National Native Title Tribunal

Registration test decision

Application name	Wakka Wakka People #3
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.	QC2016/003
Federal Court of Australia file no.	QUD621/2011
Date application made	12 December 2011
Date application last amended	29 April 2016
Date of decision	2 June 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 reasons: 7 June 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 Wakka Wakka People #3 native title determination application (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] In December 2011 and February 2012, respectively, the Wakka Wakka People #3 (QUD621/2011; QC2010/010) and Wakka Wakka People #5 (QUD93/2012; QC2012/004) native title determination applications were filed in the Federal Court of Australia (the Court).

[4] On 21 March 2016, orders were made for the two applications to be combined and the combination application was filed with the Court on 29 April 2016.

[5] On 12 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.

Background

[6] A notice has been issued in relation to the grant of tenements (EPM26110) in accordance with s 29 of the Act with a notification date of 3 February 2016. The application was filed within the three month timeframe over the area affected by the future act notice and this has required me to use my best endeavours to finish considering the claim by the end of four months after the notification day, that is 3 June 2016 — see s 190A(2).

Requirements of s 190A

[7] 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).

[8] I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply as the nature of the amendments, being a combination of two previously separate applications are not envisaged by the circumstances in either ss 190A(1A) or 190A(6A).

[9] I must therefore apply the registration test to this 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.

[10] 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.

[11] 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.

Information considered when making the decision

[12] Subsection 190A(3) directs me to have regard to certain information when testing an application for registration. I understand this provision 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 combination application and accompanying documents;
- the information contained in the documents accompanying the original pre-combination applications and additional material provided by the applicant in respect of those applications;
- the amended Geospatial Assessment and Overlap Analysis (GeoTrack: 2016/0730) prepared by the Tribunal's Geospatial Services on 25 May 2016 (the geospatial assessment); and
- the results of my own searches using the Tribunal's registers and mapping database.

[13] 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

[14] As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness. 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] to [31]. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

- On 13 May 2016, the case manager for this matter sent a letter to the State of Queensland (the State) enclosing a copy of the Extract from Schedule of Native Title Applications which shows details of the application. That letter informed the State that any submission in relation to the registration of this claim should be provided by 20 May 2016 and that the delegate anticipates making the registration test decision by 3 June 2016. The State advised by email that it did not wish to provide any submissions.
- The case manager, also on 13 May 2016, wrote to inform the applicant that any additional information should be provided by 20 May 2016 and that the delegate anticipates making the registration test decision by 3 June 2016. No additional information has been provided.
- On 30 May 2016, the case manager wrote to inform the State that the delegate considers it appropriate to have regard to the information contained in affidavits that accompanied the pre-combination applications and the additional material provided by the applicant in relation to those applications.

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.

[15] 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.

[16] 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).

[17] 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.

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

Native title claim group: s 61(1)

[19] Schedule A of the application provides a description of the native title claim group, an extract of which can be seen in my reasons below at s 190B(3). 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 at [1]. 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.

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

Name and address for service: s 61(3)

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

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

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

[23] 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.

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

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

[25] The application is accompanied by affidavits sworn by the person who comprises 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 — at [4] – [19].

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

Details required by s 62(1)(b)

[27] 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)

[28] 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)

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

Searches: s 62(2)(c)

[30] 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)

[31] 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)

[32] 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)

[33] 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)

[34] 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)

[35] 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)

[36] Schedule I contains details of two notices issued under s 29 of the Act.

Conclusion

[37] 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.

[38] In my view, the requirement that the Registrar be satisfied that there are no common claimants arise where there is a previous application which comes within the terms of subsections (a) to (c) — *State of Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

[39] I note that the text of this provision reads in the past tense, however I consider the proper approach would be to interpret s 190C(3) in the present tense as to do otherwise

would be contrary to its purpose. The explanatory memorandum that accompanied the Native Title Amendment Bill 1997 relevantly provides that:

> 29.25 The Registrar must be satisfied that no member of the claim group for the application … *is* a member of the claim group for a registered claim which was made before the claim under consideration, which *is* overlapped by the claim under consideration and which itself has passed the registration test [emphasis added].
>
> …
>
> 35.38 The Bill generally discourages overlapping claims by members of the same native title claim group, and encourages consolidation of such multiple claims into one application.

[40] I understand from the above that s 190C(3) was enacted to prevent overlapping claims by members of the same native title claim group from being on the Register at the same time. That purpose is achieved by preventing a claim from being registered where it has members in common with an overlapping claim that is on the Register *when* the registration test is applied. I consider that this approach, rather than a literal approach, more accurately reflects the intention of the legislature.

[41] I also note that in assessing this requirement, I am able to address information which does not form part of the application — *Doepel* at [16].

[42] The geospatial assessment does not identify any previous application that covered the whole or part of the area covered by the current application apart from the two applications, namely Wakka Wakka People #3 and Wakka Wakka People #5, that are being combined to the current application.

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

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

[45] The current application is a combination of the Wakka Wakka #3 application which was made on 12 December 2011 and entered on the Register on 19 January 2012 and the Wakka Wakka #5 application which was made on 10 February 2012 and entered on the Register on 5 April 2012. There were no previous applications for the purposes of s 190C(3) at the time both pre-combination applications were made or registered.

[72] Therefore there were no registered native title applications overlapping either pre-combination application when they were made. The geospatial assessment confirms that there continues to be no other registered native title claims overlapping the combination claim area as at the date of this decision. My search of the Tribunal's mapping database revealed an overlap with the Kabi Kabi First Nation (QUD280/2013; QC2013/003) application, Wulli Wulli and Wakka Wakka Peoples (QUD311/2011; QC2011/2015) application and the Wakka Wakka People #4 (QUD91/2012; QC2012/003) application. Attachment B provides that the application specifically excludes the Kabi Kabi application

and the Wulli Wulli and Wakka Wakka Peoples application. The geospatial assessment confirms that the overlaps with the three applications are technical overlaps only, namely that no real overlaps exist on the ground.

[46] 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.

[47] 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.

[48] 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.

[49] 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.

[50] Attachment R is entitled 'Certification of Native Title Determination Application — Wakka Wakka People #3' (certification). It is dated 9 December 2011 and signed by the Chief Executive Officer of QSNTS. This certificate originally accompanied the Wakka Wakka People #3 application prior to it being combined with Wakka Wakka People #5.

[51] Section 190C(4)(a) imposes upon the Registrar conditions which, according to Mansfield J, are straightforward — *Doepel* at [72]. His Honour noted that the Registrar is to be 'satisfied about the fact of certification by an appropriate representative body', but is not to 'go beyond that point' and 'revisit the certification of the representative body' — at [78], [80] and [81]; see also *Wakaman People #2 v Native Title Registrar* [2006] FCA 1198 (*Wakaman*) at [32]. My task here is therefore to identify the appropriate representative body and be satisfied that the application is certified under s 203BE.

[52] Once satisfied that the requirements of s 190C(4)(a) have been met, I am not required to 'address the condition imposed by s 190C(4)(b)' — *Doepel* at [80].

[53] In *Wakaman*, Kiefel J considered the issue of certification in the case of an amended application where the certificate from the pre-amended application was filed in support of

the amended application. Her Honour accepted that it is 'part of the delegate's function under the [Act] to consider whether the certification is of the particular application under consideration' — at [33]. Her Honour noted that this would necessarily involve consideration of the applicant's intention— at [33].

[54] Her Honour was of the view that to reject a certification on the basis that it was given in relation to an earlier version of the application would be 'unduly technical and not appropriate to procedures under the [Act]' — at [33]. The applicant and the representative body 'clearly intended' the certification to apply to the amended application. The content of the amended application was the same as that preceding it and it 'referred to the same lands and the process utilised for authorisation was the same, as were the persons participating in it' — at [33]. The only amendment to the application being considered in *Wakaman* was a change to the claim group description — at [33].

[55] A combination application is not a new application but a species of amendment under s 64(2) and generally results in two or more applications being combined. I therefore consider that I am able to apply the principles set out in *Wakaman* to the facts before me.

[56] The substance of the claim before me is no different from the substance of the two pre-combination applications and that the area covered by the combined application is simply a joining of the two areas covered by the pre-combination applications. In this instance though, only the certificate relating to the Wakka Wakka People #3 pre-combination application has been filed. It could be argued that the certificate relates to a smaller area than currently being considered.

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

[58] I also note that the Wakka Wakka People #5 application was nevertheless certified and although that certificate was not filed with the combination application it is in identical terms to the certificate which was filed, except dated 6 February 2012, and I would therefore form the same view in relation to its compliance against s 190C(4) as the Wakka Wakka People #3 certification. This certificate when read together with the original Wakka Wakka People #3 certificate, clearly reflects QSNTS' intention to have certified the making of both pre-combination applications and, therefore, the current combination application over the entire area covered by the combination application.

[59] I have had regard to the geospatial assessment dated 25 May 2016 which identifies the QSNTS as the only representative body responsible for the area covered by the application. The QSNTS is therefore the only body that could certify the application.

[60] I will proceed to consider whether the certificate contained in the application meets the requirements of s 190C(4)(a).

Identification of the representative body and its power to certify

[61] 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.

[62] 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.

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

[64] 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

[65] As mentioned above, I consider that I am only required to be satisfied of 'the fact of certification' and am not permitted 'to consider the correctness of the certification by the representative body' — *Doepel* at [78] and [82].

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

Subsection 203BE(4)(a)

[67] 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.

[68] 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.

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

Subsection 203BE(4)(b)

[70] 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).

[71] 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].

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

Subsection 203BE(4)(c)

[73] This subsection applies where the application area is covered by an overlapping application for determination of native title. Subsection 203BE(3) sets out the steps that a representative body must take if there are overlapping applications. In short, a representative body must use reasonable efforts to achieve agreement between competing claimants and minimise the number of applications being made. That subsection further provides that a failure by the representative body to comply with this subsection does not invalidate any certification of the application by the representative body.

[74] 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].

[75] 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.

[76] I also do not consider that any application currently overlaps the application area — see my 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.

[77] 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).

[78] 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.

[79] Attachment B is a written description titled 'Area of Land and Waters Covered by the Application – QUD621/2011 Wakka Wakka People #3 (As Combined)', which is prepared by QSNTS on 22 January 2016. It says that the 'combined application area includes all the land and waters subject to' the original Wakka Wakka People #3 and Wakka Wakka People #5 applications. Attachment B also contains a metes and bounds description of the external boundaries of the application area, referencing sub catchment basins, rivers, local government authority boundaries, lot on plan and geographic coordinates. It specifically excludes the Wulli Wulli and Wakka Wakka Peoples and the Kabi Kabi First Nation native title determination applications. Schedule B lists general exclusions.

[80] Attachment C is a copy of a map titled 'QUD621/2011 Wakka Wakka People #3 (Combined)' prepared by QSNTS on 12 January 2016. The map includes:

- the application area depicted by a bold outline;
- local government authority areas;
- sub catchment areas;
- topographic background;
- scalebar, commencement point and legend; and
- notes relating to the source, currency and datum of data used to prepare the map.

Consideration

[81] The geospatial assessment states that the area covered by the combination application does not include any areas which have not previously been claimed in the original Wakka Wakka People #3 and Wakka Wakka People #5 applications and concludes that the description and map of the application area are consistent and identify the application area with reasonable certainty. I agree with this assessment.

[82] Schedule B contains some general exclusions to categories of land and waters, which provides a sufficiently certain and objective mechanism to identify areas that are not covered by the application and fall within the categories described — see *Daniels for the Ngaluma People and Ors v State of Western Australia* [1999] FCA 686 at [29] – [38].

[83] 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.

[84] 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.

[85] Schedule A contains the following description of the native title claim group:

> The native title claim group is made up of families whose members identify as Wakka Wakka in accordance with traditional laws acknowledged and traditional customs observed by them. Membership is based on the principle of cognatic descent (i.e. descent traced through either mother or father).
>
> This application is brought on behalf Aboriginal people whose members identify as Wakka Wakka People, who are descended from the following ancestors:
>
> Jenny and David Carlo (parents of Princess Carlo);
>
> Minnie Bly (mother of Thomas Simpson), Ethel and Bill Button;
>
> Maggie Hart (mother of Crabbie Chapman and Henry Hart);
>
> Mother of Willie Boy Pickering;
>
> King Billy and Maria of Boondooma (parents of Tommy Dodd of Taabinga);
>
> Maggie West;
>
> Kitty of Boonara;
>
> MiMi;
>
> Kitty (mother of Jack Bulong);
>
> John Bond;
>
> Kitty (mother of Jenny Lind), Jenny Lind and Mick Buck;
>
> Boubijan Cobbo;
>
> Stockman Bligh and Aggie Bligh;
>
> Tommy (aka Boondoon) and Maggie (parents of Willie Bone), Billy McKenzie (father of Chlorine McKenzie), Chlorine McKenzie;
>
> Kate/Katie/Kitty Law;
>
> Emily of Degilbo, mother of Annie.

[86] It follows from the description above that the condition of s 190B(3)(b) is applicable to this assessment. Thus, I am required to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Nature of the task at s 190B(3)(b)

[87] When assessing the requirements of this provision, I understand that I must determine whether the material contained in the application 'enables the reliable identification of persons in the native title claim group' — *Doepel* at [51].

[88] In *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*), Dowsett J commented that s 190B(3) 'requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification' — at [33]. His Honour expressed the view that where a claim group description contained a number of paragraphs, 'consistent with traditional canons of construction', the paragraphs should be read 'as part of one discrete passage, and in such a way as to secure consistency between them, if such an approach is reasonably open' — at [34]. His Honour also confirmed that s 190B(3) required the Registrar to address only the content of the application — at [30].

[89] In *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*), Carr J commented that to determine whether the conditions (or rules) specified in the application has a sufficiently clear description of the native title claim group:

> [i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently. It is more likely to result from the effects of the passage of time and the movement of people from one place to another. The Act is clearly remedial in character and should be construed beneficially — at [67].

[90] While not addressing the requirements of s 190B(3), Dowsett J in *Aplin on behalf of the Waanyi Peoples v State of Queensland* [2010] FCA 625 considers the complexities relating to the criteria for the membership of the claim group and the internal perspective of the group, which, as a matter of necessity, determines its composition. His Honour, whilst dealing with, among other things, a request to change the native title claim group description to include a criterion of descent from another apical ancestor not identified in the application, stated that:

> … for the purposes of the [Act], it is the claim group which must determine its own composition … The claim group must assert that, pursuant to relevant traditional laws and customs, it holds Native Title over the relevant area. It is not necessary that all of the members of the claim group be identified in the application. It is, however, necessary that such identification be possible at any future point in time. A claim group cannot arrogate to itself the right arbitrarily to determine who is, and who is not a member. As to substantive matters concerning membership, the claim group must act in accordance with traditional laws and customs — at [256].

[91] Dowsett J referred to the decision of the *High Court in Members of the Yorta Yorta Aboriginal Community v State of Victoria* (2002) 214 CLR 422; (2202) 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*) where it was found that the existence of a society depended upon mutual recognition within the group. His Honour also referred to the decision in *Sampi v State of Western Australia* [2005] FCA 777 where French J stated that identification as a member involved an internal perspective of the group. The decision of French J was appealed and the Full Court stated that:

> A relevant factor among the constellation of factors to be considered in determining whether a group constitutes a society in the *Yorta Yorta* sense is the internal view of the members of the group … The unity among members of the group required by Yorta Yorta means that they must identify as people together who are bound by the one set of laws and customs or normative system — *Sampi v State of Western Australia* [2010] FCAFC 26 at [45].

[92] Dowsett J noted that '[t]hese cases clearly demonstrate that membership must be based on group acceptance' — at [260].

Consideration

[93] Although Schedule A states that the native title claim group is made up of families whose members identify as Wakka Wakka in accordance with the traditional laws and customs, I understand that descent from the named ancestors provides the fundamental basis for membership to the Wakka Wakka People native title claim group. This is supported by the statement that membership must be in accordance with traditional laws and customs and *is based on the principle of cognatic descent* — see also Attachment F&M at [5]. In my view, identification as a Wakka Wakka person is a qualifier to membership by descent – see Attachment F&M at [15] – [16] and [22]. I am of the view that this description is to be read as a discrete whole — *Gudjala 2007* at [34].

[94] Schedule A states that the application is brought by those persons who are the biological descendants of the apical ancestors listed above. Describing a claim group in this manner is one method that has been accepted by the Court as satisfying the requirements of s 190B(3)(b) — see *WA v NTR* at [67].

[95] I consider that requiring a member to show biological descent from an ancestor named in Schedule A provides a clear starting or external reference point to commence an inquiry about whether a person is a member of the native title claim group. This inquiry would also ascertain those who identify as a member of the claim group and therefore would also satisfy the requirements of s 190B(3)(b). With some factual inquiry it will be possible to ascertain the persons who fit the description of the native title claim group.

[96] In my view, 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).

[97] 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.

[98] The task at s 190B(4) is to assess whether the description of the native title rights and interests claimed is sufficient to allow the rights and interests to be readily identified. In my

opinion, that description must be understandable and have meaning — *Doepel* at [91], [92], [95], [98] to [101] and [123]. I understand that in order to assess the requirements of this provision, I am confined to the material contained in the application itself — at [16].

[99] I note that the description referred to in s 190B(4), and as required by s 62(2)(d) to be contained in the application, is:

> a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law …

[100] I will consider whether the claimed rights and interests can be prima facie established as native title rights and interests, as defined in s 223, when considering the claim under s 190B(6) of the Act. For the purposes of s 190B(4), I will focus only on whether the rights and interests as claimed are 'readily identifiable'. Whilst undertaking this task, I consider that a description of a native title right and interest that is broadly asserted 'does not mean that the rights broadly described cannot readily be identified within the meaning of s 190B(4)' — *Strickland* at [60]; see also *Strickland FC* at [80] to [87], where the Full Court cited the observations of French J in *Strickland* with approval.

[101] Schedule E provides the following description of the claimed native title rights and interests:

> 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 s238, ss47, 47A or 47B apply), the Wakka Wakka People claim the right to possess, occupy, use and enjoy the land and traditional 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 claim group claims the non-exclusive right to:
>
> (a) access, live, camp, erect shelters, exist, move and be present on the application area;
>
> (b) take, use, share and exchange Traditional Natural Resources for personal domestic and non-commercial, communal purposes;
>
> (c) conduct burial rites;
>
> (d) conduct ceremonies;
>
> (e) hold meetings;
>
> (f) participate in cultural activities;
>
> (g) teach on the area about the physical and spiritual attributes of the area;
>
> (h) speak for and make non-exclusive decisions;
>
> (i) maintain and protect places of importance under traditional laws and areas of significance to the native title holders under their traditional laws and customs from physical harm;
>
> (j) light fires for domestic purposes including cooking but not for the purposes of hunting or clearing vegetation;

(k) hunt;

(l) fish;

(m) gather the natural products (including food, medical plants, timber, stone, ochre and resin) according to traditional laws and customs;

(n) cultivate and harvest native flora according to traditional laws and customs;

(o) be accompanied into the claim area by non-claim group members being people required:

i. by traditional law and custom for the performance of ceremonies or cultural activities; and

ii. to assist in observing and recording traditional activities on the claim area; and

(p) in relation to water, take and use:

i. traditional Natural Resources from the water source for personal, domestic and non-commercial purposes;

ii. for personal, domestic and non-commercial, communal purposes; and

iii. Use the natural water resources of the application area including the beds and banks of the watercourses.

Consideration

[102] For the purposes of s 190B(4), I am satisfied that the rights and interests identified are understandable and have meaning.

[103] I find that the description of the native title rights and interests claimed is sufficient to allow the rights and interests to be readily identified and that therefore the application satisfies the condition of s 190B(4).

[104] 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.

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

The requirements of s 190B(5) generally

[106] Whilst assessing the requirements of this provision, I understand that I must treat the asserted facts as true and consider whether those facts can support the existence of the native title rights and interests that have been identified — *Doepel* at [17] and *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [57], [83] and [91].

[107] Although the facts asserted are not required to be proven by the applicant, I consider the factual basis must provide sufficient detail to enable a 'genuine assessment' of whether the particularised assertions outlined in subsections (a), (b) and (c) are supported by the claimant's factual basis material — see *Gudjala FC* at [92].

[108] I also understand that the applicant's material must be 'more than assertions at a high level of generality' and must not merely restate or be an alternate way of expressing the claim — *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*) at [28] and [29] and *Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal* [2012] FCA 1215 at [43] and [48].

[109] I am therefore of the opinion that the test at s 190B(5) requires adequate specificity of particular and relevant facts within the claimants' factual basis material going to each of the assertions before the Registrar can be satisfied of its sufficiency for the purpose of s 190B(5).

[110] The factual basis material is contained in Attachment F&M. I consider that the anthropological report dated March 2000 (report) and affidavit of [name deleted]of 16 November 2011 (affidavit) that were provided by the applicant in relation to both pre-combination applications contain more detailed information that is also relevant to the factual basis.

[111] I proceed with my assessment of the sufficiency of this material by addressing each assertion set out in s 190B(5) below.

Reasons for s 190B(5)(a)

The requirements of s 190B(5)(a)

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

- that there is 'an association between the whole group and the area', although not 'all members must have such association at all times' — *Gudjala 2007* at [52];
- that the predecessors of the group were associated with the area over the period since sovereignty — at [52]; and
- that there is an association with the entire claim area, rather than an association with part of it or 'very broad statements', which for instance have no 'geographical particularity' — *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) at [26]; see also *Corunna v Native Title Registrar* [2013] FCA 372 at [39] and [45] where Siopis J cited the observations of French J in *Martin* with approval.

Information provided in support of the assertion at s 190B(5)(a)

[113] 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, eastern and southern regions of the application area — at [49], [52], [55] and Table 4.1.
- In the early 1900s, the Wakka Wakka 'tribe' was reported to be located around the southeastern region of the application area – at [57] and Table 4.1.
- Records from 1919 show the most easterly extent of the Wakka Wakka country to be around the eastern boundary of the application area – at [69] and Table 4.1.
- Articles from the 1930s and 1940s place the Wakka Wakka people in the area between the northern, central and southern regions — at [71] and Table 4.1.
- Research from 2003 'characterises Wakka Wakka relationships to land' around the central region — at [117] and Table 4.1. The research provides some account of the earlier literature, particularly with respect to 'tribal boundaries' as well as accounts provided by Aboriginal people. The research 'includes a collection of customary beliefs and observances and notes on places of spiritual importance' — at [117].
- A linguist concludes that the historical records show that 'Indigenous peoples [which included the Wakka Wakka people] inhabited the approximate areas of the land claims [including the application area] at the time of European colonisation' — at [168].
- Traditional law and customs, lifestyle and economy prior to effective sovereignty, would have remained substantially unaltered and therefore the Wakka Wakka language speaking society would have been in occupation of the application area at the time of sovereignty — at [169].
- Of relevance to the association of some of the apical ancestors identified in Schedule A and their descendants, the report includes the following information:
    - A certificate dated 1910 records Jenny and David Carlo to be in the middle region and that they were both 'fullblood' — at [616]. Their daughter [name deleted] was born around 1870 proximate to the northwestern boundary and one of their grandchildren was also born there — at [623]. [Name deleted] was removed from that area to the central region with her children in 1910 — at [621]. She died in the middle region around the mid-1940s — at [622]. Her mother was most likely from the region near the northwestern boundary and born around 1850 — at [623]. David Carlo may have been born in 1845 and would have likely been in possession of parts of the application area before the time of effective sovereignty — at [624].
    - Thomas Simpson was born around the central or eastern region in the mid-1880s or 1890 — at [626]. His mother Minnie Bly was born about 1866 and her parents,

who would have been born prior to effective sovereignty, would have also originated from the central region of the application area — at [634].

- Maggie Hart's country was around or near the northwestern boundary 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 around or proximate to the northwestern region — at [640]. Her grandson was born around 1905 near the northwestern region and was married in the central region in 1927 — at [639]. Maggie was removed from near the northwestern region to the central region 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 northwestern region — at [643].
- Tommy Dodd was born in 1870 and died in the middle region in 1956 — at [653]. He originated from near the northwestern region and worked around that area. His daughter was born around that region in 1907. His mother was likely born around 1850 and from or associated with the western region — at [654], [657] and [659]. They both identified as being from the Wakka Wakka language group — at [657].
- Kitty of Boonara was born around the 1850s and therefore her mother was likely to have been in possession of her country around the northeastern region prior to the time of effective sovereignty — at [674].
- Mimi's country was around or near the northwestern region — at [675]. His children were born in the northern region and some died proximate to the northwestern region. The family was connected with both the northwestern and northern regions of the application area. One of his sons was born in or around the northern region in 1873, which means Mimi may have been born around the early 1850s or late 1840s — at [678] – [679].
- Jack Bulong was born around 1856 within the northeastern region — at [685]. He died in the northern region in 1923. His mother Kitty was most likely born around 1836 and also affiliated with the northern/northeastern region — at [686].
- John Bond was from the southern region and travelled the country, visiting the northern region where he had children as well as the northwestern/western region — at [687]. His son was born around 1887 around the western boundary — at [692]. John Bond was recorded to be around the northern/central region around 1905, when he was 40 years old, suggesting he was born around 1865.
- Jenny Lind was born around the middle region around the mid to late 1840s — at [706]. She married a Wakka Wakka man from the northern/central region — at [700] – [701]. She died in 1939 and is buried within the northern/central region — at [698]. Jenny's mother is likely to have also been affiliated with the country around the middle region and been born around 1825.
- Boubijan Cobbo was from the northeastern region and was born around the early 1860s — at [709], [714] and [719].

- Stockman Bligh was also from the northeastern region and born about 1868 and Aggie Bligh was from the mid-eastern region and born about 1863 — at [730] and [732]. Their parents were likely to have been born in the period 1840 to 1850 — at [733].
- Willie Bone and his brother were born in the southeastern region, around 1900 and 1904 respectively — at [746] – [747] and [750].
- Chlorine McKenzie was born about 1902 around or proximate to the northwestern 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 northwestern region — at [751]. Her parents were born around the late 1870s and 1880s — at [756].

- Genealogical research indicates that the current claimants are descendants of the ancestors identified in Schedule A — at [28] – [29] and Appendix D. The Wakka Wakka society can be understood as comprising three inter-related components, namely that the people are recruited according to descent from Wakka Wakka ancestors, language forms the essential identity of the group, and it is country more or less bounded where members exercise customary rights — at [299]. Members are united through decent from common ancestors who were linked by language group identity, and over Wakka Wakka country — at [300].
- The current claim group members continue to identify boundaries with reference to geographic location markers taught to them by their predecessors. They continue to identify with their ancestral country where they have a filiative attachment and within which they assert rights — at [302] – [314]. They continue to have knowledge of the country their ancestors were associated with and find these areas of significance to their family. For instance, the descendants of apical ancestor Mimi find the northern regions of significance — at [390]. Descendants of Jenny Lind are associated with the central region — at [390].
- Current claimants continue to use the country for its natural resources — at [794]. They hunt bush food such as porcupine, goanna and kangaroo which can be found in the central and mid-western regions — at [795] and [799]. One claimant says that she and her family continue to collect and eat witchetty grubs and bush vegetables in the central region where they live — at [803] and [812]. Another claim group member says that he has lived in the northern 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 within the northern 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 in the northern region — at [207] – [210].
- The claimants speak of the importance of teaching the younger generation and continuing to pass on information to them, such as teaching them about hunting, fishing, bush food and collecting natural resources — at [810].

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

- He is a member of the claim group through his descent from apical ancestors King Billy, Maria of Boondooma and Maggie West — at [1].
- He was born in 1942 proximate to the northwestern boundary and was raised with his siblings around or proximate to the northwestern/western regions — at [2]. In 1952, they were moved to the middle region and he moved back near the northwestern/western regions in 1959 to work with his father and uncle. In the early 1960s, he worked with his uncle around the southwestern region — at [30].
- When he was married he moved away from Wakka Wakka country but always returned on a regular basis to visit relatives and to show his 'family places that were important' to him — at [2].
- His parents were married in 1936 near the northwestern region — at [3].
- His mother was the granddaughter of King Billy and Maria of Boondooma — at [17]. She was born in 1923 around or near the northwestern boundary and her sister was born around or near the northwestern/western boundary in 1907 — at [4]. His mother always lived in Wakka Wakka country and moved with her children when they were taken to the central region and stayed there the rest of her life.
- His father was born around the northwestern/western region, possibly about 1895 and worked there as a stockman — at [15]. He died around the northern region in about 1967. His father's mother was Maggie West who was from around or near the northwestern region — at [16]. His father's father is buried near or around the northwestern/western region — at [17].
- His parents, aunts and uncles taught him about Wakka Wakka history, traditions, language and songs — at [6] – [8].
- Elders told him that his country includes the area around the northwestern and western regions — at [19]. He has knowledge of significant spiritual and other sites in that country, including burial grounds and a site where the spiritual presence can do harm — at [22] – [24] and [26] – [27].
- His uncles and aunts lived within or near the northwestern boundary — at [29].

Consideration

[115] In *Gudjala 2007*, Dowsett J noted the necessity for the Registrar 'to address the relationship which all members claim to have in common in connection with the relevant land' — at [40]. In my view, this criterion should be considered in conjunction with his Honour's statement that the 'alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)' — at [39]. I consider that these principles are relevant in assessing the sufficiency of the claimant's factual basis for the purpose of the assertion at s 190B(5)(a) as they elicit the need for the factual basis material to provide information pertaining to the identity of the native title claim group, the predecessors of the group and the nature of the association with the area covered by the application. In that regard, I consider that the factual basis material clearly 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 spiritual and burial sites as well as ancestral lands that belong to the different Wakka Wakka family groups.

[116] 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 application area — see *Gudjala 2007* at [51]. The factual basis contains references to the presence of the predecessors of the apical ancestors within the application area prior to the date of effective sovereignty, which I understand from the factual basis to have occurred around the 1840s. For instance, the mother of apical ancestor Jenny Lind was likely to have been born around 1825 and Jenny Lind was born in the mid to late 1840s within the application area. Kitty, mother of Jack Bulong was likely to have been born around 1836. David Carlo was likely to have been born around 1845 and apical ancestor Mimi around the late 1840s. The asserted facts also indicate that apical ancestors Thomas Simpson, Jack Bulong, Willie Bone and Chlorine McKenzie were born in and around 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, King Billy, Maria of Boondooma and Maggie West and their descendants have since effective sovereignty lived and been present in the northwestern, central, western and surrounding regions of the application area. Jenny Lind and her predecessors were, and her descendants continue to be, associated with the middle region. The descendants of Mimi find the northern region of significance.

[117] 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, mythic 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.

[118] 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 King Billy, Maria of Boondooma, Maggie West, Maggie Hart, Tommy Dodd, Mimi, John Bond and Chlorine McKenzie were associated with the northwestern, western and/or the central regions. Jenny and David Carlo, Minnie Bly and Thomas Simpson were associated with the central and/or eastern region. Kitty of Boonara, Jack Bulong, Boubijan Cobbo and Stockman Bligh were associated with the northern and/or northeastern region. Jenny Lind with the central and northern regions and Willie Bone with the southeastern region. 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 northern region.

[119] From the above information, I consider that the factual basis is sufficient to support the assertion of an association, both physical and spiritual, '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.

[120] 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)

The requirements of s 190B(5)(b)

[121] The definition of 'native title rights and interests' in s 223(1) provides, at subsection (a), that those rights and interests must be 'possessed under the traditional laws acknowledged, and traditional customs observed,' by the native title holders. Noting the similar wording between this provision and the assertion at s 190B(5)(b), I consider that it is appropriate to apply s 190B(5)(b) in light of the case law regarding the definition of 'native title rights and interests' in s 223(1). In that regard, I have taken into consideration the observations of the High Court in *Yorta Yorta* about the meaning of the word 'traditional' — see *Gudjala 2007* at [26] and [62] to [66].

[122] In light of *Yorta Yorta*, I consider that a law or custom is 'traditional' where:

- 'the origins of the content of the law or custom concerned are to be found in the normative rules' of a society that existed prior to sovereignty, where the society consists of a body of persons united in and by its acknowledgement and observance of a body of law and customs — at [46] and [49];
- the 'normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty' — at [47];
- the law or custom has been passed from generation to generation of a society, but not merely by word of mouth — at [46] and [79];
- those laws and customs have been acknowledged and observed without substantial interruption since sovereignty, having been passed down the generations to the claim group — at [87].

[123] I note that in *Gudjala 2009,* Dowsett J also discussed some of the factors that may guide the Registrar, or her delegate, in assessing the asserted factual basis, including:

- that the factual basis demonstrate the existence of a pre-sovereignty society and identify the persons who acknowledged and observed the laws and customs of the pre-sovereignty society — at [37] and [52];
- that if descent from named ancestors is the basis of membership to the group, that the factual basis demonstrate some relationship between those ancestral persons and the pre-sovereignty society from which the laws and customs are derived — at [40]; and

- that the factual basis contain an explanation as to how the current laws and customs of the claim group are traditional (that is laws and customs of a pre-sovereignty society relating to rights and interests in land and waters). Further, the mere assertion that current laws and customs of a native title claim group are traditional because they derive from a pre-sovereignty society from which the claim group is said to be descended, is not a sufficient factual basis for the purposes of s 190B(5)(b) — at [29], [54] and [69].

Society

[124] The identification of a pre-sovereignty society or a society that existed prior to European contact of the application area is relevant to my assessment of the assertion at s 190B(5)(b). In particular, I am of the view that identification of such a society is necessary to support the assertion of a connection between that society and the apical ancestors as well as a connection with the current native title claim group. I consider the following asserted facts to be relevant to my consideration of whether the factual basis is sufficient to support the existence of such a society:

- The Wakka Wakka language speaking society at sovereignty was one whose members shared a common language, which gave rise to their identity, and had common laws and customs — report at [149] – [150] and [203].
- The members of the society would have been in occupation of areas which include the application area at the time of sovereignty — at [169].
- 'Rights to country were exercised by members of country groups recruited by reference to descent from forebears' — at [199]. Descent is the principle means to gain rights to country, but place of birth and adoption can also be important factors — at [197]. Rights to country 'included the right to enter and use all of the resources of the land as well as control, licence or refuse its use by others' — at [201].

Traditional laws and customs

[125] The factual basis contains the following relevant information about the traditional laws and customs of the Wakka Wakka People native title claim group.

[126] The 'Wakka Wakka society, as it is observable today is based upon and is rooted in a customary system which is likely to have been in operation at the time of sovereignty' — at [319].

[127] There are rules that govern membership to the claim group — at [296]. The principle basis is of cognatic descent. Wakka Wakka is a spoken language but language proficiency is not necessary to be a part of the Wakka Wakka language group — at [297]. Rather it is an identifier which distinguishes them from other groups. The current claimants continue to have knowledge of their Wakka Wakka identity and the characteristics and customs that distinguish them from other groups, which they are told through instruction from the 'old people' when they are children — at [285] – [294].

[128] The claim group members continue to follow a landholding system which defines a boundary for country within Wakka Wakka land — at [302] – [311]. They learnt about the Wakka Wakka country, which is identified by reference to named places or other geographical references within and at the boundary of country, from their immediate

predecessors and other 'old people' — at [316] and [461]; see also affidavit at [19]. They have knowledge of their ancestral lands within Wakka Wakka country that their own family are connected with — see for instance report at [311]. For instance the descendants of Mimi are associated with the northern regions of the application area — at [437].

[129] The claimants may assert customary rights over their ancestral country — at [313] and [403]. Rights to country and effective exercise of those rights require geographic, environmental and spiritual knowledge of that country — at [404]. It is the 'exercise of choice over the country of cognatic kin [that] accommodates [this] acquisition of knowledge' — at [416]; see also [402] – [410]. One claimant says that he was informed by his knowledge of country which determined his assertion of rights to Wakka Wakka country — at [406]. The 'possession of requisite knowledge [of country] remains central to the management and exercise of rights to country' — at [429]. The 'manner whereby one ancestral country is privileged over another and rights within it realised are founded on a customary principle' — at [430]. There is 'continuity of country groups, recruited according to filiative principles whose members assert rights to more or less bounded areas of country' and 'this continuity can reasonably be supposed to extend back to the time of sovereignty within the application area' — at [431].

[130] The claim group members have knowledge of myths which they are told by the 'old people' and they continue to believe in mythic beings and other spiritual presence that inhabit country — at [488] – [490], [508] – [510] and [515] – [517]. The claimants have knowledge of their totem, which is derived from descent, and continue to believe in birds and animals representing omens or messages as well as other spiritual beliefs — at [494] – [507] and [512] – 513].

[131] Current claimants continue to perform corroborees, knowledge of which is handed down to the present generation by their predecessors — at [528] – [530], [558] – [559] and [567]. They practice smoking rituals to manage unwelcome spirits on country and know the protocols associated with the practice — at [536] – [542], [561] and [568]. They also follow aspects of funeral rites that their predecessors practiced — at [570]. These customs are likely to have been practiced by their ancestors around the time of effective sovereignty.

[132] The current claim group members speak of hunting, fishing and gathering resources on the application area like their predecessors and continue to teach the younger generation. One claimant says that he teaches the younger members of his family about hunting, fishing and firewood and another says she takes her grandchildren to the bush every weekend to teach about bush food and fishing — at [795] – [810].

[133] I note that the information extracted at s 190B(5)(a) is also relevant to my consideration of the assertions at s 190B(5)(b).

Consideration

[134] In order to support the assertion that the relevant laws and customs are 'traditional' in the *Yorta Yorta* sense, I consider that the factual basis must include factual details of:

- the connection between the pre-sovereignty society and the existing claim group; and
- the connection between the laws and customs acknowledged and observed by the pre-sovereignty society and the existing claim group.

[135] I also consider that the factual basis must include assertions that do not merely restate the claim but provide an adequate general description of the factual basis — see *Gudjala 2007* at [62] and [66] and *Gudjala 2009* at [27] and [29].

[136] In my view, the factual basis identifies a relevant pre-sovereignty society, namely the Wakka Wakka language speaking society, in the application area, which consisted of the predecessors of the native title claim group. The report sets out the nature, extent and the laws and customs of that society. The society comprised of members of the Wakka Wakka claim group who were united by a common ancestry and who shared the Wakka Wakka country and language in common. The pre-sovereignty society acknowledged and observed a body of laws and customs regarding, amongst other things, rights to country and other practices.

[137] In my view, the factual basis demonstrates that at least some of these ancestors were living within Wakka Wakka country, or were amongst the generation born to those who were living within Wakka Wakka country, at the time of effective sovereignty. In this sense, I understand that the information supports the assertion that at least some of the apical ancestors were born into the Wakka Wakka language speaking society that existed at and prior to effective sovereignty — see *Gudjala 2009* at [55] and also my reasons at s 190B(5)(a) above. From the factual basis, I understand the current claim members are descendants of these ancestors as well as those identified in Schedule A.

[138] I am also of the view that there is information contained within the factual basis material from which the current laws and customs can be compared with those that are asserted to have existed at sovereignty. The Wakka Wakka People observe a landholding system in which rights and responsibilities are exercised by the descendants of the ancestors named in Schedule A. The factual basis demonstrates that country groups continue to have knowledge of their ancestral country and have knowledge of significant and spiritual sites as well as burial grounds on country — see also my reasons at s 190B(5)(a) above. In my view, there is sufficient information to support the assertion that the present landholding system whereby members of the Wakka Wakka claim group gain rights to their country 'of choice' on the basis of cognatic descent and knowledge of that country, and the spiritual relationship to country, is founded upon a normative system that is likely to have been present at or before effective sovereignty. I consider that there is a sufficient factual basis that the landholding system held by the current claimants are derived from and rooted in customary laws and practices.

[139] The factual basis contains information which speaks to the way the claim group continues to perform traditional practices such as hunting and gathering natural resources for various purposes — see also my reasons at s 190B(5)(a). This in my view is sufficient to support the assertion that the laws and customs currently observed are relatively unchanged from those acknowledged and observed at the time of effective sovereignty, and that they have been passed down the generations to the claimants today.

[140] The factual basis also contains references to current observance and acknowledgement of laws and customs of a spiritual nature. The claimants have knowledge of myths, mythic beings and sites on country that have spiritual presence. There are references to current claimants performing corroborees, smoking ceremonies to ward off bad spirits and aspects of funeral rites.

[141] The factual basis, in my view, is sufficient to support the assertion that the relevant laws and customs, acknowledged and observed by this society, have been passed down through the generations, by word of mouth and instruction, to the current members of the claim group, and have been acknowledged by them without substantial interruption. There are references to the current claimants being told myths and about mythic beings and sacred sites, conducting smoking ceremonies and performing corroborees, as well as hunting, fishing and gathering resources in the application area, which reveals a continuing practice of teaching laws and customs to the younger generation. This in my opinion is sufficient to support the assertion that these laws and customs will continue to be passed to future generations ensuring a vitality and continuity of the traditional laws and customs. I infer that, given the level of detail in the continued acknowledgement and observance of the group's cultural traditions and that the laws and customs have been passed between a few generations from the apical ancestors to the current claimants, the apical ancestors would have also practiced these modes of teachings. It follows that, in my view, the laws and customs currently observed and acknowledged are 'traditional' in the *Yorta Yorta* sense as they derive from a society that existed at the time of effective sovereignty.

[142] 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)

[143] This condition is concerned with whether the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the native title rights and interests claimed in accordance with their traditional laws and customs.

[144] In *Martin*, French J held that:

> [u]nder s 190B(5)(c) the delegate had to be satisfied that there was a factual basis supporting the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs. This is plainly a reference to the traditional laws and customs which answer the description set out in par (b) of s 190B(5) — at [29].

[145] Accordingly, meeting the requirements of this condition relies on whether there is a sufficient factual basis to support the assertion at s 190B(5)(b) that there exist traditional laws and customs which give rise to the claimed native title rights and interests. In my view, this assertion relates to the continued holding of native title through the continued observance of the traditional laws and customs of the group.

[146] In addressing this aspect of the test, in *Gudjala 2009*, Dowsett J considered that where the claimant's factual basis relied upon the drawing of inferences, that:

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

Consideration

[147] There is, in my view, information within the factual basis material that goes to explaining the transmission and continuity of the native title rights and interests held in the application area in accordance with relevant traditional laws and customs.

[148] The factual basis provides references to the predecessors telling stories about myths, mythic beings and country, and teaching customs and practices to the younger generation. For instance, one claimant says that 'he teaches younger members of his family about hunting, fishing and collecting firewood' and another says that she 'takes her grandchildren out into the bush 'every weekend' and teaches them about bush food, fishing and witchetty grubs' — at [810].

[149] In reaching my view in relation to this requirement, I have also considered my reasons in relation to s 190B(5)(b) and in particular that:

- the relevant pre-sovereignty society has been clearly identified and some facts in relation to that society have been set out;
- there is some information pertaining to the acknowledgement and observance of laws and customs by previous generations of Wakka Wakka People in relation to the application area;
- examples of the claim group's current acknowledgement and observance of laws and customs in relation to the application area have been provided.

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

[151] 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.

[152] The claimed native title rights and interests that I consider can be prima facie established is identified in my reasons below.

The requirements of s 190B(6)

[153] The requirements of this section are concerned with whether the native title rights and interests, identified and claimed in this application, can be *prima facie* established. Thus, 'if on its face a claim is arguable**,** whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis' — *Doepel* at [135]. Nonetheless, it does involve some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed' — at [126], [127] and [132].

[154] I note that this section is one that permits consideration of material that is beyond the parameters of the application — at [16].

[155] I understand that the requirements of s 190B(6) are to be considered in light of the definition of 'native title rights and interests' at s 223(1) — *Gudjala 2007* at [85]. I must, therefore, consider whether, prima facie, the individual rights and interests claimed:

- exist under traditional laws and customs in relation to any of the land or waters in the application area;
- are native title rights and interests in relation to land or waters; and
- have not been extinguished over the whole of the application area.

[156] I also understand that the claimed native title rights and interests:

> must nonetheless be rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the peoples in question. Further, the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs. For the reasons given earlier, "traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty — *Yorta Yorta* at [86], cited in *Gudjala 2007* at [86].

[157] I am therefore of the view that a claimed native title right and interest can be prima facie established if the factual basis is sufficient to demonstrate that they are possessed pursuant to the traditional laws and customs of the native title claim group.

[158] I note that the 'critical threshold question' for recognition of a native title right or interest under the Act 'is whether it is a right or interest "in relation to" land or waters' — *Western Australia v Ward* [2002] HCA 28 (*Ward HC*) per Kirby J at [577]. I also note that the phrase 'in relation to' is 'of wide import' — *Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [93]. Having examined the native title rights and interests set out in Schedule E of the application, I am of the opinion that they are, prima facie, rights or interests 'in relation to land or waters.'

[159] I also note that I consider that Schedules B, E and L of the application sufficiently address any issue of extinguishment, for the purpose of the test at s 190B(6).

[160] Before I consider the rights and interests claimed, I note that my reasons at s 190B(6) should be considered in conjunction with, and in addition to, my reasons and the material outlined at s 190B(5).

Rights prima facie established

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 s238, ss47, 47A or 47B apply), the Wakka Wakka People claim the right to possess, occupy, use and enjoy the land and traditional waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group.

[161] The majority of the High Court in *Ward HC* considered that '[t]he expression "possession, occupation, use and enjoyment … to the exclusion of all others" is a composite expression directed to describing a particular measure of *control over access to land* [emphasis added]' — at [89]. The High Court further noted that the expression, collectively, conveys 'the assertion of rights of control over the land', which necessarily flow 'from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country' — at [93].

[162] In *Griffiths v Northern Territory of Australia* [2007] FCAFC 178, the Full Court, whilst exploring the relevant requirements to proving that such exclusive rights are vested in a native title claim group, stated that:

> the question whether the native title rights of a given native title claim group include the right to exclude others from the land the subject of their application does not depend upon any formal classification of such rights as usufructuary or proprietary. *It depends rather on the consideration of what the evidence discloses about their content under traditional law and custom* [emphasis added] — at [71].

[163] I also note the Full Court's observations in relation to control of access to country that:

> [i]f control of access to country flows from spiritual necessity because of the harm that "the country" will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive. The relationship to country is essentially a "spiritual affair". It is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people. The question of exclusivity depends upon the ability of the [native title holders] effectively to exclude from their country people not of their community. If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have … an exclusive right of possession, use and occupation — at [127].

[164] The above paragraphs point to the nature of this right in land and waters. In examining whether the claimants' material prima facie establishes its existence, I am of the view that this right materialises from traditional laws and customs that permit the native title claim group to exhibit control over all others in relation to access to the land and waters.

[165] The factual basis is such that it is asserted that at the time of effective sovereignty, there existed an association between the Wakka Wakka people and its land and waters — see my reasons at s 190B(5)(a).

[166] The factual basis provides that the Wakka Wakka people maintain the traditional right to exclude all others from the application area. The claim group continue to follow an ancestral landholding system where '[r]ights to country were exercised by members of country groups recruited by reference to descent' — report at [199]. Rights to that particular ancestral country are acquired through knowledge of that country and an 'exercise of choice' and these rights were understood to be 'exercisable and defensible' — at [200]. Those 'who were not members of the relevant country group were required to seek permission prior to entering, gathering or hunting on the country of the group' and '[t]respass was considered a breach of customary law and sanctions applied to those who transgressed that law' — at [200].

[167] Current claimants continue to acknowledge and observe the traditional laws and customs regarding rights to country and the right to speak for country — at [402] – [427]. They continue to speak of the significance of knowledge of country when asserting rights to country — at [411]. They say they are 'free to do much as they please' when in their ancestral country — at [461]. Speaking for country is a right realised through the possession of relevant knowledge of the ancestral country and is therefore 'the prerogative of senior

knowledgeable claimants who possess a deep knowledge of the country which is respected by others' — at [421].

[168] The Wakka Wakka People also consider their country to be imbued with a potent spirituality which manifests both as place and spiritual phenomenon and that familiarity with 'these forces is a part of the repertoire of knowledge possessed by senior claimants' — at [462]. Outsiders seek permission to enter country in acknowledgement of the rights of others to the country in question but also to 'gain some certainty in an otherwise uncertain spiritual environment through the guidance of those who both know and can manage the spirituality' — at [463]. The claimants also speak of the danger of outsiders entering Wakka Wakka country who are 'unaware of the prohibition of picking things up in country', which can make them sick, and speak of the importance of seeking permission — at [445].

[169] I am of the view that the factual basis material asserts that current members of the native title group maintain vast knowledge of their country. The knowledge of the laws and customs of the current members, as owners of their traditional land and waters, elicit that they have a 'spiritual affair' with their country and have the right to exclude other people from it. In my view, such control flows from a right to speak for country and a spiritual necessity to protect country from harm and injury and from country harming others. Particular family or country groups have an association with and speak for a particular area within their country on the basis of cognatic ties. I understand this symbolic ownership encompasses the right to speak for country and the right to exclude.

[170] I consider that this right is prima facie established.

2. Over areas where a claim to exclusive possession cannot be recognised, the claim group claims the non-exclusive right to:

(a) access, live, camp, erect shelters, exist, move and be present on the application area;

[171] The factual basis indicates that some of the apical ancestors and other predecessors resided on country and accessed country for various purposes.

[172] There are references to claimants regularly using country to visit family and sites, camping, traveling over the application area for cultural purposes and for hunting and gathering natural resources within it. Some members were born and raised on or proximate to the application area.

[173] It is my view that the factual basis material prima facie establishes that this right is possessed pursuant to the traditional laws and customs of the native title claim group.

(b) take, use, share and exchange Traditional Natural Resources for personal domestic and non-commercial, communal purposes;

(k) hunt;

(l) fish;

(m) gather the natural products (including food, medical plants, timber, stone, ochre and resin) according to traditional laws and customs;

(n) cultivate and harvest native flora according to traditional laws and customs;

[174] The factual basis contains references to members of the claim group and their predecessors hunting, fishing and utilising the natural resources of the land.

[175] The claimants continue to hunt bush meat such as porcupine and goanna, fish and collect bush resources, foods and medicines such as wild fig on the application area — at [795] – [819]. The associated knowledge and rules 'are rooted in practice which it may [reasonably] be supposed were evident before the time of effective sovereignty' — at [827].

[176] In my view, these rights are prima facie established under Wakka Wakka traditional laws and customs.

(c) conduct burial rites;

(d) conduct ceremonies;

(e) hold meetings;

(f) participate in cultural activities;

[177] The factual basis contains references to the current claimants continuing to perform corroborees, smoking ceremonies, aspects of funeral rites and other spiritual practices like their predecessors at the time of effective sovereignty.

[178] I am of the view that these rights are prima facie established pursuant to the traditional laws and customs of the native title claim group.

(g) teach on the area about the physical and spiritual attributes of the area;

[179] The claimants speak of being told about the boundary of Wakka Wakka country and their ancestral country by their immediate predecessors — see for instance affidavit at [19]. They were taught about spiritual and other sites on country, including burial grounds and a site where the spiritual presence can do harm — at [22] – [24] and [26] – [27]. Claimants were 'instructed by the old people to stay away from [certain places] for fear of becoming sick' — report at [440].

[180] The factual basis material, in my view, prima facie establishes that this right is possessed pursuant to the traditional laws and customs of the native title claim group.

(h) speak for and make non-exclusive decisions;

[181] The report contains references to the claim group's right to speak for and make non-exclusive decisions about the application area and indicates that knowledge is a key factor in the making of such decisions by the current claimants and that such knowledge is held by 'elders who are both respected because of their age and the quality that age yields: knowledge' — at [597]. The early literature also appears to indicate that the 'pre-sovereignty system of authority and decision making were characterized by … possession of esoteric knowledge and so too age and the attainment of the respect of consociates' — at [609].

[182] I am of the view that this right is traditionally based.

(i) maintain and protect places of importance under traditional laws and areas of significance to the native title holders under their traditional laws and customs from physical harm;

[183] The factual basis indicates that the current claimants continue to remain familiar with their ancestral country and continue to have knowledge of the spiritual dimension of places

which is important for the management of country as it was in the past — at [429]. Transmission to future generations is an important means whereby country can be managed and rights exercised. Claimants say that 'knowing where things are is essential so we can protect it and so we tell our kids about it' — at [443].

[184] This right is prima facie established under Wakka Wakka traditional laws and customs.

(j) light fires for domestic purposes including cooking but not for the purposes of hunting or clearing vegetation;

[185] One claimant says that 'they used to eat fish when they were hungry, cooking them in the ashes of a camp fire' — at [807]. The claimants says that 'knowledge of … bush resources and their preparation was learned from their parents, grandparents and other senior community members and that this knowledge is, in turn, being passed on to the next generation' — at [823].

[186] In my view, this right is prima facie established pursuant to the traditional laws and customs of the native title claim group.

(o) be accompanied into the claim area by non-claim group members being people required:

i. by traditional law and custom for the performance of ceremonies or cultural activities; and

ii. to assist in observing and recording traditional activities on the claim area; and

[187] The asserted facts contain references to members of the claim group performing smoking ceremonies and cultural and other activities on the application area. There are also references to an observed system where outsiders seek permission to access the application area for various reasons.

[188] In my opinion, this right is prima facie established under Wakka Wakka traditional laws and customs.

(p) in relation to water, take and use:

i. traditional Natural Resources from the water source for personal, domestic and non-commercial purposes;

ii. for personal, domestic and non-commercial, communal purposes; and

iii. Use the natural water resources of the application area including the beds and banks of the watercourses.

[189] The factual basis contains references to the claim group members fishing in a river flowing through the application area while growing up and fishing for dew fish in the upper creeks — at [806]; see also [808]. I also infer that water would be taken and used by the claimants while camping.

[190] I consider that this right is prima facie established under traditional laws and customs.

Conclusion

[191] As I am satisfied that at least one of the native title rights and interests claimed has been prima facie established, 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.

[192] The High Court's decision in *Yorta Yorta* and the Federal Court's decision in *Gudjala 2009* are of primary relevance in interpreting the requirements of s 190B(7). In the latter case, Dowsett J observed that it 'seems likely that [the traditional physical] connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs' — at [84]. In interpreting connection in the 'traditional' sense as required by s 223 of the Act, the members of the joint judgment in *Yorta Yorta* felt that:

> the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs … "traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty — at [86].

[193] I consider that for the purposes of s 190B(7), I must be satisfied of a particular fact or facts, from the material provided, that at least one member of the claim group has or had the necessary traditional *physical* association with the application area — *Doepel* at [18].

[194] I refer to the information above in relation to s 190B(5) of these reasons, which provide a sufficient factual basis supporting the assertion that the Wakka Wakka People acknowledge and observe the traditional laws and customs of the pre-sovereignty society.

[195] I note that the factual basis contains relevant information that describe a traditional physical association of the Wakka Wakka People with the application area, including travelling, hunting, fishing, gathering natural resources and camping on country — see for instance the affidavit. There are also references to claim members working within it.

[196] Given the above, and considering all of the information provided with the application, I am 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.

[197] 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.

[198] 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.

Reasons for s 61A(1)

[199] 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.

[200] 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.

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

Reasons for s 61A(2)

[202] 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.

[203] Schedule B indicates that areas which are subject to valid exclusive possession acts are excluded from the application, except to the extent that ss 47, 47A or 47B of the Act may apply.

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

Reasons for s 61A(3)

[205] 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.

[206] Schedule B states that exclusive possession is not claimed over areas which are subject to valid previous non-exclusive possession acts, except to the extent that ss 47, 47A or 47B of the Act may apply — see also Schedule L.

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

Conclusion

[208] 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.

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

Reasons for s 190B(9)(a)

[210] 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.

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

Reasons for s 190B(9)(b)

[212] Schedule P states that the application does not include a claim by the native title claim group to exclusive possession of all or part of an offshore place.

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

Reasons for s 190B(9)(c)

[214] 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. The application also claims the protections afforded by ss 47, 47A and 47B — see Schedules B and L.

Conclusion

[215] 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]

[End of document]