

# Registration Decision

<b>Application name</b>	Wakaman People #5
<b>Name of applicant</b>	John Alvoen, William Thomas, Robyn Hooley, Raelene Madigan, Carol Payne
<b>Federal Court of Australia No.</b>	QUD178/2018
<b>NNTT No.</b>	QC2018/001
<b>Date of Decision</b>	2 May 2018

## Claim accepted for registration

I have decided that the claim in the Wakaman People #5 application satisfies all of the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).<sup>1</sup> Therefore the claim must be accepted for registration and entered on the Register of Native Title Claims.

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Katy Woods

*Delegate of the Native Title Registrar*<sup>2</sup>

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<sup>1</sup> All legislative references are to the *Native Title Act 1993* (Cth) (the Act), unless stated otherwise.

<sup>2</sup> Delegate of the Native Title Registrar pursuant to ss 190–190D of the Act under an instrument of delegation dated 23 August 2017 made pursuant to s 99 of the Act.

# Reasons for Decision

## CASES CITED

*Corunna v Native Title Registrar* [2013] FCA 372 (*Corunna*)

*Griffiths v Northern Territory of Australia* [2007] FCAFC 178 (*Griffiths*)

*Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*)

*Gudjala People # 2 v Native Title Registrar* (2008) 171 FCR 317; [2008] FCAFC 157 (*Gudjala 2008*)

*Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*)

*Martin v Native Title Registrar* [2001] FCA 16 (*Martin*)

*Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta*)

*Northern Territory of Australia v Doepel* (2003) 133 FCR 112; [2003] FCA 1384 (*Doepel*)

*Sampi v State of Western Australia* [2005] FCA 777 (*Sampi*)

*State of Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*)

*Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*)

*Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 (*Wakaman*)

*Wulgurukaba People #1 v State of Queensland* [2002] FCA 1555 (*Wulgurukaba*)

*Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*)

*Western Australia v Ward* [2002] HCA 28 (*Ward HC*)

## **BACKGROUND**

- [1] The application was filed on behalf of the Wakaman People native title claim group on 26 March 2018. It covers an area between the Mitchell and Lynd Rivers in North Queensland, includes the town of Chillagoe and several surrounding stations, and extends to Forty Mile Scrub National Park on its southern boundary.
- [2] The Registrar of the Federal Court (the Court) gave a copy of the application and accompanying affidavits to the Native Title Registrar (Registrar) on 26 March 2018 pursuant to s 63 of the Act.
- [3] If the claim in the application satisfies all the registration test conditions in ss 190B–190C, then the Registrar must accept the claim for registration.<sup>3</sup> If it does not satisfy all the conditions, the Registrar must not accept the claim for registration.<sup>4</sup>
- [4] I have decided that the claim satisfies all of the registration test conditions and my reasons regarding each of the conditions are set out below.

### **Information considered**

- [5] Section 190A(3) sets out the information to which the Registrar must have regard in considering a claim under s 190A and provides that the Registrar ‘may have regard to such other information as he or she considers appropriate’. As required by s 190A(3), I have had regard to information in the application and accompanying documents provided by the applicant.
- [6] I have also considered information contained in a geospatial assessment and overlap analysis prepared by the Tribunal’s Geospatial Services in relation to the area covered by the application, dated 27 March 2018 (the geospatial report) and have considered information available through Geospatial Services in relation to locations mentioned in the application as being part of the application area.
- [7] I note that I can consider material from outside of the application for some of the conditions of registration, however I do not consider it appropriate to engage in fact-finding or to conduct a review of previous Wakaman native title claims, noting the guidance from Mansfield J that the Registrar’s task ‘is not to supplant the role of the Court when adjudicating upon the application for determination of native title, or generally to undertake a preliminary hearing of the application’.<sup>5</sup>
- [8] I note there is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers.<sup>6</sup>

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<sup>3</sup> Section 190A(6).

<sup>4</sup> Section 190A(6B).

<sup>5</sup> *Doepel* [16].

<sup>6</sup> Section 190A(3)(b).

- [9] The state of Queensland (the state government) has not provided submissions in relation to the application of the registration test.<sup>7</sup>

#### **Procedural fairness**

- [10] As noted above, I have considered the application and accompanying documents filed by the applicant on 26 March 2018. On 28 March 2018, the Tribunal's practice officer for the matter wrote to the state government advising that, should they wish to make any submissions, they should do so by 6 April 2018.
- [11] On 5 April 2018, the Tribunal's practice leader for the matter received confirmation that the state government had no comments or submissions to make in relation to the registration of this claim.
- [12] This concluded the procedural fairness process.

#### **Merits of the claim (s 190B) – Conditions met**

##### **Identification of area subject to native title – s 190B(2) condition met**

- [13] I am satisfied the claim meets the requirements of s 190B(2). The information provided about the external boundary and internally excluded areas are sufficient to identify with reasonable certainty the particular land or waters over which native title rights and interests are claimed.

##### ***What is required to meet this condition?***

- [14] For the application to meet the requirements of s 190B(2), the Registrar must be satisfied that the information and map contained in the application identify 'with reasonable certainty' the 'particular land and waters' where native title rights and interests are claimed. The two questions for this condition are whether the information and map provide reasonable certainty about:
- the external boundary of the area where native title rights and interests are claimed; and
  - any areas within the external boundary over which no claim is made.<sup>8</sup>

##### ***Does the information about the external boundary meet this condition?***

- [15] Attachment B includes a written description of the external boundary of the application area, beginning at the intersection of the Mitchell River and Lynd River (commencement point) and describes the application area with reference to coordinate points and various topographical features.

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<sup>7</sup> Section 190A(3)(c).

<sup>8</sup> *Doepel* [122].

- [16] Attachment C is a map showing the external boundary of the application area, prepared by the Tribunal's Geospatial Services and titled 'Wakaman #5'. The map is in colour with the external boundary marked in dark blue and the commencement point marked in red. Other features include:
- roads, water courses, mountains, towns and outstations, identified by name;
  - relief and topographical features;
  - scalebar and coordinate grid; and
  - notes relating to the source, currency and datum of data used to prepare the map.
- [17] As noted at paragraph [6] above, I have considered the geospatial report. I note the comment in the geospatial report that, but for a typographical error in the written description, *[sic]* 'the intent of the description is clear and a correspondence exists between it and map'.
- [18] The typographical error is found in the written description of the boundary where 'QI2005/001' should read 'QI2005/011', however the geospatial report concludes that this does not affect the ability of the map and description to identify the application area with reasonable certainty.
- [19] Having considered the nature of the error, the conclusions of the geospatial report, and the map and description, I agree with the geospatial assessment and am satisfied that the external boundary of the application area can be identified on the earth's surface with reasonable certainty.

***Does the information about excluded areas meet this condition?***

- [20] Schedule B includes a description of areas within the boundaries that are excluded from the application area. This description adopts general clauses to identify the excluded areas, including areas in relation to which a previous exclusive possession act has been done, and areas where native title has been validly extinguished. Schedule B also states that any area subject to a native title determination is excluded from the application.
- [21] I note French J's comment in regard to the requirements of s 190B(2), that 'it is unrealistic to expect a concluded definition of the areas subject to these provisions [in the Act] to be given in the application. Their applicability to any area will require findings of fact and law to be made as part of the hearing of the application'.<sup>9</sup> Following this reasoning, I am satisfied that the description of the excluded areas is sufficiently clear for the purposes of s 190B(2), as historic tenure searches could identify the areas described in the general exclusion clauses in Schedule B.

**Identification of the native title claim group – s 190B(3) condition met**

- [22] I am satisfied the claim sufficiently identifies the native title claim group and therefore meets the requirements of s 190B(3).

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<sup>9</sup> *Strickland* [55].

***What is required to meet this condition?***

- [23] For the application to meet the requirements of s 190B(3), 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.
- [24] The only question for this condition is ‘whether the application enables the reliable identification of persons in the native title claim group’. Whether the claim has been made on behalf of the correct native title claim group is not relevant to my task at this condition.<sup>10</sup>

***Does the description of the persons in the native title claim group meet this condition?***

- [25] Schedule A of the application refers me to Attachment A. Attachment A states ‘[t]he Wakaman People native title claim group is comprised of the descendants (including through adoption or raising up in accordance with traditional laws and customs) of the following apical ancestors...’.<sup>11</sup> Attachment A then provides a list of apical ancestors, listed (a)–(u).
- [26] I note that I am not required to do more than make ‘an assessment of the sufficiency of the description of the group for the purpose of facilitating the identification of any person as part of the group’.<sup>12</sup>
- [27] I understand from Attachment A that there is only one criterion that must be satisfied in order for an individual to qualify as a member of the group, being a descendant (including through adoption or ‘raising up’) of the listed apical ancestors. This description provides a clear objective starting point, being descent from named persons. Determining all the members of the group from the 21 apical ancestors / ancestor couples will require some genealogical research, however I note Carr J’s view that the need to undertake a factual enquiry to determine the members of the group does not mean that the group has not been described sufficiently.<sup>13</sup>
- [28] Based on the information provided in Attachment A, I am satisfied that the application describes sufficiently clearly the persons in the Wakaman People native title claim group and therefore satisfies the condition of s 190B(3)(b).

**Identification of claimed native title – s 190B(4) condition met**

- [29] I am satisfied the description in Schedule E is sufficient for me to clearly understand and identify the itemised rights as ‘native title rights and interests.’

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<sup>10</sup> *Doepel* [51]; *Gudjala* 2007 [33].

<sup>11</sup> Attachment A.

<sup>12</sup> *Wakaman* [34].

<sup>13</sup> *WA v NTR* [67].

***What is required to meet this condition?***

- [30] For the application to meet the requirements of s 190B(4), the Registrar must be satisfied that the application's description of the claimed native title rights and interests, as required by s 62(2)(d), is sufficient to allow the rights and interests to be readily identified.
- [31] The question for this condition is whether the claimed rights are understandable and have meaning, having regard to the definition of the term 'native title rights and interests' in s 223 of the Act.<sup>14</sup>

***Does the description of the native title rights and interests meet this condition?***

- [32] Schedule E of the application refers me to Attachment E. Paragraph 1 of Attachment E describes rights and interests in relation to areas where 'there has been no prior extinguishment of Native Title or where prior extinguishment is to be disregarded...'.<sup>15</sup>
- [33] The types of native title rights and interests claimed in relation to these areas are described as 'the right to possession, occupation, use and enjoyment of the claim area as against the whole world.'
- [34] I consider that this broadly-worded description of the rights and interests claimed in relation to these areas is consistent with the requirements of s 62(2)(d), and so satisfies s 190B(4).<sup>16</sup>
- [35] Paragraph 2 of Attachment E describes rights and interests in relation to '[a]ll remaining land and waters within the claim area'. Within such areas, 'the Native title rights and interests claimed are not to the exclusion of all others and are the rights to speak for country, be present on, have access to and use of the claim area and its cultural resources, namely the right to:...'.<sup>17</sup> There follows a list of rights and interests marked (a)–(z) and (aa)–(mm). Given the use of the word 'namely', rather than 'including', I consider the list of rights and interests to be exhaustive.
- [36] I am satisfied that the rights and interests in this list may be understood as 'native title rights and interests' as defined by s 223 and which have 'meaning'.<sup>18</sup>
- [37] Attachment E contains caveats that the asserted native title rights and interests are subject to the valid laws of the State of Queensland and the Commonwealth, and rights past and present conferred upon persons pursuant to those laws.<sup>19</sup>
- [38] Attachment E also states that the asserted rights and interests do not include a claim to ownership of any minerals, petroleum or gas wholly owned by the Crown, and will not apply if they have been extinguished in accordance with valid State or Commonwealth laws.<sup>20</sup>

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<sup>14</sup> *Doepel* [99], [123].

<sup>15</sup> Attachment E [1].

<sup>16</sup> *Strickland* [60]; *Strickland FC* [80]–[87]; *Wulgurukaba* [12].

<sup>17</sup> Attachment E [2].

<sup>18</sup> *Doepel* [99].

<sup>19</sup> Attachment E unnumbered paragraph.

[39] While there are some grammatical and formatting anomalies in Attachment E, I do not consider that these negatively affect the ability of the application to meet this condition.

### Factual basis for claimed native title – s 190B(5) condition met

[40] I am satisfied that the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support the three assertions of ss 190B(5)(a)–(c).

#### ***What is needed to meet this condition?***

[41] For the application to meet the requirements of s 190B(5), the Registrar must be satisfied there is a sufficient factual basis to support the assertion that the claimed native title rights and interests exist. 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;
- (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to native title rights and interests; and
- (c) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[42] The question for this condition is whether the factual basis is sufficient to support these assertions. To answer that question, I must assess whether the asserted facts can support the existence of the claimed native title rights and interests, rather than determine whether the applicant has provided ‘evidence that proves directly or by inference the facts necessary to establish the claim’.<sup>21</sup>

#### ***What is required to provide a sufficient factual basis for s 190B(5)(a)?***

[43] I understand that s 190B(5)(a) requires the factual basis material to address:

- that there is ‘an association between the whole group and the area’, although not ‘all members must have such association at all times’;<sup>22</sup>
- that the predecessors of the group were associated with the area over the period since sovereignty;<sup>23</sup> and
- that there is an association with the entire claim area, rather than an association with only part of it or ‘very broad statements’, which have no ‘geographical particularity’.<sup>24</sup>

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<sup>20</sup> Ibid.

<sup>21</sup> *Gudjala 2008* [92]; *Doepel* [16]–[17].

<sup>22</sup> *Gudjala 2007* [52].

<sup>23</sup> Ibid.

***What information has been provided in support of the assertion at s 190B(5)(a)?***

- [44] Schedule F of the application refers me to Attachment F. Attachment F provides relevant information about the association of members of the claim group, and that of their predecessors, with the application area, which I have summarised below.
- [45] Attachment F states that '[t]his application is to the area between the Mitchell and Lynd Rivers junction' and includes the town of Chillagoe, the old town of Mungana, the old Tate tin mine, Crystalbrook and Spring Valley stations, Almaden and Wrotham Park.<sup>25</sup>
- [46] The historical material included in Attachment F quotes William Parry Okeden in 1896 as describing the Aboriginal inhabitants between the Tate and Lynd rivers as 'Wataman' and 'Wakkamon'.<sup>26</sup> Attachment F also quotes William Kracke, who worked at the Tate tin mine from 1881 onwards, and who recorded 'that the area was highly populated by Aboriginal people and that there was plenty of game around which they collected. Kracke also described cultural practices such as corroborees...'.<sup>27</sup>
- [47] Regarding the association of some of the apical ancestors identified in Attachment A and their descendants, Attachment F provides material in support of this assertion, including the following, which I have paraphrased:
- Apical ancestor Mick McTavish (circa 1880) was born at Piccaninny Waterhole on the lower Tate River. Apical ancestor Pluto Brumby was born at the Walsh River, Mungana (circa 1865) and lived all his life at Wrotham Park Station. All these places are in the application area. Pluto's grandson [name deleted] was also born at Mungana (circa 1919).<sup>28</sup> Applicant [name deleted] is descended from both Mick McTavish and Pluto Brumby and has a particular association with the northern part of the application area.<sup>29</sup>
  - Mick McTavish's daughter Jessie Chong is the grandmother of current elders [name deleted], [name deleted] and [name deleted]. The descendants of Mick McTavish and Jessie Chong are strongly associated with the Tate River area where these ancestors were born and many of the descendants grew up on or near the Tate River.<sup>30</sup>
  - Apical ancestors Jimmy and Winnie are the parents of Maude Byrne who was born at Ryan Creek around Chillagoe circa 1888. Maude's daughter [name deleted] was born in Chillagoe in 1925. [name deleted]'s daughter [name deleted] is an applicant in this claim. [name deleted] learned and passed on knowledge of significant sites on Wakaman

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<sup>24</sup> Martin [26]; Corunna [39], [45].

<sup>25</sup> Attachment F [2].

<sup>26</sup> Ibid [8].

<sup>27</sup> Ibid [7].

<sup>28</sup> Ibid [15].

<sup>29</sup> Ibid [13], [15].

<sup>30</sup> Ibid [14].

country including a waterhole near Chillagoe associated with the Wakaman creation being, the Rainbow Serpent.<sup>31</sup>

- Apical ancestor Spider or ‘[name deleted]’ and his daughter Maggie were informants for researcher Lauriston Sharp in 1935. Maggie is the mother of Jubilee Jackson (born circa 1900) on the Tate River near Crystalbrook Station. Jubilee Jackson is the grandfather of applicant [name deleted].<sup>32</sup>
- Apical ancestors Billy Garbutt and Lucy aka Lizzie are the parents of Margaret Maude who was born at Fisherton around 1870. All of Margaret’s children, including Albert Thomas in circa 1904, were born in Wakaman country. Albert Thomas’s daughter [name deleted] is the mother of applicant [name deleted]. [name deleted] recalls his mother and grandmother living at Almaden and travelling along Crooked Creek to Fossilbrook with them in the dry season.<sup>33</sup>
- Apical ancestor Micky Atherton is the father of Roley Cameron, born circa 1900 at Chillagoe Station – adjacent to Spring Valley Station. Roley Cameron is the father of [name deleted], who was born at Chillagoe Station in 1927, and [name deleted] is the mother of applicant [name deleted]. [name deleted] recalls her mother and uncle, [name deleted], taking her and her siblings through Wakaman country showing them fishing holes and teaching them about cultural norms.<sup>34</sup>

[48] According to the material, the claimants continue to use and occupy the application area. This includes use for ceremonial purposes around births,<sup>35</sup> funerals and burials.<sup>36</sup> Other uses of the claim area include fishing and hunting<sup>37</sup>, use of fire for cooking and warmth,<sup>38</sup> and smoking ceremonies, such as that performed in 2014 by [name deleted], descendant of Mick McTavish and Pluto Brumby, for the Kowanyama people’s visit to the burial caves at Chillagoe.<sup>39</sup>

[49] Members of the claim group continue to have a spiritual association with the application area, and notably some laws attach to particular spiritual figures in association with particular sites. For example, the Rainbow Serpent *mula mali* prohibits swimming in certain waterholes in Wakaman country and these sanctions around access are known and practiced by the current claimants.<sup>40</sup> Other spiritual associations include:

- the *Djungkan* Dog, also associated with waterholes in Wakaman country;<sup>41</sup>

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<sup>31</sup> Ibid [16].

<sup>32</sup> Ibid [17].

<sup>33</sup> Ibid [18].

<sup>34</sup> Ibid [19].

<sup>35</sup> Ibid [33].

<sup>36</sup> Ibid [36].

<sup>37</sup> Ibid [45].

<sup>38</sup> Ibid [47].

<sup>39</sup> Ibid [36].

<sup>40</sup> Ibid [26].

<sup>41</sup> Ibid [28].

- the *Quinkan* spirits, which dictate practices to do with eating fish and disposal of fish bones, still practiced by the current claimants;<sup>42</sup> and
- the *Gangligan* ancestral being which is associated with male initiation sites, around which the claimants become uneasy.<sup>43</sup>

[50] Knowledge of traditional laws and customs are passed from generation to generation through traditional modes of oral transmission, teaching, observation,<sup>44</sup> as well as ‘active occupation and use of Wakaman country’.<sup>45</sup>

***Is the factual basis sufficient for the assertion of s 190B(5)(a)?***

- [51] I understand that s 190B(5)(a) requires me to ‘address the relationship which all members claim to have in common in connection with the relevant land’.<sup>46</sup> In my view, Dowsett J’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)’ is also relevant when considering whether this condition is met.<sup>47</sup>
- [52] I consider that these principles highlight the need for the factual basis material to identify the claim group and the predecessors of the group, and to explain the extent and nature of the association with the application area.

***Does the factual basis material show the association the predecessors of the claim group previously had with the area?***

- [53] I consider that the factual basis material contained in Attachment F demonstrates the physical association that the predecessors of the claim group had with the application area. Attachment F contains references to the presence of the predecessors of the apical ancestors within the application area prior to the date of European settlement, which is said to have occurred in the 1870s. For example, apical ancestor Pluto Brumby was born at Mungana around 1865<sup>48</sup> and Margaret Maude, daughter of apical ancestors Billy Garbutt and Lucy aka Lizzy, was born at ‘Fisherton’ around 1870.<sup>49</sup> The Tribunal’s Geospatial Service has confirmed there is a homestead called ‘Fischerton’ in the application area on the Tate River.
- [54] Attachment F also states that during the early years of European settlement, a number of the apical ancestors were born and lived in the application area.<sup>50</sup>

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<sup>42</sup> Ibid [29].

<sup>43</sup> Ibid [30].

<sup>44</sup> Ibid [14]–[16], [18]–[19], [27].

<sup>45</sup> Ibid [22].

<sup>46</sup> *Gudjala 2007* [40].

<sup>47</sup> Ibid [39].

<sup>48</sup> Attachment F [15].

<sup>49</sup> Ibid [18].

<sup>50</sup> Ibid [13]–[19].

- [55] In regard to the spiritual association of the predecessors, Attachment F states that Kracke recorded a ‘big corroboree’ in 1894 on the mid Tate River during a full moon.<sup>51</sup> Attachment F also notes that Tindale recorded a ‘Chillagoe song of the Wakaman tribe’ about a sleeping boy who sees *Kitja*, the morning star, in 1938.<sup>52</sup>

*Does the factual basis material show the association the claim group currently has with the area?*

- [56] On the basis of the information contained in Attachment F, I am satisfied that the descendants of the apical ancestors continue to remain associated with the application area and continue to use and occupy the application area. [name deleted] ’s smoking ceremony in 2014 at the caves in Chillagoe is an example of this association.<sup>53</sup>
- [57] I consider that the factual basis material contained in Attachment F also demonstrates the spiritual association that members of the claim group currently have with the application area. The claim group have knowledge of the dreaming stories and the associated sites in and around the application area, as outlined at paragraph [44] above. The claim group also interact with the application area in particular ways based on their spiritual beliefs, such as never leaving a fish exposed to moonlight or throwing a fish back into the water, and introducing themselves to the Wakaman ancestral spirits for protection.<sup>54</sup>

*Is there a sufficient factual basis that the association both past and present relates to the area as a whole?*

- [58] For the purposes of s 190B(5)(a), I must be satisfied that there is sufficient factual basis material to support the assertion of an association between the group and the whole application area.
- [59] According to the Tribunal’s Geospatial Services, the application area covers 13,927.06 square kilometres.
- [60] With the assistance of the Tribunal’s Geospatial Services, I have considered all of the places named in the application, with reference to the external boundary of the application area. I am satisfied that those places are spread across the geographical bounds of the area so as to demonstrate an association ‘between the whole group and the area’.<sup>55</sup>
- [61] 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.

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<sup>51</sup> Ibid [37].

<sup>52</sup> Ibid [39].

<sup>53</sup> Ibid [36].

<sup>54</sup> Ibid [34].

<sup>55</sup> *Gudjala 2007* [52].

### ***Decision on s 190B(5)(a)***

[62] I consider that the factual basis material clearly identifies the claim group and adequately describes the association the claim group have with the whole application area, being both of a physical and spiritual nature. The factual basis material clearly explains the knowledge claim group members have of their traditional land and waters including sites associated with dreaming stories, birthing, initiations and burials. I am therefore satisfied that there is a sufficient factual basis to meet the requirements of s 190B(5)(a).

### ***What is required to provide a sufficient factual basis for s 190B(5)(b)?***

- [63] Section 190B(5)(b) requires me to be satisfied that the factual basis material is sufficient to support an assertion ‘that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to native title rights and interests’.
- [64] ‘Native title rights and interests’ is defined in s 223(1)(a) as meaning those rights and interests ‘possessed under the traditional laws acknowledged, and traditional customs observed,’ by the native title holders.
- [65] Noting the similarity in language between the two provisions, I consider that it is appropriate to interpret s 190B(5)(b) in light of the case law regarding the definition of ‘native title rights and interests’ in s 223(1).
- [66] The observations of the High Court in *Yorta Yorta* about the meaning of the word ‘traditional’ in relation to laws and customs include that:
- ‘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;<sup>56</sup>
  - 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’;<sup>57</sup>
  - the law or custom ‘is one which has been passed from generation to generation of a society, usually by word of mouth and common practice’;<sup>58</sup> and
  - those laws and customs have been acknowledged and observed ‘substantially uninterrupted’ since sovereignty, having been passed down the generations to the claim group.<sup>59</sup>

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<sup>56</sup> *Yorta Yorta* [46], [49].

<sup>57</sup> Ibid [47].

<sup>58</sup> Ibid [46].

<sup>59</sup> Ibid [87].

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

- that the factual basis demonstrates the existence of a pre-sovereignty society and identifies the persons who acknowledged and observed the laws and customs of the pre-sovereignty society;<sup>60</sup>
- that if descent from named ancestors is the basis of membership to the group, the factual basis demonstrates some relationship between those ancestors and the pre-sovereignty society from which the laws and customs are derived,<sup>61</sup>
- that the factual basis contains an explanation as to how the current laws and customs of the claim group are ‘traditional’ in how they relate to the rights and interests in the application area. 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).<sup>62</sup>

***What information has been provided in relation to the society?***

[68] Relevant to my assessment of the assertion at s 190B(5)(b) is the identification of a pre-sovereignty society or a society that existed prior to European settlement, acknowledging and observing normative laws and customs. 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:

- Leichhardt records camps with two-storied gunyahs, large fires and burial places in his 1884 expedition;<sup>63</sup>
- Kracke records the Wakaman people participating in corroborees, including a large one in 1894;<sup>64</sup>
- [name deleted] (born circa 1906), the daughter of apical ancestor Mick McTavish, was married in accordance with Wakaman law and custom;<sup>65</sup>
- Tindale in his 1938 journals records a ‘Chillagoe Song of the Wakaman tribe’;<sup>66</sup>

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<sup>60</sup> *Gudjala 2009* [37], [52].

<sup>61</sup> *Ibid* [40].

<sup>62</sup> *Ibid* [29], [54], [69].

<sup>63</sup> Attachment F [4].

<sup>64</sup> *Ibid* [7], [37].

<sup>65</sup> *Ibid* [13].

<sup>66</sup> *Ibid* [39].

- Apical ancestor Mick McTavish is remembered as being a ‘grave digger’ and spiritual teacher in Wakaman traditional practices;<sup>67</sup>
- Kracke records Aboriginal people hunting and gathering from the plentiful natural resources available during his 22 years working at the Tate tin mine, which began in 1881;<sup>68</sup>
- The Aboriginal people in the application area during the period of early settlement are described as ‘Warkeeman’ (Matthews), ‘Wataman’ and ‘Wakkamon’ (Okeden), ‘Warkaman’ (Richards) and ‘Wakamen’ (Tindale);<sup>69</sup> and
- Several ancestors were born in the application area during the period of settlement, including Margaret Maude around 1870, Mick McTavish around 1880, Maude Byrne around 1888 and Harold Jackson in 1898.<sup>70</sup>
- Also in 1898, anthropologist R.H Mathews recorded the ‘Warkeeman’ tribe in the area as being the ‘most numerous, and [that] holds the largest territory’.<sup>71</sup>

*Conclusion on factual basis addressing the society*

[69] I am satisfied that there is sufficient factual basis to show that there was a distinct and identifiable territory-based society of Wakaman people at the time of settlement. It can be inferred from the material in Attachment F that the society observed laws and customs in association with the area, including marriages, corroborees and burial practices. From the birth dates of the Wakaman ancestors in the application area around the time of settlement, it can be inferred that those ancestors were part of that society.

*What information has been provided in relation to the laws and customs?*

[70] Attachment F provides information to demonstrate that the laws and customs of the society at the time of European settlement have been passed down from identified apical ancestors to their descendants, including:

- a system of land tenure based on descent from known Wakaman ancestors; for example, the descendants of Mick McTavish continue to be strongly associated with the Tate River area where he was born,<sup>72</sup> and [name deleted]’s descendants continue to be associated with the northern part of the claim area including Mungana where he was born.<sup>73</sup>

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<sup>67</sup> Ibid [40].

<sup>68</sup> Ibid [45].

<sup>69</sup> Ibid [6]–[10].

<sup>70</sup> Ibid [18], [13], [16]–[17].

<sup>71</sup> Ibid [6].

<sup>72</sup> Ibid [13]–[14].

<sup>73</sup> Ibid [15].

- the laws and customs governing marriage, which were practiced by [name deleted], the daughter of apical ancestor Mick McTavish; [name deleted] was married in accordance with these laws<sup>74</sup> which continue to be considered to be the laws of ‘proper marriage’ by current Wakaman families who ‘are clear on telling the younger generations when a marriage is too close or not accepted’;<sup>75</sup>
- the law prohibiting eating fish after dark and putting fish bones in the fire so as not to attract dangerous spirits, which was passed down from Jessie Chong, the second daughter of apical ancestor Mick McTavish,<sup>76</sup> and which claimants continue to practice and pass onto the younger generations to keep them safe on country;<sup>77</sup>
- the custom of speaking to deceased ancestors in certain places to explain how they were related, which was passed down from [name deleted], the granddaughter of apical ancestors Jimmy and Winnie, who was taught to identify herself through her ‘grannie’s name to the ancestors of these places’, and in turn passed this custom to the claim group members, including to her daughter [name deleted] , who continue to practice it;<sup>78</sup>
- the law prohibiting access to certain places, which was also passed down from [name deleted], including the prohibition on swimming in a particular waterhole associated with *mula mali*, the rainbow serpent,<sup>79</sup> which continues to govern the claim group’s access to particular places;<sup>80</sup> and
- the laws restricting consumption of particular foods by children, which was practiced by Albert Thomas, grandson of apical ancestors Billy Garbutt and Lucy, and taught to his descendants, including to applicant [name deleted].<sup>81</sup> Claimants continue to observe these laws, forbidding children from eating echidna and silver bream.<sup>82</sup>

*Conclusion on factual basis addressing laws and customs*

[71] Noting the examples above, I am satisfied that the laws and customs currently observed and acknowledged are ‘traditional’ in the *Yorta Yorta* sense as they derive from the laws and customs that were observed by an identifiable society that existed at the time of European settlement.

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<sup>74</sup> Ibid [13].

<sup>75</sup> Ibid [25].

<sup>76</sup> Ibid [14].

<sup>77</sup> Ibid [29].

<sup>78</sup> Ibid [16], [32]–[33].

<sup>79</sup> Ibid [16].

<sup>80</sup> Ibid [27], [35].

<sup>81</sup> Ibid [46].

<sup>82</sup> Ibid [46].

### ***Decision on s 190B(5)(b)***

- [72] I am satisfied that the factual basis material provided is sufficient to meet the requirements of s 190B(5)(b).

### ***What is required to provide a sufficient factual basis for s 190B(5)(c)?***

- [73] This condition is concerned with whether the factual basis material 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.
- [74] Meeting the requirements of this condition relies on whether there is a factual basis supporting 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.<sup>83</sup>
- [75] I also understand that if the claimant's factual basis material relies 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'.<sup>84</sup>

### ***Is the factual basis sufficient for the assertion of s 190B(5)(c)?***

- [76] As discussed above with regard to s 190B(5)(b), I am satisfied that the factual basis material is sufficient in establishing the existence of a society at settlement which acknowledged and observed laws and customs, from which the present laws and customs are derived.
- [77] In my view, the material also addresses the way in which these traditional laws and customs have continued to be acknowledged and observed since European settlement.
- [78] For example, applicant [name deleted] is the great-granddaughter of apical ancestors Jimmy and Winnie. [name deleted]'s mother [name deleted] was taught Wakaman laws and customs from her elders and passed this knowledge to her children and grandchildren, including the prohibition on swimming in a particular waterhole and the obligation to introduce oneself to relevant ancestral spirits in certain places.<sup>85</sup> These laws are still practiced by the claim group.<sup>86</sup> I am satisfied that the observance of these laws over four generations justifies an inference of continuity.

### ***Decision on s 190B(5)(c)***

- [79] I am satisfied that there is information within the factual basis material which explains the transmission and continuity of the native title rights and interests held in the application area in accordance with relevant traditional laws and customs, and that the factual basis material provided is sufficient to support the assertion described by s 190B(5)(c).

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<sup>83</sup> Martin [29].

<sup>84</sup> Gudjala 2009 [33].

<sup>85</sup> Attachment F, [16].

<sup>86</sup> Ibid [27], [32].

## **Prima facie case – s 190B(6): condition met**

- [80] I consider that some of the claimed rights and interests have been established on a prima facie basis. Therefore, the claim satisfies the condition of s 190B(6).

### ***What is required to meet this condition?***

- [81] For the application to meet the requirements of s 190B(6), the Registrar must consider that, prima facie, at least some of the native title rights and interests claimed can be established. I note Mansfield J's view that s 190B(6) 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'.<sup>87</sup>
- [82] Mansfield J considered 'prima facie' to mean that 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'.<sup>88</sup>
- [83] I understand that the requirements of s 190B(6) are to be considered in light of the definition of 'native title rights and interests' in s 223(1).<sup>89</sup> This means that I must consider whether, prima facie, the individual rights and interests claimed:
- (a) exist under traditional laws and customs in relation to any of the land or waters in the application area;
  - (b) are native title rights and interests in relation to land or waters; and
  - (c) have not been extinguished over the whole of the application area.
- [84] I also understand that a claimed native title right and interest can only be prima facie established if the factual basis is sufficient to demonstrate that it is possessed pursuant to the traditional laws and customs of the native title claim group.<sup>90</sup>

### **Which of the claimed native title rights and interests can be established on a prima facie basis?**

#### *Non-exclusive rights*

- [85] Attachment E to the application lists the non-exclusive rights claimed. I have considered whether each of these rights can be established on a prima facie basis. For ease of reference I have used the same numbering as what appears in Attachment E, and have grouped particular claimed rights together where they appear similar in substance.
- [86] I consider the following rights to be established on a prima facie basis:

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<sup>87</sup> *Doepel* [126]–[127], [132].

<sup>88</sup> *Ibid* [135].

<sup>89</sup> *Gudjala 2007* [85].

<sup>90</sup> *Yorta Yorta* [86]; *Gudjala 2007* [86].

- a. occupy the claim area;*
- b. use the claim area;*
- c. access the claim area;*
- d. traverse the claim area;*
- e. enjoy the claim area;*

[87] Attachment F provides examples of occupation, use, access, traversing and enjoyment of the claim area by the claim group. For example, applicant [name deleted] recalls living at Almaden and traversing the claim area along Crooked Creek to Fossilbrook.<sup>91</sup>

[88] I also consider the following rights established on a *prima facie* basis:

- j. hunt on the claim area;*
- k. fish on the claim area;*
- l. gather on the claim area;*

[89] Attachment F provides that '[c]laimants continue to use Wakaman country for fishing and hunting of things like flying foxes, short necked turtles, goanna and possum'.<sup>92</sup> There are also numerous references to both the claim group members and their ancestors fishing in the rivers in the application area as well as particular cultural practices that relate to cooking and eating fish.<sup>93</sup>

[90] I also consider the following rights established on a *prima facie* basis:

- z. consume natural resources on the claim area;*
- ...
- cc. harvest natural resources on the claim area;*
- dd. construct material items from natural resources on the claim area including but not restricted to shields, baskets, bagu, and items of adornment;*

[91] Attachment F provides examples of extracting the gum from a particular tree to make twine, and using Box Gum trees to make boomerangs.<sup>94</sup> It also refers to the consumption of natural resources such as animals and fish, as discussed above at [89].

[92] I also consider the following rights established on a *prima facie* basis:

- h. camp on the claim area;*
- i. erect structures on the claim area...*

[93] Attachment F provides examples of camping on the claim area, as well as the 'two-storied gunyas' recorded by Leichhardt in the area of the Lynd and Tate Rives in the early 1800s.<sup>95</sup>

[94] I also consider the following right established on a *prima facie* basis:

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<sup>91</sup> Attachment F [18].

<sup>92</sup> Ibid [44].

<sup>93</sup> Ibid [14], [18], [29], [34], [46].

<sup>94</sup> Ibid [42].

<sup>95</sup> Ibid [4], [41], [47].

*m. light fires on the claim area for domestic purposes, including but not restricted to, cooking and warmth;*

[95] Attachment F provides examples of the use of fire for domestic purposes, including cooking in earth ovens and to provide warmth.<sup>96</sup>

[96] I also consider the following rights established on a *prima facie* basis:

*g. speak to the claim area;*

...

*p. conduct religious activities on the claim area;*

*q. conduct religious ceremonies on the claim area;*

*r. conduct spiritual activities on the claim area;*

*s. conduct spiritual ceremonies on the claim area;*

...

*v. interact with the spirits and ancestral beings on the claim area;*

[97] Attachment F provides examples of specific religious and spiritual activities and ceremonies such as smoking ceremonies,<sup>97</sup> and healing rituals which ward off dangerous spirits.<sup>98</sup> There are also numerous examples of the claim group, and their ancestors, speaking to spirits and ancestral beings residing in the claim area.<sup>99</sup>

[98] I also consider the following rights established on a *prima facie* basis:

*ll. bury deceased claim group members on the claim area;*

*mm. be buried on the claim area.*

[99] Attachment F provides information about ancestors buried in the claim area,<sup>100</sup> as well as specific practices that are carried out when burying Wakaman people on country.<sup>101</sup>

[100] I also consider the following rights established on a *prima facie* basis:

*t. conduct secular activities on the claim area;*

...

*y. teach on the claim area the physical and spiritual attributes of the claim area;*

[101] Attachment F provides that members of the claim group exercise these rights ‘through cultural heritage surveys to protect important places on Wakaman country’ and teaching their children and grandchildren the law and custom that connect them to Wakaman country.<sup>102</sup> Specific examples include the protection of waterholes through laws around access, which have been passed down to current claimants;<sup>103</sup> and protection of specific sacred sites through gender-restricted access.<sup>104</sup>

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<sup>96</sup> Ibid [47].

<sup>97</sup> Ibid [36].

<sup>98</sup> Ibid [44].

<sup>99</sup> Ibid [16], [32]–[34].

<sup>100</sup> Ibid [18].

<sup>101</sup> Ibid [40].

<sup>102</sup> Ibid [24].

<sup>103</sup> Ibid [16], [27].

<sup>104</sup> Ibid [35].

[102] I also consider the following rights established on a *prima facie* basis:

- gg. practice traditional bush medicine on the claim area;*
- hh. produce traditional bush medicines in the claim area;*
- ii. consume traditional bush medicines in the claim area;*

[103] Attachment F describes healing rituals including ‘singing, waving a smoking leaf over the body, rubbing the body with a ball of wax and *jackawarang* the act of blowing sweat from healers armpits over the person’.<sup>105</sup> I consider that description establishes *prima facie* rights to practice, produce and consume traditional bush medicines by the claim group in the claim area.

[104] I also consider the following rights established on a *prima facie* basis:

- aa. share natural resources on the claim area;*
- bb. exchange natural resources on the claim area;*
- ...
- ee. trade on the claim area;*
- ff. carry out commercial activities on the claim area;*

[105] Attachment F provides that ‘Wakaman people traditionally traded foods and other material goods with neighbouring groups and amongst their family groups.’<sup>106</sup>

[106] I also consider the following rights established on a *prima facie* basis:

- w. maintain places of importance under traditional laws and customs on the claim area;*
- x. protect places of importance under traditional laws and customs on the claim area from physical harm;*

[107] Attachment F notes that Wakaman people continue to protect important places on Wakaman country through cultural heritage surveys,<sup>107</sup> in addition to observing traditional laws and customs which maintain and protect such places, for example through abiding by prohibitions on swimming in certain waterholes.<sup>108</sup>

[108] Finally, I consider the following right to be established on a *prima facie* basis:

- jj. inherit native title rights and interests in the claim area in accordance with traditional laws and customs;*

[109] Attachment F describes how the applicants have inherited their native title rights and interests from their predecessors in accordance with traditional laws and customs. For example applicant [name deleted] has inherited rights in the northern part of the claim area, having been taught about bush lore, restricted sites and stories.<sup>109</sup>

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<sup>105</sup> Ibid [44], [47].

<sup>106</sup> Ibid [43].

<sup>107</sup> Ibid [24].

<sup>108</sup> Ibid [27].

<sup>109</sup> Ibid [15].

***Which of the claimed native title rights and interests cannot be established on a *prima facie* basis?***

*Right of exclusive possession*

[110] I do not consider the right of exclusive possession can be established on a *prima facie* basis.

[111] The nature of a native title right to exclusive possession was discussed in *Ward HC*, where the High Court held that:

A core concept of traditional law and custom [is] the right to be asked permission and to ‘speak for country’. It is the rights under traditional law and custom to be asked permission and to ‘speak for country’ that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others.<sup>110</sup>

[112] Since *Ward HC*, the following principles have emerged from the case law, indicating what the material may need to address in providing *prima facie* support for a right of exclusive possession:

- A native title right to exclusive possession includes the right to make decisions about access to and use of the land by others;<sup>111</sup>
- The right does not depend on any formal classification as ‘proprietary’ - its existence depends on what the evidence discloses about its content under traditional law and custom;<sup>112</sup> and
- The material must speak to how, pursuant to their laws and customs, the group is able to ‘exclude from their country people not of their community’, acting as ‘gatekeepers for the purpose of preventing harm and avoiding injury to country’.<sup>113</sup>

[113] Attachment F states that the claim group believes entry onto Wakaman country without permission of the traditional owners can lead to ‘supernatural misfortune.’<sup>114</sup>

[114] While there is material in Attachment F to show how Wakaman people introduce themselves to the spirits of their ancestors while on country,<sup>115</sup> there is no material to show the existence of specific laws and customs that have been passed down through the generations, which demonstrate whether, or how, outsiders are excluded from the application area.

*Non-exclusive rights*

[115] I do not consider that there is evidence in the application to establish the following rights on a *prima facie* basis:

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<sup>110</sup> *Ward HC* [88].

<sup>111</sup> *Sampi* [1072].

<sup>112</sup> *Griffiths* [71].

<sup>113</sup> *Ibid* [127].

<sup>114</sup> Attachment F [31].

<sup>115</sup> *Ibid* [31]–[33].

- h. speak for the claim area;*
- ...
- n. light fires on the claim area for hunting purposes;*
- o. light fires on the claim area for clearing vegetation and regenerating growth of natural resources;*
- ...
- u. conduct secular ceremonies on the claim area;*
- ...
- kk. dispose of native title rights and interests in the claim area in accordance with traditional laws and customs;*

[116] The only material which speaks to any of the above rights and interests is in Attachment F, which includes a broad statement that senior Wakaman people can speak for Wakaman country.<sup>116</sup> However there is no material to explain what that right entails, and so I cannot consider it to be established on a *prima facie* basis.

[117] I am not satisfied that any of the above rights and interests exist under traditional law and customs, as there is no evidence of them in the application and no material before me to explain what these rights involve.

#### Physical connection – s 190B(7): condition met

[118] I am satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with a part of the application area.

#### ***What is required to meet this condition?***

[119] For the application to meet the requirements of s 190B(7), the Registrar ‘must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application’.<sup>117</sup>

[120] The following principles have emerged from the case law about what is required at s 190B(7):

- The material must satisfy the Registrar (or her delegate) of particular facts and evidentiary material is therefore required;
- The focus is confined to the relationship of at least one member of the native title claim group with some part of the claim area;<sup>118</sup>
- The physical connection must be in accordance with the traditional laws and customs of the claim group;<sup>119</sup>
- The material may need to address an actual presence on the application area.<sup>120</sup>

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<sup>116</sup> Ibid [21], [35].

<sup>117</sup> Section 190B(7)(a).

<sup>118</sup> *Doepel* [18].

<sup>119</sup> *Gudjala* 2007 [89].

***Is there evidence that a member of the claim group has a traditional physical connection?***

[121] Schedule M of the application requires the claimants to provide information addressing a traditional physical connection with any of the land or waters covered by the application with any member of the claim group. Schedule M refers me to Attachment F.

[122] On reviewing Attachment F, I am satisfied that [name deleted] has or previously had a traditional physical connection with some part of the application area.

[123] Attachment F states that [name deleted]:

- has a relationship with the southern part of the claim area, as:
  - (a) his mother and grandmother lived at Almaden and they would travel across to Fossilbrook in the dry season; and
  - (b) his great-great grandfather, apical ancestor Billy Garbutt is buried at Fossilbrook.
- has a physical connection in accordance with the traditional laws and customs of the Wakaman people, as while traversing the application area from Almaden along Crooked Creek to Fossilbrook he:
  - (a) was taught 'much about bush lore by his elders';
  - (b) learned how to 'strip bark';
  - (c) learned how to set up camp; and
  - (d) 'would fish and take scrub turkey'.<sup>121</sup>

[124] Based on the information in Attachment F, I am satisfied that [name deleted] has at least previously had a traditional physical connection with the application area, which is sufficient to meet the requirements of s 190B(7).

No failure to comply with s 61A – s 190B(8): condition met

[125] In my view the application complies with the provisions of ss 61A(1)–(3) and therefore the application satisfies the condition of s 190B(8):

Requirement	Information addressing requirement	Result
s 61A(1) no native title determination application if approved determination of native title	Geospatial report	Met

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<sup>120</sup> *Yorta Yorta* [184].

<sup>121</sup> Attachment F [18].

s 61A(2) claimant application not to be made covering previous exclusive possession over areas	Schedule B	Met
s 61A(3) claimant applications not to claim certain rights and interest in previous non-exclusive possession act areas	Schedule B	Met

No extinguishment etc. of claimed native title – s 190B(9): condition met

[126] In my view the application meets the requirements of s 190B(9):

Requirement	Information addressing requirement	Result
s 190B(9)(a) no claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q	Met
s 190B(9)(b) exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P	Met
s 190B(9)(c) native title rights and/or interests in the application area have otherwise been extinguished	Schedule B	Met

Procedural and other matters (s 190C)—Conditions met

Information etc. required by sections 61 and 62 – s 190C(2): condition met

[127] I have examined the application and I am satisfied that it contains the prescribed information and is accompanied by the prescribed documents.

***What is required to meet this condition?***

[128] To meet s 190C(2), the Registrar must be satisfied that the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61–2. I am not required to undertake a merit assessment of the material.<sup>122</sup>

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<sup>122</sup> *Doepel* [16], [35]–[39].

## **Section 61**

[129] The application contains the details specified in s 61.

<b>Section</b>	<b>Details</b>	<b>Form 1</b>	<b>Result</b>
s 61(1)	Native title claim group	Attachment A	Met
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Attachment A	Met

## **Section 62**

[130] The application contains the details specified in s 62.

<b>Section</b>	<b>Details</b>	<b>Form 1</b>	<b>Result</b>
s 62(1)(a)	Affidavits in prescribed form	Attachments R2 – R6	Met
s 62(2)(a)	Information about the boundaries of the area	Schedule B & Attachment B	Met
s 62(2)(b)	Map of external boundaries of the area	Attachment C	Met
s 62(2)(c)	Searches	Attachment D	Met
s 62(2)(d)	Description of native title rights and interests	Attachment E	Met
s 62(2)(e)	Description of factual basis	Attachment F	Met
s 62(2)(f)	Activities	Attachment G	Met
s 62(2)(g)	Other applications	Schedule H	Met
s 62(2)(ga)	Notices under s 24MD(6B)(c)	Schedule HA	Met
s 62(2)(h)	Notices under s 29	Attachment I	Met

No previous overlapping claim group – s 190C(3): condition met

[131] I am satisfied that no person is included in the claim group for this application that was a member of the claim group for any previous overlapping application.

***What is required to meet this condition?***

[132] To meet s 190C(3), the Registrar ‘must be satisfied that no person included in the native title claim group for the application (the **current application**) was a member of a native title claim group for any previous application’.<sup>123</sup> To be a ‘previous application’:

- the application must overlap the current application in whole or part;
- there must be an entry for the claim in the previous application on the Register of Native Title Claims when the current application was made; and
- the entry must have been made or not removed as a result of the previous application being considered for registration under s 190A.

***Are there any relevant ‘previous applications’?***

[133] The geospatial report included at Attachment D states that no applications fall within the external boundary of the application area. As there is no previous application which overlaps the current application, s 190C(3) is met.

**Identity of claimed native title holders – s 190C(4): condition met**

[134] I am satisfied that the requirements of s 190C(4)(a) are met because the application has been certified by an identified representative Aboriginal/Torres Strait Islander body with the power to certify the application, and the certification contains all the information required by ss 203BE(4)(a)–(c).

***What is required to meet this condition?***

[135] For the application to meet the requirements of s 190C(4), the Registrar must be satisfied that either:

- (a) the application has been certified by all representative Aboriginal/Torres Strait Islander bodies that could certify the application in performing its functions,<sup>124</sup> 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.<sup>125</sup>

[136] Schedule R of the application refers me to Attachment R1, which is a document titled ‘Certificate of an Application for a Determination of Native Title under Section 203BE of the Native Title Act 1993 (Cth)’ (the certificate). As the application purports to be certified, I must be satisfied that the certificate:

- identifies the relevant representative body;

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<sup>123</sup> Emphasis in original.

<sup>124</sup> Section 190C(4)(a).

<sup>125</sup> Section 190C(4)(b).

- identifies the representative body's power under Part 11 to issue the certification; and
- meets the requirements of s 203BE.<sup>126</sup>

***Which representative body has been identified?***

[137] The certificate states that it is provided by the North Queensland Land Council Native Title Representative Body Aboriginal Corporation (NQLC), and is dated and signed by a director of NQLC.

[138] I am satisfied that the relevant representative body has been identified.

***What power under Part 11 does the representative body have to issue the certification?***

[139] The certificate states that the NQLC is recognised under s 203AD 'as the representative Aboriginal/Torres Strait islander body... for the Northern Queensland Region'.

[140] The geospatial report included at Attachment D confirms that the NQLC is the only representative body for the whole of the area covered by the application. I have verified this information against current data held by the Tribunal's Geospatial Services in the national map of Representative Aboriginal and Torres Strait Island Body areas. That map shows the NQLC to be the representative Aboriginal/Torres Strait Island Body for the area covering the application area. As a representative body, the NQLC can perform all of the functions listed in s 203B, including, relevantly, the certification functions referred to in s 203BE.<sup>127</sup>

[141] I am satisfied that the NQLC has the power under Part 11 to issue the certification.

***Does the certification meet the requirements in s 203BE?***

[142] Section 203BE(4) provides that '[a] certification of an application for a determination of native title by a representative body must:

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

[143] I have considered these requirements in turn below.

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<sup>126</sup> *Doepel* [80]–[81].

<sup>127</sup> Section 203B(1)(b).

*Section 203BE(4)(a)*

- [144] Section 203BE(2)(a) prohibits a representative body from certifying an application unless it is of the opinion 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.
- [145] Section 203BE(2)(b) prohibits a representative body from certifying an application unless it is of the opinion 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.
- [146] Section 203BE(4)(a) requires a representative body to state in its certification that an application meets the requirements of ss 203BE(2)(a)–(b).
- [147] The certificate states that the NQLC ‘certifies that it is of the opinion that the requirements of paragraphs 203BE(2)(a) and (b) have been met’, including the following statements:

- ‘All persons in the native title group have authorised the Applicant to make the application and to deal with matters arising in relation to it, and
- All reasonable efforts have been made to ensure that the Application describes or otherwise identifies all the other persons in the native title claim group.’

*Section 203BE(4)(b)*

- [148] Regarding s 203BE(4)(b), the certificate sets out the NQLC’s reasons regarding its opinion that s 203BE(2)(a) is met. This includes an outline of how the applicant was authorised by the native title claim group at a meeting on 24 November 2017 at Mareeba. According to the certificate, this meeting and the authorisation occurred after the claim was proposed to the claim group at a community meeting on 25 August 2017 and further discussed at another meeting on 23 November 2017.
- [149] The certificate also includes the reasons for the NQLC’s opinion that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the claim group, as required by s 203BE(2)(b). The certificate notes that this includes the engagement of a consultant anthropologist ‘who has undertaken extensive research in the region, including the land and waters covered by the Application and the native title holders connected to those land and waters’ and that the description of the claim group has been considered by the Elders of the claim group. The certificate also states that ‘various reports’ on the claim group which are held by the NQLC have been checked by an in-house anthropologist and this information was presented at the community meeting on 25 August 2017.

*Section 203BE(4)(c)*

- [150] Section 203BE(3) states that if the land or waters covered by the application are wholly or partly covered by one or more applications (including proposed applications) of which the representative body is aware, then representative body must make all reasonable efforts to:

- (a) Achieve agreement, relating to native title over the land or waters, between the persons in respect of whom the applications are, or would be, made; and
- (b) Minimise the number of applications over the land or waters.

[151] Section 203BE(4)(c) requires a representative body to set out, where applicable, what it has done to meet the requirements of s 203BE(3).

[152] The certificate sets out what NQLC has done in relation to any overlapping applications for determinations of native title, as required by s 203BE(3), referring to the geospatial report confirming that there is no overlap. It also states that the NQLC does not intend to lodge any overlapping claims which goes to the requirement of s 203BE(3)(b).

[153] I am satisfied that the certificate meets all the requirements in s203BE and so s 190C(4) is therefore met.

*End of reasons*