythic story and a spiritual site located around the southern and eastern regions.

[91] From the above information, I consider that the factual basis is therefore sufficient to support the assertion of an association, both physical and spiritual, with the application area and therefore is sufficient to support the assertion of an association 'between the whole group and the area' — see *Gudjala 2007* at [52]. In my view, the factual basis material provides sufficient examples and facts of the necessary geographical particularity to support the assertion of an association between the whole group and the whole area.

[92] Given the information before me, I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s 190B(5)(a).

Reasons for s 190B(5)(b)

[93] The factual basis in relation to paragraph (b) is unchanged from that considered when making my Wakka Wakka #3 decision. I have read the material again and have afresh decided,

for the reasons there outlined and on the basis of my consideration of subsection (a) above, that in my view the factual basis:

- identifies a relevant pre-sovereignty society under which Wakka Wakka traditional laws and customs are said to operate;
- supports the assertion that the apical ancestors or their predecessors were born into the Wakka Wakka language speaking society that existed prior to sovereignty;
- supports the assertion of a connection between the society that existed prior to effective sovereignty and the current native title claim group and a continued association by the claim group with the application area (see also my reasons at s 190B(5)(a) above);
- reveals that the laws and customs currently observed and acknowledged by the Wakka Wakka People are organised around, amongst other things, their belief in the mythical beings and other spiritual beliefs and accompanying systems of rights, interests and responsibilities;
- is sufficient to compare the current laws and customs with those that are asserted to have existed prior to sovereignty and is sufficient to support the assertion that the current system of rights and interests finds its origin in the pre-sovereignty normative system; and
- is sufficient to support the assertions that the relevant laws and customs, acknowledged and observed by this society, have been passed down through the generations to the claim group, such as by being told stories and shown traditional practices, and have been acknowledged by them without substantial interruption, which will allow the laws and customs to be passed to future generations ensuring their vitality and continuity.

[94] It follows that, in my view, the laws and customs currently observed and acknowledged are 'traditional', as defined in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] 214 CLR 422; HCA 58, as they derive from a society that existed at the time of effective sovereignty. These traditional laws and customs, in my view, give rise to the claim to native title rights and interests.

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

Reasons for s 190B(5)(c)

[96] There has also been no relevant change to the factual basis material in relation to this subcondition since I made my Wakka Wakka #3 decision. I have reread the material and have decided afresh, for the reasons there outlined, that in my view the factual basis:

- goes to explaining the transmission and continuity of the native title rights and interests held in the application area in accordance with traditional laws and customs; and
- is sufficient to support the assertion that the Wakka Wakka system of laws and customs originate from their ancestors prior to effective sovereignty and that by passing on traditional knowledge such as through telling stories about myths, mythical beings and country and teaching customs and traditional practices to the younger generation ensures continuity in the acknowledgement and observance of those laws and customs.

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

[98] 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.

[99] The description of the claimed native title rights and interests set out in Schedule E of the application is essentially identical to the rights and interests I considered when making my Wakka Wakka #3 decision. The information in support of whether those rights and interests can be prima facie established is also the same. I have considered the reasons that I made in relation to this condition in my decision dated 2 June 2016 and am of the view that the statement of law, as set out at pp 30 to 32, is still correct. I have also reviewed the applicant's material in support of the rights and interests claimed and my reasons in relation to each right and interest claimed and consider that I accurately related the contents of the material in my decision — see my statement of reasons at pp 32 – 35. In the interests of brevity, I do not restate any analysis of the law or the material in support of the claimed native title rights and interests and simply refer to and rely on it for this fresh consideration of this amended application against s 190B(6).

[100] Having considered this condition afresh, I remain satisfied that the requirements of s 190B(6) are met and therefore rely on my reasons in my Wakka Wakka #3 decision — refer to decision dated 2 June 2016 for the claimed native title rights and interests that I consider can be prima facie established.

[101] 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.

[102] The Wakka Wakka #3 application satisfied this condition of the registration test. The information that is currently before me is essentially the same as the information which was before me for that application. I have considered the reasons that I made in relation to this

condition in my decision dated 2 June 2016 and am of the view that the statement of law relevant to this condition is still correct and that I accurately related the contents of the material in my decision — see my statement of reasons at p 36. In the interests of brevity, I do not restate any analysis of the law or the material in support of this condition and simply refer to and rely on it for this fresh consideration of this amended application against s 190B(7).

[103] Having considered this condition afresh, I remain satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with the land or waters within the application area. I therefore rely on the reasons in my earlier decision.

[104] 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, and

(b) either:

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

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

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

(3) If:

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

(b) either:

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

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

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

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

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

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

[105] In the reasons below, I consider each part of s 61A against what is contained in the application and accompanying documents and in any other information before me as to whether the application should not have been made.

Reasons for s 61A(1)

[106] 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.

[107] The geospatial assessment states that no determinations of native title fall within the external boundaries of the application area. The results of my own search of the Tribunal's mapping database confirm that there is no overlap with any native title determination. It follows that the application is not made in relation to an area for which there is an approved determination of native title.

[108] In my view the application **does not** offend the provisions of s 61A(1).

Reasons for s 61A(2)

[109] 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.

[110] I consider that the application is not made over areas covered by a previous exclusive possession act except to the extent ss 47, 47A and 47B may apply — see Schedules B and L.

[111] In my view the application **does not** offend the provisions of s 61A(2).

Reasons for s 61A(3)

[112] 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.

[113] I consider that the application does not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area that is, or has been, subject of a previous non-exclusive possession act, except to the extent that ss 47, 47A or 47B of the Act may apply — see Schedules B and L.

[114] In my view, the application **does not** offend the provisions of s 61A(3).

Conclusion

[115] In my view the application **does not** offend any of the provisions of ss 61A(1), (2) and (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.

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

Reasons for s 190B(9)(a)

[117] Schedule Q provides that the native title claim group does not claim ownership of minerals, petroleum or gas where they are wholly owned by the Crown.

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

Reasons for s 190B(9)(b)

[119] Schedule P indicates that the native title claim group does not claim exclusive possession of all or part of an offshore place.

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

Reasons for s 190B(9)(c)

[121] The application does not disclose, nor is there any information before me to indicate, that the native title rights and interests claimed have otherwise been extinguished.

Conclusion

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

[End of reasons]

Attachment A
Information to be included on the Register of Native Title Claims

Application name	Wakka Wakka People #4
NNTT file no.	QC2012/003
Federal Court of Australia file no.	QUD91/2012

In accordance with ss 190(1) and 186 of the *Native Title Act 1993* (Cth), the following is to be entered on the Register of Native Title Claims for the above application.

Section 186(1): Mandatory information

Application filed/lodged with:

Federal Court of Australia

Date application filed/lodged:

10 February 2012

Date application entered on Register:

5 April 2016

Applicant:

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

Applicant's address for service:

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

Area covered by application:

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

Persons claiming to hold native title:

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

Registered native title rights and interests:

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

[End of document]