Registration Decision

National Native Title Tribunal

Application name	Harriet Vea Vea & Ors on behalf of the Wadja People and State of Queensland & Ors (Wadja People)
Name of applicant	Harriet Vea Vea, Richard Sporne, Chris Priestley, Daisy Gibson, Judy Tatow, Phyllis Freeman
Federal Court of Australia No.	QUD28/2019
NNTT No.	QC2012/010
Date of Decision	6 December 2019

Claim accepted for registration

I have decided the claim in the Wadja People amended application satisfies all the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).[1] Therefore the claim must be accepted for registration and will remain on the Register of Native Title Claims.

Katy Woods[2]

[1] All legislative references are to the *Native Title Act 1993* (Cth) (Native Title Act), unless stated otherwise.

[2] Delegate of the Native Title Registrar pursuant to ss 190–190D of the Native Title Act under an instrument of delegation dated 27 July 2018 and made pursuant to s 99 of the Native Title Act.

Reasons for Decision

Cases Cited

Corunna v Native Title Registrar [2013] FCA 372 (*Corunna*)
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*)
Harrington-Smith v Western Australia (No 5) [2003] FCA 218 (*Harrington-Smith No 5*)
Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9) [2007] FCA 31 (*Harrington-Smith*)
Kanak v National Native Title Tribunal (1995) 61 FCR 103; [1995] FCA 1624 (*Kanak*)
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*)
Noble v Mundraby [2005] FCAFC 212 *(Noble)*
Northern Land Council v Quall [2019] FCAFC 77 (*Quall*)
Northern Territory of Australia v Doepel [2003] FCA 1384 (*Doepel*)
Strickland v Native Title Registrar [1999] FCA 1530 (*Strickland*)
Wakaman People 2 v Native Title Registrar and Authorised Delegate [2006] FCA 1198 (*Wakaman*)
Ward v Northern Territory [2002] FCA 171 (*Ward v Northern Territory*)
Ward v Registrar, National Native Title Tribunal (1999) 168 ALR 242; [1999] FCA 1732 (*Ward v Registrar*)
Western Australia v Native Title Registrar (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*)
Wiri People v Native Title Registrar [2008] FCA 574 (*Wiri People*)

Background

[1] The claim in this application is made on behalf of the Wadja People native title claim group (**claim group**). It covers land and waters in the central highlands region of Queensland, and includes parts of the Expedition and Theodore State Forests (**application area**).

[2] This claim was first made on 22 August 2012. It was first accepted for registration and entered onto the Register of Native Title Claims (**Register**) on 19 December 2012. It has remained on the Register since that time, and has been amended once previously in 2014. The amended application before me was filed on 23 October 2019. On 25 October 2019 the Registrar of the Federal Court (**Court**) gave a copy to the Native Title Registrar (**Registrar**) pursuant to s 64(4).

[3] The granting of leave by the Court to amend the application was not made pursuant to s 87A, and so the circumstance described in s 190A(1A) does not arise. The amendments to the application are greater than the changes prescribed by s 190A(6A), so that provision does not apply. Therefore, in accordance with s 190A(6), I must accept the claim for registration if it satisfies all the conditions in ss 190B–190C.

Procedural fairness

[4] On 23 October 2019, the applicant's legal representative, Queensland South Native Title Services (**QSNTS**) provided the following information directly to the Registrar (**additional material**):

(a) Covering letter from QSNTS dated 23 October 2019 (**covering letter to the additional material**);

(b) Anthropology Report for the Wadja Native Title Claim (QUD422/2012) dated 29 November 2013 (**anthropologist's report**);
(c) Supplementary Anthropology Report for the Wadja Native Title Claim dated 31 March 2016 (**supplementary report**);
(d) Affidavit of a QSNTS employee dated 26 September 2019 (**authorisation affidavit**); and
(e) Meeting Outcomes from the Wadja Authorisation Meetings held on 21 September 2019 (**meeting outcomes**).

[5] On 28 October 2019, a senior officer of the Tribunal (**senior officer**) wrote to the relevant minister of the state of Queensland (**state**) advising that I would be considering the information in the application and the additional material in my decision, and should the state wish to supply any information or make any submissions, it should do so by 4 November 2019.

[6] Also on 28 October 2019, a representative of the state advised the senior officer that the state would not be making a submission on the additional material.

[7] On 20 November 2019, the senior officer wrote to the state to advise that I would be considering affidavits from claim group members which were provided to the Registrar by the applicant when the claim was originally filed in 2012 (**connection affidavits**). The senior officer advised that any submissions the state wished to make about the connection affidavits should be received by 22 November 2019.

[8] On 21 November 2019, a representative of the state advised that the state would not be making a submission and so this concluded the procedural fairness process.

Information considered

[9] I have considered the information in the application and additional information provided by the applicant in relation to both the original application and this amended application, as outlined above.[3] The connection affidavits which I have considered are as follows:

(a) Affidavit of [name removed], deposed 11 February 2012 (**connection affidavit 1**);
(b) Affidavit of [name removed], deposed 1 May 2012 (**connection affidavit 2**);
(c) Affidavit of [name removed], deposed 12 December 2011 (**connection affidavit 3**);
(d) Affidavit of [name removed], deposed 8 February 2012 (**connection affidavit 4**);
(e) Affidavit of [name removed], deposed 1 December 2011 (**connection affidavit 5**);
(f) Affidavit of [name removed], deposed 9 November 2011 (**connection affidavit 6**);
(g) Affidavit of [name removed] deposed 1 October 2011 (**connection affidavit 7**).

[10] I have considered information contained in the geospatial assessment and overlap analysis of the application area prepared by the National Native Title Tribunal's (**Tribunal**) Geospatial Services dated 11 November 2019 (**geospatial report**) and information available in the Tribunal's geospatial database in relation to locations mentioned in the application.[4]

[3] Section 190A(3)(a).
[4] Section 190A(3)(c).

[11] There is no information before me obtained from searches of state or Commonwealth interest registers,[5] and as noted above, the state has not supplied any information as to whether the registration test conditions are satisfied in relation to this claim.[6]

Section 190C: conditions about procedures and other matters

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

[12] To meet s 190C(2), the Registrar must be satisfied 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 at this condition.[7] I have not addressed s 61(5) as I consider the matters covered by that condition are matters for the Court.

[13] The application contains the details specified in s 61:

Section	Details	Information	Result
s 61(1)	Native title claim group have authorised the applicant	Part A, Schedule A, s 62 affidavits filed with application	Met
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Schedule A	Met

[14] The application contains the information specified in s 62:

Section	Details	Information	Result
s 62(1)(a)	Affidavits in prescribed form	Section 62 affidavits filed with application	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	Schedule D	Met
s 62(2)(d)	Description of native title rights and interests	Schedule E	Met
s 62(2)(e)	Description of factual basis	Schedule F, Attachment 'F and M'	Met
s 62(2)(f)	Activities	Schedule 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	Schedule I	Met

[5] Section 190A(3)(b).
[6] Section 190A(3)(c).
[7] *Doepel* [16], [35]–[39].

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

[15] To meet s 190C(3), the Registrar must be satisfied that no person included in the claim group for the current application was a member of a claim group for any previous application. To be a 'previous application':

(a) the application must overlap the current application in whole or part;

(b) there must be an entry for the claim in the previous application on the Register when the current application was made; and

(c) the entry must have been made or not removed as a result of the previous application being considered for registration under s 190A.

[16] The geospatial report states and my own searches confirm there are no applications which overlap the current application, as required by s 190C(3)(a). Therefore, there are no applications which meet the definition of a 'previous application' under s 190C(3). This means that the issue of common claimants does not arise and s 190C(3) is met.

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

[17] To meet s 190C(4), the Registrar must be satisfied:

(a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part; 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.

[18] Schedule R(2) of the application refers to Attachment R, which is a copy of a certificate dated 21 August 2012 signed by the Chief Executive Officer of QSNTS. The additional information, in particular the authorisation affidavit and meeting outcomes, indicate that a claim group meeting has been held to authorise the applicant to make the application since the claim was certified in 2012.

[19] The covering letter to the additional material states that the additional material has been provided pursuant to s 190C(4)(b), and that the certificate in Attachment R predates the Full Court's decision in *Quall*. In that decision the Full Court considered the certification of applications for registration of indigenous land use agreements (ILUAs) under s 203BE(1)(b) by representative bodies and held that a representative body may not delegate its functions under s 203B(1). Those functions which have been held to be non-delegable include the certification of native title determination applications under s 203BE(1)(a).[8]

[20] In light of the additional information provided by the applicant, I understand that the certificate in Attachment R is not relied upon and I must instead assess the application against the requirements of s 190C(4)(b).

What is required to meet s 190C(4)(b)?

[21] Section 190C(4)(b) contains two limbs, both of which must be satisfied:

[8] *Quall* [102]–[104].

(a) that the applicant is a member of the claim group; and

(b) that the applicant is authorised to make the application, by all the other members of the claim group.

[22] Following s 190C(4)(b) there is a note in the Native Title Act referring to the definition of 'authorising the making of applications' in s 251B. That provision stipulates that all the persons in a claim group authorise a person to make an application and to deal with matters arising in relation to it, where one of the following processes of decision-making is utilised:

(a) a process which, under the traditional laws and customs of the persons in the claim group, must be complied with, or

(b) where there is no traditional process, a process agreed to and adopted by the claim group.

[23] The case law also confirms that s 190C(4)(b) requires consideration of whether the identified native title holders have authorised the applicant to make the application in accordance with s 251B.[9]

[24] Section 190C(5) states that if the application has not been certified under s 190C(4)(a), the Registrar cannot be satisfied that the condition in s 190C(4) is met unless the application:

(a) includes a statement to the effect that the requirement in s 190C(4)(b) has been met; and

(b) briefly sets out the grounds on which the Registrar should consider that the requirement in s 190C(4)(b) has been met.

[25] I therefore understand that in order to be satisfied that s 190C(4)(b) is met, one of the decision making processes outlined in s 251B must be identified and complied with, and the requirements of s 190C(5) must also be met.

Summary of the authorisation material

[26] The information before me which is relevant to this condition is found in:

(a) The s 62 affidavits from the members of the applicant which accompany the amended application (**s 62 affidavits**);

(b) The authorisation affidavit; and

(c) The meeting outcomes.

[27] As the covering letter to the additional material states that the anthropologist's report and supplementary report have been provided pursuant to s 190C(4)(b), I have also had regard to these documents in my consideration of s 190C(4). The supplementary report provides the following information, which I understand is relied upon as the reason for the changes to the claim group description:

(a) Tindale recorded Eva Tyson in 1938 as the granddaughter of an 'unnamed Wadjainggo woman from Rolleston'. Rolleston lies to the west of the application area. The descendants of Eva Tyson identify and are recognised by the claim group as Wadja, and

[9] *Wiri People* [26]–[36].

the author considers there are reasonable grounds to include Eva Tyson's grandmother in the claim group description;[10]

(b) In the author's view, the evidence does not support Lilla Livingstone being associated with the application area and as all but one of her descendants identify as Gaangalu, rather than Wadja, 'it is difficult to justify keeping Lilla Livingstone as an apical ancestor for the Wadja claim'.[11]

Does the application satisfy s 190C(5)?

[28] The s 62 affidavits each state that the deponent is a Wadja person and a member of the claim group, and outlines the process by which the members of the applicant were authorised at a meeting on 21 September 2019, under a decision making process agreed to and adopted by the claim group.

[29] I note French J's comment that the insertion of the word 'briefly' in s 190C(5)(b) 'suggests that the legislature was not concerned to require any detailed explanation of the process by which authorisation is obtained.'[12] I therefore consider that the information contained in the s 62 affidavits is sufficient to satisfy both limbs of s 190C(5).

Does the application meet s 190C(4)(b)?

[30] Firstly, I must be satisfied the persons comprising the applicant are members of the claim group. As the s 62 affidavits contain such a statement, I am satisfied this requirement is met.

[31] Secondly, I must be satisfied that the applicant is authorised to make the application, by all the other members of the claim group. The identification of the appropriate decision making process and whether it was complied with is a primary consideration for my task at s 190C(4)(b).[13]

Which decision making process under s 251B has been identified?

[32] The s 62 affidavits and the authorisation affidavit state that the claim group agreed to and adopted a process for decision making.[14] Section 251B(b) provides for the adoption of an agreed to decision making process by the claim group. I am satisfied the application identifies such a process.

How was the decision making process applied in the decision to authorise the applicant?

[33] In order to be satisfied that the necessary authorisation has been given by the claim group in accordance with the identified decision making process, I must inquire through the material available to the Registrar. [15] The material before me provides information about the notice and conduct of the authorisation meeting at which the applicant was authorised to make the application, which I have summarised below.

[10] Supplementary report [7], [93].
[11] Ibid [124].
[12] *Strickland* [57].
[13] *Noble* [16].
[14] Section 62 affidavits, [10]; authorisation affidavit [13].
[15] *Doepel* [78].

Notice of authorisation meeting

[34] The authorisation affidavit provides that QSNTS gave notice of the authorisation meeting in the following ways:

(a) Public notice in the *Rockhampton Morning Bulletin* on 23 August 2019 and in *The Koori Mail* on 28 August 2019;

(b) Personal notice by mail to 126 members of the claim group for whom QSNTS had postal addresses; and

(c) Personal notice by telephone to 47 members of the claim group for whom QSNTS had telephone numbers.[16]

[35] Annexed to the authorisation affidavit are copies of the public notice as they appeared in the two newspapers, and the personal notice sent to the claim group members (collectively, the **notice**).

[36] The notice includes the date, time and venue for two meetings scheduled to be held on 21 September 2019. The first meeting (**Meeting #1**) invites the members of the claim group as it was described at that time, and explains that the purpose of the meeting is to consider making changes to the claim group description. The proposed changes are set out clearly and it is stated that the people who are descended from the proposed additional ancestor can participate in the meeting, but not the vote on the amendments to the claim group description. The notice explains that if the proposed changes to the claim group are authorised at Meeting #1, then a second meeting will be held for all members of the newly described claim group (**Meeting #2**). The purpose of Meeting #2 includes authorising persons to be, or continue to be, the applicant for the claim, to make the application and to deal with matters arising in relation to it.

[37] The notice provides two contact numbers for registration and further information, one being a Freecall number.

Conduct of authorisation meeting

[38] The authorisation affidavit provides the following information about the conduct of the authorisation meetings:

(a) Thirty nine (39) members of the claim group attended Meeting #1 and a copy of the Attendance Register accompanies the authorisation affidavit. The attendees passed a resolution confirming there is no traditional decision making process that the claim group must use when making decisions arising under the Native Title Act. The attendees then passed a resolution confirming the adopted decision making process, being a decision by a show of hands, passed by a majority of claim members present. The claim group used this decision making process in resolutions to make the proposed changes to the claim group description, which reflect the recommendations of the anthropologist which I have extracted above. The authorisation affidavit states that all the resolutions passed without dissent and with no abstentions.[17]

[16] Authorisation affidavit [6]–[7].
[17] Ibid [10]–[19].

(b) The same 39 members of the claim group attended Meeting #2 and confirmed the same decision making process used in Meeting #1 would be adopted, and proceeded to use that process in the decisions taken at Meeting #2. In Resolution 2.6D the claim group authorised the replacement of the members of the applicant with new applicant members, being the persons whose names now appear in Schedule 1 of the application. This resolution passed without dissent and with no abstentions.[18]

Consideration

[39] I consider the notice of the meeting was sufficiently clear as to enable the details and purpose of the meeting to be understood. I also consider the notice of the meeting to be broad and comprehensive in its reach, using various media and a mix of personal and public notices in the weeks leading up to the authorisation meeting.

[40] I consider the authorisation affidavit provides sufficient detail of the conduct of the authorisation meeting, including the resolutions passed. In addition to details of the resolutions and the registration of attendees, information about the appointment of the facilitator and minute taker are also provided.[19] The resolution to authorise the applicant was made using a process agreed to and adopted by the claim group which was used throughout both Meeting #1 and Meeting #2.

[41] I note O'Loughlin J's theoretical questions about the meeting at which the applicant was authorised in the circumstances of the case of *Ward v Northern Territory*, the substance of which His Honour held must be addressed:

> Who convened it and why was it convened? To whom was notice given and how was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded? [20]

[42] In my view, there is sufficient information to address the substance of those questions, such that I can be satisfied of the 'fact of authorisation', particularly given the level of detail provided in the authorisation affidavit.[21] It follows that I am satisfied that the applicant is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the claim group.

Conclusion

[43] As I consider the requirements of s 190C(5) and s 190C(4)(b) are met, including that the material addresses s 251B(b), I am satisfied s 190C(4) is met.

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[18] Ibid [20]–[26].
[19] Ibid [4].
[20] *Ward v Northern Territory* [25]–[26], followed in *Lawson* [27]–[28].
[21] *Doepel* [78].

Section 190B: conditions about merits of the claim

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

[44] To meet s 190B(2), the Registrar must be satisfied the information and map contained in the application 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.

[45] I understand the questions for this condition are whether the information and map provide certainty about:

(a) the external boundary of the area where native title rights and interests are claimed; and
(b) any areas within the external boundary over which no claim is made.[22]

Does the information about the external boundary meet this condition?

[46] Schedule B refers to Attachment B, which describes the application area by metes and bounds referring to lots on plan, ridgelines of ranges, centrelines of waterways and boundaries of surrounding native title determination applications.

[47] Schedule C refers to Attachment C, which contains a copy of a map prepared by QSNTS titled 'QUD422/2012 – Wadja People Native Title Determination Application', dated July 2014. It includes:

(a) the application area depicted with bold blue outline and blue stippled fill;
(b) abutting native title determination application boundaries, identified by Court number and name;
(c) parcel boundaries within the application area depicted with black outline, identified by lot and plan number;
(d) topographic background;
(e) scalebar and northpoint; and
(f) notes relating to the source, currency and datum of data used to prepare the map.

[48] The assessment in the geospatial report is that the map and description are consistent and identify the application area with reasonable certainty. I have considered the map and description and I agree with that assessment.

Does the information about excluded areas meet this condition?

[49] Schedule B lists the areas which are excluded from the application in general terms, such as areas subject to a freehold estate. Schedule B also states that the application does not cover any area where native title has been extinguished, except where any extinguishment is required to be disregarded by force of ss 47–47B.

[50] I note French J's comment about general exclusion clauses, that 'it is unrealistic to expect a concluded definition of the areas subject to these provisions 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

[22] *Doepel* [122].

hearing of the application'.[23] Following this reasoning, I am satisfied the areas affected by the general exclusion clauses can be ascertained at the appropriate time.

[51] Attachment B specifically excludes land and waters subject to the following native title determination applications:

(a) QUD6162/1998 Iman People 2 as accepted for registration 24 May 2012;
(b) QUD6006/2000 Wulli Wulli People as accepted for registration 31 March 2010; and
(c) QUD400/2012 Gaangalu Nation as accepted for registration 15 November 2012.

[52] In my view, the specific exclusions are clear from the description in Attachment B.

Conclusion

[53] As I consider that both the external boundary and the excluded areas of the application can be identified from the map and description with reasonable certainty, I am satisfied that s 190B(2) is met.

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

[54] To meet 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.

[55] I understand 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' at this condition.[24]

[56] Schedule A states that the claim group 'is comprised of all the persons descended' from four named ancestors. It follows from the description that s 190B(3)(b) is applicable. I am therefore required to be satisfied that the persons in the claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Is the description sufficient to ascertain the members of the claim group?

[57] From the description in Schedule A, I understand an individual is a member of the claim group by virtue of being a descendant of one of the named ancestors. The Court has previously held that describing a claim group with reference to descent from named ancestors satisfies the requirements of s 190B(3)(b).[25] I consider that requiring a person to show descent from an identified ancestor provides a clear starting point to commence an inquiry about whether a person is a member of the claim group. I consider that factual enquiries would lead to the identification of the people who meet this criterion.

[58] The description does not specify whether 'descendants' is limited to biological descendants or includes descendants by adoption. The application elsewhere asserts that rights and interests

[23] *Strickland* [55].
[24] *Wakaman* [34].
[25] *WA v NTR* [67].

in the application area are acquired under the traditional laws and customs of the claim group.[26] I consider it is by that 'set of rules or principles' that it could be ascertained whether the claim group includes descendants by adoption.[27] In reaching this view I have also considered the judicial guidance that is appropriate to construe the requirements of the Native Title Act beneficially.[28]

Conclusion

[59] I am satisfied the application describes the persons in the claim group sufficiently clearly such that it can be ascertained whether any particular person is a member of the group as required by s 190B(3)(b). This means s 190B(3) is met.

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

[60] To meet s 190B(4), the Registrar must be satisfied the description contained in the application is sufficient to allow the claimed native title rights and interests to be identified. I have not considered whether the rights and interests claimed can be considered 'native title rights and interests' in accordance with s 223 as I consider that is part of the task at s 190B(6), where I must decide whether each of the claimed rights is established as a native title right on a prima facie basis. I note that my consideration of this condition is confined to information found in the application.[29]

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

Exclusive Possession

[61] From the description in paragraph 1 of Schedule E, I understand that exclusive possession is claimed in areas within the application area where there has been no prior extinguishment, or where any such extinguishment must be disregarded, such as areas where ss 47–47B apply. I understand that a broad claim to exclusive possession such as this does not offend s 190B(4).[30]

Non-exclusive rights

[62] From the description in paragraph 2 of Schedule E, I understand that the listed non-exclusive rights are claimed in areas where exclusive possession cannot be claimed. The non-exclusive rights form an exhaustive list, and in my view there is no inherent or explicit contradiction within the description.[31]

Qualifications

[63] Paragraphs 3 and 4 of Schedule E describe the qualifications on the claimed rights, particularly that they are subject to the laws of Queensland and the Commonwealth, and do not include ownership of minerals, petroleum or gas wholly owned by the Crown.

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[26] Attachment F and M.
[27] *Ward v Registrar* [25].
[28] *Strickland* [55].
[29] *Doepel* [16].
[30] *Strickland* [60].
[31] *Doepel* [123].

Conclusion

[64] I am satisfied the description is sufficient to understand and identify all the claimed rights and interests, which means s 190B(4) is met.

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

[65] To meet s 190B(5), the Registrar must be satisfied there is 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; and

(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) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[66] I understand my task is to assess whether the asserted facts can support the existence of the claimed native title rights and interests, rather than determine whether there is 'evidence that proves directly or by inference the facts necessary to establish the claim'.[32]

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

[67] Schedule F refers to Attachment 'F and M', which provides some information in support of the assertions at s 190B(5), including information about the claim group's predecessors. Schedule G lists the activities currently carried out by the claim group on the application area, and Schedule M briefly describes the physical connection which members have with the application area. I consider this is the extent of the information in the application which supports the assertions at s 190B(5).

[68] The additional material more specifically addresses the assertions of s 190B(5) and so my reasoning will focus primarily on the information in that material, particularly the anthropologist's report and supplementary report.

What is required to meet s 190B(5)(a)?

[69] To meet s 190B(5)(a), the factual basis must be sufficient to show:

(a) the claim group presently has an association with the area, and the claim group's predecessors have had an association with the area since sovereignty or at least since European settlement;[33]

(b) there is 'an association between the whole group and the area', although not 'all members must have such association at all times';[34] and

(c) there is an association with the entire area claimed, rather than an association with only part of it or 'very broad statements', which have no 'geographical particularity'.[35]

[32] *Doepel* [16]–[17]; *Gudjala 2008* [83], [92].
[33] *Gudjala 2007* [52].
[34] Ibid.

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

[70] Attachment F and M provides:

(a) 'Wadja country' lies between the Bigge, Expedition and Dawson Ranges;[36]

(b) The first European to arrive in the vicinity of the application area was Leichhardt in 1845–46, and settlement did not occur until the 1850s;[37]

(c) Harriet Dutton was born in 1845 at nearby Duaringa to apical ancestor Biddy Dutton. Harriet married at Bauhinia Downs station in the application area in 1874 and had seven children there;[38]

(d) Apical ancestor Sarah Dodd was born circa 1858 at Mimosa Creek on or near to the application area. She worked in the application area until 1904 and lived until she was nearly 100, and is remembered by current claimants;[39]

(e) Apical ancestor Myra Freeman was born in the 1870s and lived on and near the application area all her life. Her children were all born on or near the application area. She died in the 1930s and is buried in the application area, alongside her daughter.[40]

[71] The anthropologist's report provides:

(a) In 1887, Curr recorded the languages of Aboriginal people in the region of the application area, which included 'Vocabulary 157'. This language has since been identified as being the same as that used by Wadja people recorded decades later around the application area by Tindale and Breen;[41]

(b) In 1938, Tindale was the first person to record references to Wadja (variously spelled and with some alternative names including 'Wayinggu') and located the Wadja people on the eastern side of Expedition Range, south to Bigge Range, east 'nearly to Dawson River';[42]

(c) Tindale's 1940s map of Aboriginal Australia labels an area as 'Wadje', the southern portion of which accords closely with the application area. Tindale's genealogies include many ancestors of the claim group associated with pastoral stations which cover and surround the application area, including Bauhinia Downs, Comet Station and Planet Downs;[43]

(d) The author opines that there is 'clear consistency' in the association of Wadja people with Bauhinia Downs throughout the historical records; [44]

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[35] *Martin* [26]; *Corunna* [39], [45].
[36] Attachment F and M [1].
[37] Ibid [4].
[38] Ibid [15].
[39] Ibid [11].
[40] Ibid [8].
[41] Anthropologist's report [112].
[42] Ibid [49], [54].
[43] Ibid [56], [158].
[44] Ibid [82].

(e) In the 1970s, informants to the linguist Breen identified Bauhinia Downs as the area associated with the Wadja people, including the descendants of apical ancestor Biddy Dutton;[45]

(f) The author summarises the connections that current claimant families and individuals have to various apical ancestors, including that a grandson of apical ancestor Sarah Dodd is a senior member of the current claim group;[46]

(g) Claimants today access the application area to look after particular sites, including art sites along Mimosa Creek, which I can see from the geospatial database intersects the northern boundary of the application area;[47]

(h) A claimant recalls visiting the application area with her mother, who would tell her, when crossing Perch Creek, '[n]ow you're on your country'.[48] I understand Perch Creek forms part of the northern boundary of the application area;

(i) Intervening generations of the claim group were forcibly moved and interned at Woorabinda, which lies approximately 30 km north of the application area. Woorabinda is now an Aboriginal DOGIT community where many current claimants live, and was included in the original application area prior to the amendment of the claim in 2014;[49]

(j) Current claimants describe a spiritual serpent as their principal creation being, who is believed to have created various physical attributes of the application area including Bigge Range;[50]

(k) Current claimants describe how they grew up hunting and gathering on the same country used by their ancestors for those purposes, including at Blackboy in the north of the application area.[51]

[72] The supplementary report speaks directly to the application area as it currently exists, following its amendment and reduction in 2014. It provides:

(a) Based on the author's research and fieldwork, there have always been Wadja people who assert their rights and interests in the application area.[52]

(b) The author summarises the historical records of the association of the claim group with the application area during the 19th and 20th centuries. For example, particular families are associated with the south of the application area, where their forebears were born, lived, worked and were buried on Bauhinia Downs and Fairfield which are pastoral stations located in the southern region.[53]

[45] Ibid [100].
[46] Ibid [319], [327]–[340].
[47] Ibid [376].
[48] Ibid [441].
[49] Ibid [444]–[457].
[50] Ibid [462].
[51] Ibid [483], [492].
[52] Supplementary report [57].
[53] Ibid [75]–[79].

(c) Current and previous claimants worked on Goomaly Station and Zamia Creek station, in the northern and central parts of the application area respectively. Claimants described hunting and fishing at Zamia Creek, Repulse Creek and around Bauhinia Downs.[54]

(d) Current claimants have participated in heritage clearance surveys in the application area, including between Bauhinia Downs and Moura, and in the Expedition Ranges which lie along the western boundary of the application area.[55]

Is the factual basis sufficient to support the assertion at s 190B(5)(a)?

[73] I understand that in assessing the factual basis for the purposes of s 190B(5)(a), I am not obliged to accept very broad statements which have no geographical particularity.[56] I do not consider this application is of that nature. In my view, the information before me addresses the relationship the claim group claims to have with the relevant land and waters, in a sufficient level of detail, both at the time of settlement and since that time.[57] I have considered whether there is information sufficient to support the requirements of s 190B(5)(a) below.

Does the application support an association between the claim group at sovereignty and since that time?

[74] The supplementary report contains a map of the current application area with locations associated with the claimants' ancestors.[58] Using this map, as well as information in the Tribunal's geospatial database, I can see that the locations referred to in the material are spread across and around the application area. Bauhinia Downs, once a pastoral station and now a township, is close to the centre of the application area. Fairfield, also once a pastoral station, lies directly south of Bauhinia Downs and is also in the application area. Rolleston lies to the west, on the other side of the Expedition Ranges which form the application area's western boundary. Dawson River lies just outside the application boundary to the east.

[75] I understand that settlement in the application area occurred much later than the acquisition of British sovereignty in 1788, as it was not until the 1850s that the area was settled. Several of the apical ancestors are asserted to have been born before or in the early years of settlement. For example, Biddy Dutton gave birth to Harriet Dutton in 1845. This means that Biddy Dutton was likely alive in the early decades of the 1800s. In my view, Biddy Dutton and the other ancestors likely had the same association with the application area as their parents and grandparents, who would have been alive around the time of sovereignty. In making this retrospective inference I have considered the judicial guidance of Lindgren J on making such inferences in *Harrington-Smith*, and of French J in *Kanak* on construing the Native Title Act beneficially.[59]

[54] Ibid [85]–[86].
[55] Ibid [87].
[56] *Martin* [25].
[57] *Gudjala 2007* [40].
[58] Supplementary report, figure 10.
[59] *Harrington-Smith* [294]–[296], *Kanak* [73].

Does the application support an association between the claim group and the area currently?

[76] In my view, the factual basis is sufficient to support the assertion that the claim group currently has an association with the application area. In forming this view I have considered the information about the physical and spiritual connection to the application area which current claim group members describe. For example, the claimants describe to the anthropologist the parts of the application area where they have worked, hunted and fished. I note also the claimants' belief in a creation being whose travels led to the formation of particular attributes of the application area, including the Bigge Range in the south. In my view, these beliefs speak to the existence of a spiritual association between the claimants and the application area. Current claimants describe learning from their predecessors at locations in and around the application area, and how they continue to observe aspects of their culture on Wadja country, including hunting, fishing and caring for important sites.

Does the application support an association, both past and present, with the <u>whole</u> area claimed?

[77] I understand the task of the Registrar at s 190B(5)(a) is limited to assessing whether the factual basis is sufficient to support the assertion that the claim group have, and their predecessors had, an association over the whole area of the claim.[60] As discussed above, there are references, both historical and recent, to the communities and townships which are spread across the application area in all directions, as well as to the underlying pastoral stations of Bauhinia Downs and Fairfield. Spirits, including the creation being, are believed to be present within a number of specific sites as well as in the large features of the landscape, which supports the existence of a spiritual association with the application area. In my view, there is sufficient information in the application to support an association by the claim group, past and present, with the whole of the application area.

Conclusion - s 190B(5)(a)

[78] In my view, the information before me is sufficient to support the assertion that the claim group have, and its predecessors had, an association with the application area. This is because the material demonstrates sufficient geographical particularity to locations where claim group members and their predecessors were born, lived, worked and were buried. I am satisfied there is sufficient factual basis to support an assertion of a physical association of the claim group to the whole application area. Based on the information about the claimants' spiritual beliefs and that of their predecessors, I am also satisfied there is a sufficient factual basis to support an assertion of a spiritual association. This means s 190B(5)(a) is met.

What is required to meet s 190B(5)(b)?

[79] To meet s 190B(5)(b), the factual basis must be sufficient to support an assertion that there exist traditional laws acknowledged and traditional customs observed by the claim group that give rise to the claim to native title rights and interests. 'Native title rights and interests' is defined in s 223(1)(a) as those rights and interests 'possessed under the traditional laws acknowledged, and traditional customs observed,' by the native title holders. Applying the

[60] *Corunna* [31].

approach of Dowsett J in *Gudjala 2007*, I have interpreted s 190B(5)(b) in light of the judicial consideration of the meaning of those same words in s 223(1)(a).[61]

[80] In *Yorta Yorta*, the plurality of the High Court held that a 'traditional' law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. The High Court further held that in the context of the Native Title Act, 'traditional' also carries two other elements, namely:

> …it conveys an understanding of the *age of the traditions*: the origins of the content of the law or custom concerned are to be found in the *normative rules* of the Aboriginal and Torres Strait Islander *societies* that existed before the assertion of sovereignty by the British Crown. *It is only those normative rules that are "traditional" laws and customs*;
>
> …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*. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist.[62]

[81] In *Gudjala 2009*, Dowsett J provided further guidance to the Registrar in assessing the asserted factual basis, including that if descent from named ancestors is the basis of membership of the group, the factual basis must demonstrate some relationship between those ancestors and the pre-sovereignty society from which the laws and customs of the claim group are derived.[63]

[82] I therefore understand my assessment of the sufficiency of the factual basis under s 190B(5)(b) requires the identification of:

(a) a society which existed at sovereignty in the application area, the members of which were united through their observance of normative rules;

(b) a link between the pre-sovereignty society, the apical ancestors and the claim group; and

(c) the continued observance of normative rules through the generations down to the current claim group, such that the normative rules can be described as 'traditional laws and customs'.

What information has been provided in support of the assertion of a society at settlement?

[83] The anthropologist's report provides:

(a) The Wadja are part of a regional society which includes people who follow similar laws and customs to the north and west of the application area;[64]

(b) Curr in 1887 identified Kangulu / Gaangulu as a nation of several groups in the region of the application area. According to the author, within that larger regional society the Wadja were one such group, who had particular connections to a specific area which included the area later covered by Bauhinia Downs station.[65]

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[61] *Gudjala 2007* [26], [62]–[66], which was not criticised by Full Court on appeal in *Gudjala 2008*.
[62] *Yorta Yorta* [46]–[47], emphasis added.
[63] *Gudjala 2009* [40].
[64] Anthropologist's report [110], [223].
[65] Ibid [434]–[438].

What information has been provided in support of the assertion of traditional laws and customs?

[84] The anthropologist's report provides:

(a) A moiety system and a kinship system were observed by people in and around the region of the application area throughout the historical period, as recorded by RH Mathews and Flowers in 1898, Tennant Kelly in 1934, and Tindale in 1938 and the 1970s.[66]

(b) The moiety system regulates various aspects of life, including rules pertaining to marriage and burials. In addition to recording the observance of these rules throughout the historical period, they have been described to the author by current claimants.[67]

(c) The kinship system described in the historical record also reflects that which is used by members of the claim group today to classify their relationships with others in the group.[68]

(d) Claimants today observe the prohibition on eating the meat of their respective totem animals, which accords with the accounts from Cameron in 1904 and Tennant Kelly in the 1930s.[69] Both the historical and contemporary Wadja sources describe how the totems operate as a social identifier and that it is customary to include this information in greetings.[70]

(e) In 1871, the pastoralist Wright recorded a ceremonial gathering of 500 people on the lower Dawson River and one senior claimant alive today described the participation of her cousins and forebears, as well as her own participation, in ceremonial dances.[71] Another claimant describes his son and nephew recently participating in a regional corroborree performance in Rockhampton.[72]

(f) Rules regarding access to particular sites are observed by the claim group, for example only men may access bora grounds. A male claimant recalled that he was taken to a bora ground and taught about it by his uncles, and explained that recent unauthorised access to the site by a woman resulted in her becoming very sick, which was seen as a consequence of transgressing the law.[73]

(g) A claimant explained to the author that if people do the wrong thing in relation to country, such as access or claim country which is not theirs, they will be punished by ancestral spirits. The anthropologist's report contains many recollections from current claimants of the physical and spiritual consequences which have befallen people who have acted inappropriately.[74]

(h) In 1934, Elkin recorded people in the region of the application area 'singing the country' to ensure the wellbeing of certain locations such as waterholes. A current claimant

[66] Ibid [246]–[251], [273].
[67] Ibid [252]–[253], [264].
[68] Ibid [278]–[279], [289].
[69] Ibid [397], [402].
[70] Ibid [255]–[257], [264].
[71] Ibid [297]–[298].
[72] Ibid [364].
[73] Ibid [204]–[205].
[74] Ibid [370]–[374].

described to the author how he 'spoke to' a dry pool to entreat the associated spirit to fill it with water again. In the author's view, these actions are a 'clear parallel' of the practices documented in the historical record.[75]

(i) The author opines that all the senior claimants spoke to him about going hunting and gathering with their uncles, aunties and grandparents on weekends and during holidays, and that it is reasonable to infer that those forebears accessed their country in the same ways.[76]

(j) Wadja informants to Tindale and Tennant Kelly described the acquisition of rights to land as based on patrilineal descent.[77] The author explains that today, the pathway to membership of the group, and thus to rights to land, is cognatic, meaning that rights can be derived from either parent.[78]

[85] The supplementary report provides:

(a) The importance of the serpent in the mythological pantheon is recorded throughout the period since settlement, both in and around the application area;[79]

(b) In the author's opinion, the classificatory kinship system, the authority of elders, speaking to the land, calling out to the spirits and the totemic beliefs and practices are all contemporary expressions of pre-sovereignty practices, demonstrated by the descriptions from claimants of learning these things from their predecessors during childhood.[80]

Is the factual basis sufficient to support the assertion of s 190B(5)(b)?

Does the factual basis address the identity of a pre-sovereignty society for the area?

[86] I consider there is sufficient information in the application to support the existence of a regional society in the early years of settlement which included the application area. The factual basis material asserts that in and around the application area, this society was identifiable through common observance of a moiety system and a kinship system, among other things. Within the regional society, it is asserted that there was a distinct land holding group in the application area, comprising the claim group's predecessors. In my view, the factual basis is sufficient to support that assertion. I also consider it reasonable to infer this society existed at sovereignty and was not substantially changed between sovereignty and settlement in the 1850s, in the absence of any information before me to the contrary.

Does the factual basis address the link between the pre-sovereignty society, the apical ancestors and the claim group?

[87] As discussed above at s 190B(5)(a), I consider the factual basis shows that many of the apical ancestors lived in the area in the early decades of settlement. As the apical ancestors were born around settlement, I consider I can infer their parents and grandparents were part of the society in the application area at that time. It follows that it is reasonable to infer there is a

[75] Ibid [374]–[375].
[76] Ibid [490].
[77] Ibid [418]–[425].
[78] Ibid [427], [485].
[79] Supplementary report [14].
[80] Ibid [65]–[69].

link between the pre-sovereignty society and the apical ancestors. I understand from the material that the current claim group members are descendants of the apical ancestors, thus demonstrating the requisite link between them. The Court has previously held that '[i]t is conceivable that the traditional laws and customs under which the rights and interests claimed are held might, in whole or in part, be also traditional laws and customs of a wider population, without the wider population being part of the claim group'.[81] In my view, both the general features of the wider society and the particulars of its operation in relation to the application area by the claim group are sufficiently addressed.

Is the factual basis sufficient to support the assertion of the existence of 'traditional laws and customs'?

[88] I consider the material before me demonstrates how the laws and customs have been passed down to, and observed by, successive generations of the claim group in the application area. For example, the understanding of the moiety and kinship systems is reflected across the generations, in the historical records and in information from current claimants. In my view, that the acquisition of rights to country has moved from patrilineal to cognatic descent does not detract from the continuing observance of the relevant laws. As the author of the anthropologist's report points out, this adaptation 'has its basis in tradition'.[82] The belief in the creation serpent, its association with particular areas, and the prescriptive actions of calling out and singing to country have been observed since at least settlement. I consider the information about the claimants' totemic associations, the social and spiritual consequences which befall those who access country improperly and the rules relating to marriage and kinship, reflect those ascribed to the claim group at the time of settlement and in the subsequent decades.

[89] In my view, there is sufficient information in the application about how the laws and customs were acknowledged and observed by the apical ancestors, the intervening generations and the current members of the claim group, to support the assertion that the laws and customs are 'traditional' in the *Yorta Yorta* sense.[83] This is because there are examples provided about the observation of the various laws and customs by successive generations of the application area. In my view there is also sufficient information about how the laws and customs have been passed down to the members of the current claim group by their predecessors. Current claimants describe their predecessors teaching them the prohibitions on access to specific sites, the potential spiritual consequences for transgressions, and how to hunt and fish. I consider it is reasonable to infer that the predecessors of the current claim group acquired their knowledge of the laws and customs in much the same way as they passed it on to their descendants, thus supporting the assertion that the laws and customs are 'traditional'.

Conclusion – s 190B(5)(b)

[90] I am satisfied the factual basis is sufficient to support the assertion that there was a pre-sovereignty society in the application area. I am satisfied there is a link between the pre-sovereignty society in the application area, the apical ancestors and the current members of the claim group. I am also satisfied the factual basis is sufficient to support the assertion that

[81] *Harrington-Smith No 5* [53].
[82] Anthropologist's report [485].
[83] *Yorta Yorta* [46]–[47].

there exist traditional laws acknowledged by, and traditional customs observed by the claim group. This means s 190B(5)(b) is met.

What is required to meet s 190B(5)(c)?

[91] 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.[84] It also requires a sufficient factual basis to support an assertion that there has been continuity in the observance of traditional laws and customs going back to sovereignty or at least to European settlement.[85]

Is the factual basis sufficient to support the assertion of the continuity of traditional laws and customs?

[92] As summarised above in relation to ss 190B(5)(a)–(b), the factual basis demonstrates an ongoing association with the application area, identifies the relevant pre-sovereignty society and supports the existence of traditional laws and customs. The application provide examples of how the laws and customs have been passed down to current members of the claim group by their predecessors through oral transmission and common practice. The continuing observance of the rules relating to descent-based rights to land, kinship and totemic affiliations provide examples which I consider are relevant to s 190B(5)(c). In my view, there are sufficient examples in the information before me of how laws and customs have been observed by the claim group, substantially uninterrupted, since at least settlement in the application area.

Conclusion – s 190B(5)(c)

[93] I am satisfied the factual basis is sufficient to support the assertion that the claim group have continued to hold their native title rights in accordance with traditional laws and customs since settlement in the application area. This is because the material before me demonstrates that claimants possess knowledge about how the generations since the apical ancestors acknowledged and observed their laws and customs in relation to the application area around the time of settlement, so as to permit an inference that the claim group is a 'modern manifestation' of the pre-sovereignty society in the application area.[86] I consider the factual basis sufficient to support an assertion of continuity in the observance of traditional laws and customs, which means s 190B(5)(c) is met.

Conclusion

[94] As I consider 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), I am satisfied s 190B(5) is met.

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

[95] To meet s 190B(6), the Registrar must consider that, prima facie, at least some of the native title rights and interests claimed can be established. According to s 223(1), a 'native title right

[84] *Gudjala 2009* [29].
[85] *Gudjala 2007* [82].
[86] *Gudjala 2009* [31].

or interest' is one that is held under traditional laws acknowledged and traditional customs observed by the claim group.

[96] I note the following judicial guidance about s 190B(6):

(a) it requires some measure of the material available in support of the claim;[87]

(b) it appears to impose a more onerous test to be applied to the individual rights and interests claimed;[88] and

(c) the words 'prima facie' mean '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'.[89]

[97] It is not my role to resolve whether the asserted factual basis will be made out at trial. My task is to consider whether there is any probative factual material which supports the existence of each individual right and interest, noting that as long as some rights can be prima facie established, the requirements of s 190B(6) will be met. Only those rights and interests I consider can be established prima facie will be entered on the Register.[90] I have grouped rights together in my consideration below where it is convenient to do so.

Which of the claimed native title rights and interests are established on a prima facie basis?

2. Over areas where a claim to exclusive possession cannot be recognised, the claim group claim the following rights and interests:

(a) the right to access the application area;

(e) the right to move about the application area;

(f) the right to exist and be present on the application area;

[98] There are multiple examples in the material before me, particularly in the anthropologist's report and connection affidavits, of claim group members accessing and moving about the application area. In addition to the examples extracted at s 190B(5) above, one claimant describes how she was taken 'out bush' when she was a baby by a relative who spoke to her in Wadja language and took her to hunt porcupine. Her father's family lived at Blackboy and her parents, aunties, uncles and grandparents would take her and her siblings out to places along the Mimosa Creek.[91]

(b) the right to camp on the application area;

(c) the right to erect shelters on the application area;

(d) the right to live on the application area;

[99] There are examples provided of claimants living on the application area throughout the historical period, including on the pastoral stations that cover much of the area, some of which I have extracted above at s 190B(5). There is also information about claimants camping and erecting shelters on the application area. For example, one claimant describes his family's

[87] *Doepel* [126].
[88] Ibid [132].
[89] Ibid [135].
[90] Section 186(1)(g).
[91] Connection affidavit 3 [13], [16].

camp on Fairfield station, and recalls a story about his great-grandfather leaving and making his own camp during a dispute with his wife.[92] Another claimant describes camping on the pastoral stations as well as 'out in the bush with no tents' with her family.[93]

(h) the right to hunt on the application area;

(i) the right to fish on the application area;

(l) the right to light campfires for cooking, heating and lighting purposes on the application area; domestic purposes including cooking but not for the purposes of hunting or clearing vegetation;

[100] There are many examples provided of claimants hunting, fishing and lighting campfires in the application area. In addition to the examples previously discussed, one claimant describes going hunting with his uncles around Mimosa Creek.[94] Another claimant describes hunting various animals and birds and cooking them on hot coals, as well as fishing and collecting mussels with his children.[95]

(j) the right to take, use, share or exchange the natural resources on the application area;

(k) the right to gather the natural products of the application area (including food, medicinal plants, timber, stone, ochre and resin) according to traditional laws and customs;

(u) the right to cultivate and harvest native flora according to traditional laws and customs.

[101] One claimant explains that food harvested from the application area is shared with family.[96] Another claimant describes a number of products gathered and used for food, such as witchetty grubs and wild yams, as well particular trees which are used to make soap and medicine.[97]

(g) the right to hold meetings on the application area;

(n) the right to conduct ceremony on the application area;

(o) the right to participate in cultural activities on the application area;

[102] One claimant describes a 'law ground' near Fairfield station 'where members of the different family estates would meet to discuss Wadja business', as well as perform dances. The deponent learned about this law ground and other meeting places on Bauhinia Downs and around Zamia Creek from his grandfather, and he has taken his sons there.[98] Another claimant describes the ceremonies for which she and other women are responsible, including welcoming visitors to Wadja country.[99]

[92] Connection affidavit 6 [9].
[93] Connection affidavit 7 [17]–[21].
[94] Connection affidavit 4 [26].
[95] Connection affidavit 3 [49]–[54].
[96] Ibid [51].
[97] Connection affidavit 7 [57]–[61].
[98] Connection affidavit 6, [82]–[83].
[99] Connection affidavit 3, [23].

(m) the right to teach about the physical and spiritual attributes of the application area;

(t) the right to transmit the cultural heritage of the native title claim group including knowledge of particular sites;

[103] Many of the claimants speak about being taught by their forebears, and in turn teaching the younger generations of the claim group about the physical and spiritual attributes of the application area, including knowledge of particular sites. I have extracted above examples of a law ground which a claimant learned about from his grandfather and has passed onto his sons. Another claimant describes the role which senior men and women play in passing traditional gendered knowledge to the boys and girls of the claim group, and that he received such knowledge from his uncle who had a particularly strong understanding of Wadja country.[100]

(p) the right to maintain places of importance under traditional laws, customs and practices in the application area;

(q) the right to protect places of importance under traditional laws, customs and practices in the application area;

[104] One claimant describes places which are particularly important to Wadja women and how she helps protect these places. Elsewhere she explains the importance of protecting special places, including by having the people with traditional knowledge involved in decision making about Wadja country.[101] Another claimant explains that Wadja men have responsibility to protect particular places and that he checks on these places with his uncles.[102]

(r) the right to conduct burials on the application area;

[105] I have extracted some examples above at s 190B(5)(b) of claim group members being buried on the application area. A claimant recalls her grandmother being buried on Fairfield station and her grandfather at Woorabinda.[103]

(s) the right to be accompanied onto the application area by non-claim group members required under traditional laws and customs for the performance of ceremonies or cultural activities and to assist in observing and recording traditional activities in the application area;

[106] With regard to this right, one claimant explains: '[i]f an outsider came to Wadja country and started to hunt, I think we would have something to say about that. An outside[r] should only use the area if they are accompanied by someone from around here'.[104]

[not numbered] the right to take and use the natural water resources of the application area, including the beds and banks of watercourses;

[107] One claimant explains that camp sites are usually chosen due to their proximity to water sources and that water is taken for drinking, cooking and washing.[105] Another claimant describes bathing in creeks and boiling water to use as part of traditional medicines.[106]

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[100] Connection affidavit 6 [38]–[41].
[101] Connection affidavit 1 [28]–[29], [36].
[102] Connection affidavit 5 [45]–[49].
[103] Connection affidavit 3, [4]–[5].
[104] Connection affidavit 4 [23].
[105] Connection affidavit 5 [40].

Which of the claimed native title rights and interests are <u>not</u> established on a prima facie basis?

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 ss 47, 47A or 47B apply), the Wadja 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 their traditional laws and customs

[108] As discussed above at s 190B(5)(b), the claim group believe that punishment by ancestral spirits can occur as a consequence of unauthorised access to particular places. [107] However, the supplementary report states that there is a lack of contemporary evidence of claimants enjoying the authority to grant or withhold access to other Aboriginal people to the application area.[108] Given this assertion in the supplementary report, and as there is a paucity of information elsewhere in the material before me about the exercise of an exclusive right by the claim group in the application area, I do not consider this right is prima facie established pursuant to traditional laws and customs of the claim group.

Conclusion

[109] I am satisfied the application contains sufficient information about all but one of the rights claimed, such that they can be said to be established on a prima facie basis. I am also satisfied those claimed rights which are established prima facie can be considered 'native title rights and interests'. This is because there is information in the application to show how those rights were observed by previous generations of the claim group as well as by the claim group currently. Additionally, according to the definition in s 223(1), a native title right or interest is one held under traditional laws and customs, and I am satisfied there is sufficient factual basis to support the assertion of the existence of traditional laws and customs, as discussed above at s 190B(5)(b). This means s 190B(6) is met.

Traditional physical connection – s 190B(7): condition met

[110] To meet s 190B(7), the Registrar must be satisfied 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 have been expected currently to have such a connection but for things done by the Crown, a statutory authority of the Crown or any holder of or person acting on behalf of the holder of a lease, other than the creation of an interest in relation to land or waters.

[111] I note this condition requires the material to satisfy the Registrar of particular facts such that evidentiary material is required, and that the physical connection must be in accordance with the traditional laws and customs of the claim group.[109]

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[106] Connection affidavit 7 [60]–[61].
[107] Anthropologist's report [370]–[374].
[108] Supplementary report [83].
[109] *Doepel* [18], *Gudjala 2009* [84].

Is there evidence that at least one member of the claim group has or had a traditional physical connection?

[112] Based on the information before me, I consider at least one claim group member currently has or had a traditional physical connection to the land and waters covered by the application. The information provided in the additional material about claimants living on and visiting the application area, caring for significant sites, using its natural resources such as animals, fish and plants for food and medicine, demonstrates there is a physical connection to the application area.

[113] I also consider the claim group members' connection with the application area is 'traditional' in the sense required by s 190B(7). As discussed at s 190B(5)(b), I am satisfied the factual basis is sufficient to support an assertion that the laws and customs have been passed down to the current members of the claim group by their predecessors, it follows that I am satisfied the current claim group members' connection with the application area is in accordance with those traditional laws and customs.

Conclusion

[114] I am therefore satisfied at least one member of the native title claim group currently has or had a traditional physical connection with a part of the application area as required by s 190B(7)(a), and so s 190B(7) is met.

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

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

Section	Requirement	Information	Result
s 61A(1)	No native title determination application is approved determination of native title	The geospatial report states and my own searches confirm that the application does not cover an area where there has been an approved determination of native title.	Met
s 61A(2)	Claimant application not to be made covering previous exclusive possession act areas	Schedule B, paragraph 2 states that the application does not cover areas where a previous exclusive possession act was done, including freehold estates and exclusive pastoral leases.	Met

s 61A(3)	Claimant application not to claim possession to the exclusion of all others in previous non-exclusive possession act areas	Schedule E paragraph 1 states that exclusive possession is only claimed where it can be recognised, such as areas where there has been no prior extinguishment of native title and where ss 47–47B and s 238 apply. It follows that no claim to exclusive possession is made in previous non-exclusive possession act areas.	Met

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

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

Section	Requirement	Information	Result
s 190B(9)(a)	No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule E paragraph 4 and Schedule Q state that the applicant does not claim any minerals, petroleum or gas wholly owned by the Crown.	Met
s 190B(9)(b)	Exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P states that no claim of exclusive possession is made in relation to any offshore place.	Met
s 190B(9)(c)	Native title rights and/or interests in the claim area have otherwise been extinguished	Schedule B paragraph 2(b) states that the application does not cover areas where native title has been wholly extinguished. There is no information in the application that discloses to me that native title rights and interests in the application area have otherwise been extinguished.	Met

End of reasons

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Wadja People
NNTT No.	QC2012/010
Federal Court of Australia No.	QUD28/2019
Date of Registration Decision	6 December 2019

Section 186(1): Mandatory information

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

Application filed/lodged with:

Federal Court of Australia

Date application filed/lodged:

23 October 2019

Date application entered on Register:

6 December 2019

Applicant:

As per Schedule

Applicant's address for service:

As per Schedule

Area covered by application:

As per Schedule

Persons claiming to hold native title:

As per Schedule

Registered native title rights and interests:

2. Over areas where a claim to exclusive possession cannot be recognised, the Wadja People claim the following rights and interests:

(a) the right to access the application area;

(b) the right to camp on the application area;

(c) the right to erect shelters on the application area;

(d) the right to live on the application area;

(e) the right to move about the application area;

(f) the right to exist and be present on the application area;

(g) the right to hold meetings on the application area;

(h) the right to hunt on the application area;

(i) the right to fish on the application area;

[not numbered] the right to take and use the natural water resources of the application area, including the beds and banks of watercourses;

(j) the right to take, use, share or exchange the natural resources on the application area;

(k) the right to gather the natural products of the application area (including food,medicinal plants, timber, stone, ochre and resin) according to traditional laws and customs;

(l) the right to light campfires for cooking, heating and lighting purposes on the application area; domestic purposes including cooking but not for the purposes of hunting or clearing vegetation;

(m) the right to teach about the physical and spiritual attributes of the application area;

(n) the right to conduct ceremony on the application area;

(o) the right to participate in cultural activities on the application area;

(p) the right to maintain places of importance under traditional laws, customs and practices in the application area;

(q) the right to protect places of importance under traditional laws, customs and practices in the application area;

(r) the right to conduct burials on the application area;

(s) the right to be accompanied onto the application area by non-claim group members required under traditional laws and customs for the performance of ceremonies or cultural activities and to assist in observing and recording traditional activities in the application area;

(t) the right to transmit the cultural heritage of the native title claim group including knowledge of particular sites; and

(u) the right to cultivate and harvest native flora according to traditional laws and customs.

_____

Katy Woods

Delegate of the Native Title Registrar pursuant to ss 190–190D of the Native Title Act under an instrument of delegation dated 27 July 2018 and made pursuant to s 99 of the Native Title Act.