National Native Title Tribunal

Registration Decision

Application name	Auburn Hawkwood People
Name of applicant	Robert Clancy, Elizabeth Law, Erica Gyemore, Brian Clancy, Elizabeth Blucher, Ashley Saltner, Christine Bosworth, Jennifer Wragge, Julieanne Eisemann
Federal Court of Australia No.	QUD31/2019
NNTT No.	QC2011/005
Date of Decision	7 November 2019

Claim accepted for registration

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

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Heidi Evans

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

[1] A section reference is to the *Native Title Act 1993* (Cth) (the Act), unless otherwise specified.

Reasons for Decision

CASES CITED

Aplin on behalf of the Waanyi Peoples v State of Queensland [2010] FCA 625 (*Aplin*)
Corunna v Native Title Registrar [2013] FCA 372 (*Corunna*)
Drury v Western Australia [2000] FCA 132 (*Drury*)
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*)
Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales [2002] FCA 1517 (*Lawson*)
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 Western Australia [2005] FCA 777 (*Sampi*)
State of Western Australia v Strickland [2000] FCA 652 (*Strickland FC*)
Stock v Native Title Registrar [2013] FCA 1290 (*Stock*)
Ward v Northern Territory [2002] FCA 171 (*Ward*)
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] This is an amended application filed on behalf of the Auburn Hawkwood People native title claim group (claim group). It covers land and waters of approximately 9,787 square kilometres in south east Queensland, to the north west of Kingaroy and centred around Auburn and Hawkwood.

[2] The Registrar of the Federal Court (the Court) gave a copy of the amended application and accompanying affidavits to the Native Title Registrar (Registrar) on 30 September 2019 pursuant to s 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A.[2]

Registration conditions

[3] Sections 190A(1A), (6), (6A), (6B) set out the decisions available to the Registrar under s 190A. Section 190A(1A) provides for exemption from the registration test for certain amended applications and s 190A(6A) provides that the Registrar must accept a claim (in an amended application) when it meets certain conditions. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (which deals mainly with the merits of the claim) and s 190C (which deals with procedural and other

[2] Section 190A(1).

matters). Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B–190C.

[4] I am satisfied that neither s 190A(1A) nor s 190A(6A) apply to the claim made in this amended application. The granting of leave by the Court to amend the application was not made pursuant to s 87A, and thus the circumstance described in s 190A(1A) does not arise. The amendments to the application include a change to the claim group description that is not of a type contemplated in s 190A(6A) and does not therefore meet the requirements of that condition.

[5] Having considered the claim in the application pursuant to s 190A(6), therefore, I have decided that the claim in the application must be accepted for registration and this document sets out my reasons for that decision.

Information considered

[6] 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'.

[7] I have had regard to information in the application. I have also considered documents provided by the applicant directly to the Registrar on 14 October 2019:[3]

- sealed affidavit of Ashley Saltner, dated 9 August 2019 (filed 4 September 2019);
- sealed affidavit of Brian Clancy, dated 13 August 2019 (filed 4 September 2019);
- sealed affidavit of Christine Bosworth, dated 8 August 2019 (filed 4 September 2019);
- sealed affidavit of Elizabeth Blucher, dated 13 August 2019 (filed 4 September 2019);
- sealed affidavit of Erica Gyemore, dated 23 August 2019 (filed 4 September 2019);
- sealed affidavit of Jennifer Wragge, dated 7 August 2019 (filed 4 September 2019);
- sealed affidavit of Julie-Anne Eisemann, dated 6 August 2019 (filed 4 September 2019);
- sealed affidavit of Elizabeth Law, dated 8 August 2019 (filed 4 September 2019); and
- sealed affidavit of Robert Clancy, dated 8 August 2019 (filed 4 September 2019).

[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.[4]

[9] The state of Queensland (the State) has not provided any submissions in relation to the application of the registration test.[5]

[10] 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 9 October 2019 (the geospatial assessment).

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

Procedural fairness

[11] Upon receipt of the amended application, the Senior Officer wrote to the State inviting the State to make submissions regarding the registration testing of the application. By email of 11 October 2019, the State confirmed it would not be making submissions.

[12] As noted above, I have considered the additional material provided by the applicant on 14 October 2019. On 15 October 2019, the Senior Officer wrote to the State advising that I would be relying on this information in my application of the registration test and that should it wish to make any submissions, it should do so by 22 October 2019. On 16 October 2019 the Senior Officer received confirmation that the State had no comments or submissions to make in relation to the additional material. This concluded the procedural fairness processes.

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.

[14] A written description of the external boundary of the application area appears at Attachment B to Schedule B. It is a metes and bounds description, prepared by the Tribunal's Geospatial Services on 3 July 2014, that references cadastral boundaries, roads, watercourses, local government areas, catchment boundaries and coordinate points.

[15] A map showing the external boundary of the application area appears at Attachment C to Schedule C. It is a copy of a map also prepared by the Tribunal's Geospatial Services, dated 3 July 2014, which includes:

- the application area depicted by a bold blue outline;
- cadastral boundaries shown and colour coded by tenure type;
- topographic features shown and labelled; and
- scalebar, coordinate grid and notes relating to the source, currency and datum of data used to prepare the map.

[16] The geospatial assessment concludes that the description and map are consistent and identify the application area with reasonable certainty. Having considered the information in Attachment B and Attachment C, I agree with that assessment.

[17] Regarding those areas within the external boundary that are excluded from the application, Attachment B specifically excludes the areas subject of the Wulli Wulli People application (QUD6006/2000) and the Iman People 2 application (QUD6162/1998). Noting this is a specific exclusion, referencing native title determination application boundaries, I am satisfied it provides reasonable certainty about excluded areas.

[18] Schedule B uses general exclusion clauses to describe those areas not included in the application. In my view, there is nothing problematic in this approach in the application

satisfying this condition. By undertaking the relevant searches of historical tenure, I consider the areas captured by the exclusion clauses could be identified with reasonable certainty.

[19] The requirement at s 190B(2) is met.

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

[20] I am satisfied the claim meets the requirements of s 190B(3).

[21] A description of the persons comprising the native title claim group appears at Schedule A, as follows:

> The claim group are persons:
>
> 1. who are recognised by other members of the claim group as being descended (which may include by adoption) from a deceased person who they recognise as having been a member of the aboriginal landholding group for the application area depicted in **ATTACHMENT "C"** ("an apical ancestor"); and
>
> 2. who is a descendant of an apical ancestor and identifies himself or herself as being a descendant of an apical ancestor.

[22] The description further states that persons who are descendants by way of adoption also have the right to identify as members of the group.

[23] Following is a list of 18 named individuals and three named couples, being deceased persons who are 'recognised as having been apical ancestors from whom claim group members are descended.'

[24] From this description, I understand that there are two criteria, both of which must be satisfied in order for an individual to qualify as a member of the claim group. In my view, the second of these criteria, involving descent from a named apical ancestor, provides an objective starting point from which an inquiry into the persons comprising the group could be initiated. While this inquiry would most definitely involve some factual research, including consideration of genealogical information and records, I do not consider that this makes this part of the description unclear.[6] I note the description clarifies that persons who are descendants through adoption also satisfy this criterion.

[25] The first criterion is less objective in nature, however, I consider that once it is confirmed that an individual meets the second criterion, other members of the group could be questioned about the individual to determine whether they also satisfy the first criterion. Through this process, I am satisfied persons meeting both criteria could be known. I note the observations of Dowsett J in *Aplin* that group acceptance is a crucial aspect of group membership.[7]

[26] In light of my reasons above, therefore, I am satisfied that the persons in the group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

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[6] *WA v NTR* at [67].
[7] *Aplin* at [260].

[27] The requirement at s 190B(3) is met.

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

[28] 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.'

[29] Paragraph one of Schedule E is a claim to a right of exclusive possession. Paragraph two of Schedule E sets out numerous non-exclusive rights claimed in relation to the application area. Paragraph three provides definitions of terms within those non-exclusive rights, and paragraph four describes qualifications on the rights claimed, including that they are subject to the laws of the Commonwealth and Queensland, and any rights conferred under those laws.

[30] Having considered the description as a whole, including the stated qualifications, I am satisfied there is no explicit or inherent contradiction within the description.[8] With reference to s 223(1), I consider the rights described are understandable and have meaning as native title rights and interests, and the description is clear.[9]

[31] The requirement at s 190B(4) is met.

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

[32] 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 assertion. In particular, there is a sufficient factual basis for the three assertions of ss 190B(5)(a)–(c).

[33] For the application to meet the requirements of 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;

(b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the 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.

[34] I am to consider whether the asserted facts are sufficient to support the claimed conclusions, rather than determine whether there is 'evidence that proves directly or by inference the facts necessary to establish the claim'.[10]

[35] Section 62(2)(e) requires only a 'general description' of the factual basis. However, where the facts provided are not at a sufficient level of detail to enable a genuine assessment of the

[8] *Doepel* at [123].
[9] *Doepel* at [99].
[10] *Doepel* at [16]-[17]; *Gudjala 2008* at [83] and [92].

application by the Registrar, the application may not satisfy the condition. The material must comprise 'more than assertions at a high level of generality'.[11]

[36] To satisfy the condition, the material must contain sufficient details addressing the particular native title, claimed by the particular native title claim group, over the particular land and waters of the application area.[12]

[37] The factual basis material appears in a report of Dr Powell dated 19 September 2011 (Powell report) at Attachment F of the application, and in Schedules G and M.

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

[38] To meet the requirement at s 190B(5)(a), the factual basis must support the assertion that 'the native title claim group have, and the predecessors of those persons had, an association with the area.' Generally, to satisfy this requirement:

- it is not necessary for the factual basis to support an assertion that all members of the native title claim group have an association with the area at all times;[13]
- it is necessary that the material is sufficient to support that the group as a whole presently has an association with the area and to also support an association with the area by the predecessors of the whole group over the period since sovereignty, or at least since European settlement;[14] and
- the materials must support that the association both presently and by the group's predecessors relates to the area as a whole.[15]

Is there a sufficient factual basis for the purposes of s 190B(5)(a)?

[39] I am satisfied the factual basis is sufficient to support the assertion that the native title claim group have, and the predecessors of those persons had, an association with the land and waters of the application area.

[40] The factual basis material confirms that settlement in the area took place in approximately 1850.[16] Regarding the persons associated with the application area at and prior to that time, the Powell report provides that anthropological records identify four 'seemingly' language-named groups, being the Dakundair/Djakunda, the Willill-lee, Wulili and Wakka, or variants of these names.[17] Following an analysis of the relevant records and literature, the author concludes that the mapping of the traditional country of the Wakka-speaking group as inclusive of the application area is most likely incorrect.[18] She also concludes that Dakundair/Djakunda and Willill-lee, and also another group, Jangerie Jangerie, are locality groups that are considered by claimants through their oral history to be part of the larger

[11] *Gudjala 2008* at [92].
[12] *Gudjala 2007* at [39].
[13] *Gudjala 2007* at [52].
[14] *Gudjala 2007* at [51]-[52].
[15] See *Martin* at [23]–[26], affirmed in *Corunna* at [35]–[39] and [42]–[44].
[16] Powell report at [100].
[17] At [21].
[18] At [25]-[26].

land-holding group Wulli Wulli.[19] She explains that specifically, Willill-lee is associated with Hawkwood, Narayen, Knockbreak and Redbank (central and northern parts of the application area); Jangerie Jangerie with Narayen and Hawkwood; and Djakunda with Auburn, Hawkwood, Boondooma and Coondarra (southern parts of the application area).[20] Importantly, the author notes that the landholding group is at the language-named group level, Wulli Wulli, and that this group therefore incorporates the smaller locality groups discussed.[21]

[41] From this information, I understand the material to assert that the application area, in the period immediately prior to, and at settlement, was occupied by the Wulli Wulli language-based landholding group.

[42] The Powell report also contains information about each of the apical ancestors listed in the claim group description. The birth dates of the ancestors is given, and those birth dates range from 1812 to 1890.[22] The information demonstrates that more than half the apical ancestors were born prior to or around the time of settlement, and that the remaining ancestors were born in the two decades following settlement.[23] Places which the historical records evidence these ancestors or their children were associated with are also listed in the Powell report.[24] I have considered these locations and understand most are within or in the immediate vicinity of the application area.[25]

[43] The Powell report addresses three apical ancestors who appear to have associations with areas east of the application area, and with the Wakka socio-linguistic identity.[26] The author discusses the records containing the names of these three persons, and concludes that the information does not present a fixed view, and that in each case, there is prima facie evidence to connect them to the application area, and to the Wulli Wulli language group. In particular, the author relies on the oral testimonies of and pathways of identification taken by their descendants.[27]

[44] In light of the above, I am satisfied the factual basis is sufficient in supporting an association of the apical ancestors, around the time of settlement and in the decades following, with the application area.

[45] The Powell report also speaks to an association of the claim group with the area today, and an association of the group's predecessors with the area over the period since settlement. It states 'evidence in claimants' oral histories, the written records and claimants' genealogies […] shows that successive generations of the claim group have inhabited the Application area since the time of effective sovereignty in this region until the mid-1950s – 1960s when they began to move to nearby towns to comply with requirements that their children attend

[19] At [29]-[30], [40].
[20] At [40].
[21] At [41].
[22] At [100].
[23] At [100].
[24] See Table 3 at [101].
[25] At [101]-[102].
[26] At [105].
[27] At [106]-[117].

school.'[28] The report goes on to explain the way in which the arrival of the pastoral industry to the region in the late 1840s allowed for claimants' predecessors to remain on their traditional country, working and camping on the stations.[29]

[46] As an example, the Powell report speaks of a claimant, descended from apical ancestors Bojimba, Narrygn and Maggie West, born in 1949, who was reared up by her grandmother, aunt and parents at Piggott, Auburn, Hawkwood and Coondarra (all within the application area). The report explains that the claimant's father was a station worker and that Piggott was a main camping area for Aboriginal people where the claimant's extended family lived. Numerous members of the family worked on properties in the application area and would return to the camp at Piggott in between periods of employment. The report describes the claimant's memory of the particular persons who stayed at the camp, and her explanation that upon her grandfather's death, many members of the family moved to Eidsvold (outside the application area), yet continued to return to the application area to gather its resources. The material further explains that the claimant's husband worked and lived in the application area until 1973.[30]

[47] From this and other specific examples in the material,[31] I am satisfied the factual basis is sufficient to support an assertion that the predecessors of the claim group have maintained an association with the application area over the period since settlement.

[48] Regarding an association of the claim group presently with the area, the Powell report includes numerous statements from claimants about their interactions with places in the application area in the contemporary period. For example, one claimant states:

> We took my niece, [name removed], to Cockatoo, where her father was born, she videoed it. We took her all around Hawkwood and Auburn, and we showed her the caves – climbed up them – these are our caves in our area. We showed her Narayen Mountain, took her to where Narrygn and Bojimba – Grannie [name removed]'s Granny and Grandfather – are buried. They were tribal people. [name removed], Grannie [name removed]'s father, got shot while Bojimba was running away with them. He became head of the tribe.[32]

[49] Elsewhere in the report, another claimant explains that:

> I go and ask – tell them [the pastoralists] – I tell them that I'm coming and they appreciate it. I ring up Auburn and Coondarra and Hawkwood and Piggott – all them station owners – and talk to them – and Boondooma – I always stop and have a cup of tea at Boondooma – I never pass – the owner is [name removed] and I have known him from a kid – I have had many a feed at the place when his mother and father were there. The station owners knew that they have put their stations on our country and they still know this – you see the [family name removed] at Chinchilla? – They came from Mount Perry before they owned a block on the Auburn and old [name removed] deceased said "I knew this country was the [family name removed]'s country before I bought it."[33]

[28] At [193].
[29] At [197]-[201].
[30] At [194].
[31] See for example at [201].
[32] At [160].
[33] At [166].

[50] And another statement that appears elsewhere provides:

> I have hunted and fished there for bush food with my family and others all my life and still eat my native foods – when my family and friends have been out – they bring some to me – out of love and respect for me. I eat porcupine, possum, kangaroo, scrub turkey, fish, turtle, emu, goanna, emu eggs, wallaby, sugarbag. We never catch more than we need. We still get our porcupines when we want one, clean and eat them. We get them along the road, as we are driving out to Piggott. I share with my family, but they have to be there to get some.[34]

[51] In light of this information before me, which speaks of claimants spending time at specific places within the application area, I am satisfied the factual basis is sufficient to support an association of the claim group with the area presently.

[52] At s 190B(5)(a), I note that the association must be shown to be with the area as a whole. The factual basis material includes various place names when discussing the association of the claim group and its predecessors with the application area. Using the Tribunal's Native Title Vision Plus database, I have considered the location of these places with reference to the boundary of the application area. From doing so, I understand that the places identified are generally spread across the full extent of the application area, and where not located within the boundary of the area, they are within close proximity to the boundary, including in areas subject of other Wulli Wulli applications.[35]

[53] It follows that I am satisfied the factual basis material is sufficient to support the assertion at s 190B(5)(a).

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

[54] To meet s 190B(5)(b), the factual basis must support the assertion 'that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests'. The wording of s 190B(5)(b) is almost identical to that at s 223(1)(a) of the Act which provides the definition of 'native title rights and interests'. Dowsett J approached this in *Gudjala 2007* by considering s 190B(5)(b) in light of the case law regarding s 223(1)(a), particularly the leading decision of the High Court in *Yorta Yorta*.

[55] According to the High Court's decision in *Yorta Yorta*, a law or custom is 'traditional' where:

(a) it 'is one which has been passed from generation to generation of a society, usually by word of mouth and common practice';[36]
(b) the origins of the content of the law or custom concerned can be found in the normative rules of a society[37] which existed before the assertion of sovereignty by the Crown;[38]

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[34] At [152].
[35] For example, Wulli Wulli People #3 (QUD619/2017), situated immediately north and slightly east of the current application area.
[36] *Yorta Yorta* at [46].
[37] The term 'society' in this context is 'understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs'—*Yorta Yorta* at [49].
[38] *Yorta Yorta* at [46].

(c) the normative system has had a 'continuous existence and vitality since sovereignty';[39] and

(d) the relevant society's descendants have acknowledged the laws and observed the customs since sovereignty and without substantial interruption.[40]

[56] Dowsett J found that a sufficient factual basis must therefore demonstrate that the laws and customs relied on by the claim group 'have their source in a pre-sovereignty society and have been observed since that time by a continuing society.'[41] His Honour held that the 'starting point must be identification of an indigenous society at the time of sovereignty',[42] and concluded that a sufficient factual basis must also establish a link between the native title claim group described in the application and the area covered by the application, which involves 'identifying some link between the apical ancestors and any society identified at sovereignty.'[43]

[57] I understand that it is not appropriate that I impose too high a burden when assessing these matters, having regard to the limited nature of the enquiry when assessing the condition of s 190B(5).[44]

Is there a sufficient factual basis for the purposes of s 190B(5)(b)?

[58] As above, the starting point at s 190B(5)(b) is the identification of a society of people living in the application area at sovereignty, or European settlement, bound by the observance of shared laws and customs. As touched on in my reasons above at s 190B(5)(a),[45] the Powell report explains that the relevant landholding society is the language-based group, the Wulli Wulli people.[46] It further explains that this group was comprised of smaller locality groups associated with particular areas within the application area. These included the Jangerie Jangerie, the Djakunda/Dakundair and the Willill-lee. The Powell report provides that while several language varieties were associated with the application area, Wulli Wulli appears to have been the most widely spoken.[47]

[59] Regarding the laws and customs of a normative character that were acknowledged and observed by the society at settlement, the Powell report discusses numerous examples. I have summarised some of these below:

- a matri-moiety system, further divided into sections;[48]

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[39] *Yorta Yorta* at [47].
[40] *Yorta Yorta* at [87].
[41] *Gudjala 2007* at [63].
[42] At [66].
[43] See *Gudjala 2007* at [66]. Although the Full Court found error in Dowsett J's evaluation of the factual basis materials, the Full Court did not disagree with his Honour's assessment of what a sufficient factual basis for this assertion must address—see *Gudjala 2008* at [71]–[72]. The Full Court also agreed with Dowsett J that one question a sufficient factual basis must address is whether 'there was, in 1850–1860, an indigenous society in the area, observing identifiable laws and customs'—*Gudjala 2008* at [96]. (1850–1860 is the time of European settlement of the Gudjala application area.)
[44] See also *Stock* at [64] where His Honour held that 'it must be borne in mind that the provisions of the NTA dealing with registration are not, nor could they be, concerned with the proof that native title exists.'
[45] See above at [41].
[46] At [41]
[47] At [40].
[48] At [47].

- a totemic system, which gave rise to responsibilities of landholding groups to maintain and protect sites (such as totemic increase sites) within their territory;[49]
- recruitment of group members through parental filiation;[50]
- ownership of all resources within the territory occupied by the group;[51]
- positions of authority and leadership within the group, including the role of 'headmen';[52]
- belief in two cosmological figures – *Ngiyeran/Ngayeran*, a Sky God and Creator being who established the laws and customs and imbued them into the physical landscape; and a Rainbow Serpent being known as *Dhakkan* or *Gauwar* who inhabited the land and waters and had significant power;[53] and
- a region-wide ceremonial system whose members conducted joint ceremonies and shared cosmological beliefs.[54]

[60] For each of these aspects of the system of laws and customs of the society at settlement asserted by the material, reference to historical and anthropological sources is made and excerpts provided from those sources. For example, regarding ceremonies, the Powell report provides that 'Aboriginal people are reported to have regularly travelled on a well-defined track between the Auburn and the Dawson regions, through the broken country of the Auburn Range near the homestead on Knockbreak station […] to attend corroborees at Camboon, which is in the Wulli Wulli QUD 6006/2000 area and at Hawkwood, which is in the Application area.' Two sources, one dated 1935 and one dated 1948, are referred to in the report. It is then further stated that from the author's research, the oldest living claimants, born in the 1920s and 1930s, shared their experiences of attending corroborees at places within the application area such as Hawkwood and Piggott.[55]

[61] In light of this information before me, I am satisfied the factual basis is sufficient in supporting an assertion that there was a society of people, being the Wulli Wulli language-based level group, occupying the area at settlement and acknowledging and observing shared laws and customs of a normative character.

[62] Further, I am satisfied the material explains the link between the claim group and the claim area, in asserting a connection between the apical ancestors identified in the claim group description, and the society in the area at settlement. As explained in my reasons above at s 190B(5)(a), the material provides approximate birth dates for each of the apical ancestors, and lists places with which they were associated. Also as above, these birth dates range from 1812 to 1890.[56] I understand the material to assert, therefore, that the apical ancestors were members of the society in the area, prior to or around the time of settlement, or they were persons born into that society in the decades following settlement.

[49] At [48]-[49].
[50] At [50].
[51] At [56].
[52] At [65].
[53] At [71]-[73].
[54] At [76].
[55] At [76].
[56] See above at [43].

[63] The factual basis material must also speak to traditional laws and customs. A traditional law or custom is one that has been passed down from generation to generation by word-of-mouth or common observance, and it is my view that the material speaks to laws and customs of this nature. In the Powell report, quotes from claimants describe how they have been taught by their elders about their laws and customs, and their culture, and how they continue to pass this knowledge on. For example, one claimant states:

> When we were out hunting, if there was no water to drink, or if the water in the creek or the waterhole was muddy, my mother taught us to dig on a sandy part of the creek, about a foot down, until the hollow was filled with water, to get a drink. That water was clean. It's under the ground out there. I have taught this to my children. I have passed all my knowledge to my children because it means that they, like me, know how to get water and food out there. I've made sure that my children have learnt everything that I learnt as I grew up – I've ensured that they know all I know, so that they know their connection, I've even tried to teach them the language words I know, and I've shown them the plants, the anthills for signs of porcupines – all my cultural practices.[57]

[64] I note, in addressing traditional laws and customs, the material must also speak to laws and customs acknowledged and observed by the native title claim group today that are rooted in those of the society at settlement. In my view, the material speaks to such laws and customs, and gives a number of examples of laws and customs acknowledged and observed by the claim group today that are derived from those of their predecessors around the time of settlement. In setting out the following examples, I have had regard to the information in the Powell report regarding the laws and customs of the society at settlement, summarised in my reasons above at [60].

[65] One example from the material involves laws and customs about recruitment of group members to the landholding group that is the native title claim group. One claimant shares her understanding of the requirement for parental filiation in the following way:

> What's important is where your ancestors come from and what you know about that area and what you do for it – most important thing is your bloodline to ancestors and their area – that's where you come from and you can claim – it's your right – it's the blackfellows' rule – you have to have a bloodline to the land – when you can show you have a bloodline to the land, you can say you belong there and that you are the one for that land – in my bloodlines I'm close to this land.[58]

[66] Another example involves laws and customs about elders and positions of authority within the claim group. One claimant describes a scenario I consider demonstrates these positions of authority continue to exist today:

> I heard what [so-and-so] [sic] was getting up to – going to take people out walking without letting me know – told [so-and-so] [sic] off! Don't like people talking about things they know nothing about! I'm the boss for my family, my tribe – this is handed down and I'm the Elder for my family now and I know the country – I was born and raised out there – by rights there should only be one Elder to a tribe! And you have to go by that Elder – Younger people in my group should ask my

[57] At [192].
[58] Powell report at [215].

> permission before they go out there – that's the Aboriginal way – this is because I'm the boss and the oldest now.[59]

[67] Yet another example involves laws and customs surrounding ceremonies. One claimant explains the use of natural resources from the application area by the claim group's predecessors, and by members of the group today, for ceremonial purposes:

> My father's generation used to make boomerangs, spears, didgeridoos – I saw this when I was a child. Now, my family mostly use the ochre – my son uses the ochre for his dance troupe which came to open the Keeping Place at Cracow [in the Wulli Wulli QUD6006/2000 area]. He asked the Elders' permission to use the ochre.[60]

[68] In light of these examples, and with regard to the laws and customs of the society at settlement, I consider there is before me detail about and information to support, an assertion that the laws and customs acknowledged and observed by the claim group today are rooted in those of the society at settlement.

[69] It follows that I am satisfied the factual basis is sufficient to support an assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group giving rise to the claim to native title.

[70] The requirement at s 190B(5)(b) is met.

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

[71] To meet s 190B(5)(c), the factual basis must support the assertion 'that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs' addressed in the requirement in s 190B(5)(b). In order for a delegate to be satisfied that there is a factual basis for s 190B(5)(c) there must be some material which addresses the following matters outlined by Dowsett J in *Gudjala 2007*:

- that there was a society at settlement that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed to the claim group;
- that there has been continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement.[61]

Is there a sufficient factual basis for the purposes of s 190C(5)(c)?

[72] I have already explained above at s 190B(5)(b), the reasons for which I am satisfied the material supports an assertion of a society in the area at settlement, acknowledging and observing normative laws and customs, from which the laws and customs of the claim group today are derived.

[73] Subsequently, I turn to consider whether the material speaks to continuity in the acknowledgement and observance of those traditional laws and customs. The material sets

[59] Powell report at [163].
[60] Powell report at [150].
[61] *Gudjala 2007* at [82].

out numerous statements from claimants about the way in which laws and customs were handed down to them, and how they continue to pass this knowledge on to younger generations, which in my view, supports an assertion of continuity.

[74] One example is where a claimant says:

> I learnt about my country from my Auntie and my Grannie – I grew up with them – they taught us that our land provided everything for us – food, water and our spiritual connections – I was taught by my auntie and Grannie that I belonged to this land [the Application area] and to respect this knowledge and this land – we were brought up never to take more from the land than we needed and to leave the rest – so that whatever we took could make some more – like when we found a turkey nest, we'd be told to only to take some of the eggs and to leave the rest, so that they would hatch – I feel spiritually disconnected when I am in someone else's country – I feel really uncomfortable – and I can't talk about or for another person's country, even though I might be living in it at the moment – it's not right by our law to do this – I can only talk for my own area – I have taught my children about my country because it's theirs too and I am now teaching my grandchildren so that they know where they come from – we plan to have a family camping trip there this Christmas so that we can take the grandkids and, because this will be their first time, we'll introduce them to the country.[62]

[75] In addition to this, the material about the involvement of the claim group and its predecessors in the pastoral industry, including how this allowed them to remain living on their traditional country, in my view, supports continuity. From the material, I understand that settlement in the area was prompted by the establishment of pastoral runs, and from this time (1850s) to the present day, claimants have worked on these properties, and maintained strong relationships with pastoralists allowing them continued access to their country.

[76] For example, one claimant explains:

> My father [name removed] was well known and the pastoralists on these properties ask me to visit but for health reasons I decline – they make me feel I'm welcome to go back to my country. I've been asked to go out to three properties whenever I want to – Boondooma (by [name removed]), and to [name removed]'s place, and [name removed]'s place and to the [family name removed]'s property – all these are in my area – they ask me to come because of the connection they had with my father. They knew my father came from the area – [name removed] wants me to come out to inspect the places at Boondooma – you can only get there by horse and foot – so I can't go I'm sending (so-an-so [close relative]) [sic] in my place.[63]

[77] I note that the above statement indicates that the continued occupation of the application area through employment in the pastoral industry has been marked by acknowledgement and observance of laws and customs, including those around protecting sites and special places. In light of this material, and the material addressing the pattern of intergenerational transfer of knowledge, I am satisfied the factual basis is sufficient to support an assertion that the claim group have continued to hold their native title in accordance with their traditional laws and customs.

[78] The requirement at s 190B(5)(c) is met.

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[62] Powell report at [159].
[63] Powell report at [167].

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

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

[80] 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 clamed can be established.' I note the following comments by Mansfield J in *Doepel* in relation to this condition:

- it requires some measure of the material available in support of the claim.[64]
- although s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed, this does not itself require some weighing of that factual assertion as that is the task required by s 190B(6).[65]
- section 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed.[66]

[81] Mansfield J found that the use of the words 'prima facie' in s 190B(6) means 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.'[67]

[82] Noting the definition of 'native title rights and interests' in s 223(1) of the Act, in order for me to consider a right or interest prima facie established, it must be shown to be a right or interest that is:

(a) possessed under the traditional laws and customs of the native title claim group;[68]
(b) a right or interest in relation to the land or waters of the application area;[69] and
(c) not extinguished in relation to the entirety of the application area.[70]

Exclusive possession

[83] 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.[71]

[84] Since *Ward HC*, there have been a number of cases that have also considered the substance of such a right. From these cases, the following principles have emerged:

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[64] *Doepel* at [126].
[65] *Doepel* at [127].
[66] *Doepel* at [132].
[67] *Doepel* at [135].
[68] Section 223(1)(a).
[69] Section 223(1)(b).
[70] Section 223(1)(c).
[71] At [88].

- a native title right to exclusive possession includes the right to make decisions about access to and use of the land by others;[72]

- the right cannot be formally classified as proprietary - its existence depends on what the evidence discloses about its content under traditional law and custom;[73] 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.'[74]

[85] In my view, the material speaks to a right of this nature. The Powell report states claimants' understanding that 'according to their law and custom, if Aboriginal persons who are not members of the claimant group want to access the Application area, they should first seek permission from the claimants, because "we are the carers, the protectors of that land and all its resources" and that the Elders of the claimant group are the proper persons who should be approached for such permission.'[75]

[86] A number of statements by claimants set out in the material support this assertion. For example, one claimant says:

> If another group wants to come out – they have to contact me – [once] the [family name removed] – the mongrel things – did walk on my country but they will get punished – it's coming! The [family name removed] did this and I did not know – no one stopped them – People had big fights over that! But they will get punished! Now, if I hear another Aboriginal person has been at my sites and in my area, I tell the pastoralists to lock the gate.[76]

[87] Elsewhere, another claimant says:

> The Wakka Wakka are our neighbours – they join us around the Proston area. The Wakka area comes up towards Mudubbera but it does not come beyond that. Then there's Gurang-Gurang. They are our neighbours too. I go by what my mother told me. She said that the Wakkas are down from Mundubbera and the Gurangs are up from there. In my young days the Wakkas stayed in their area, the Gurangs in theirs and we stayed in ours. The only people who can walk in my area are ones with a true connection there – that's the blackfellows' rule – I tell my nieces these rules.[77]

[88] The concept of being gatekeepers for the purpose of preventing harm to persons not familiar with the application area, and avoiding injury to country, is also addressed in the material. Claimants explain the way strangers can be punished by spirits in the landscape where they fail to adhere to the correct protocols for an area or place. One claimant says:

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[72] *Sampi* at [1072].
[73] *Griffiths* at [71].
[74] *Griffiths* at [127].
[75] At [171].
[76] Powell report at [171].
[77] Powell report at [182].

> Only way your country can be damaged is if you sell it – I'd never sell our land – it's for future generations; I'd never give any of it away; […] If you damage country – you will get a warning – like, you will get tormented by the spirits.[78]

[89] And another claimant gives the following example:

> [So-and-so] [sic] took something from someone else's country and he's that sick! Poor fellow! I told him to take that thing straight back – ever since he took it, he hasn't been well. And that's the same with [So-and-so] [sic] – she walked where she shouldn't have gone and now she's getting sick. That old bird, that owl – he's a spiritual one and we know that when that bird comes, there's something wrong. That bird belongs to my father, and it's in my land and when it comes to me, I know something is up! Too right I do! My niece was out at Kununurra [not in the application area] and that owl flew down in front of her and she knew right away something was wrong. And rang up here and found out that her uncle was sick.[79]

[90] From these statements, I understand claimants hold a belief in various spiritual forces and powers within the application area, that need to be appeased when interacting with the land and waters of the area. Further, I understand that they seek to ensure these spirits are appeased on a daily basis to prevent harm and injury to members of the claim group, and to any other person who comes onto the application area. In this way, I consider the material to assert that the claimants do act as gatekeepers for the purpose of preventing harm and avoiding injury to the country itself, but also to persons engaging with the country.

[91] In this way, I understand the material to assert that the native title claim group possess the right to make decisions about access to and use of the area by others.

[92] It follows that I consider the right of the claim group to exclusive possession of the application area established on a prima facie basis.

Non-exclusive right to access, be present on, move about on and travel over the application area

[93] The following statement by a claim group member is an example of the material before me that I consider speaks to a right of the claim group to access, be present on, move about on and travel over the application area:

> I go and ask – tell them [the pastoralists] – I tell them that I'm coming and they appreciate it. I ring up Auburn and Coondarra and Hawkwood and Piggott – all them station owners – and talk to them – and Boondooma – I always stop and have a cup of tea at Boondooma – I never pass – the owner is [name removed] and I have known him from a kid – I have had many a feed at the place when his mother and father were there. The station owners knew that they have put their stations on our country and they still know this – you see the [family name removed] at Chinchilla? – They came from Mount Perry before they owned a block on the Auburn and old [name removed] deceased said "I knew this country was the [family name removed]'s country before I bought it.[80]

[94] From the material, I understand that prior to, and following the establishment of pastoral runs on their country, members of the claim group and their predecessors have continued to live

[78] Powell report at [129].
[79] Powell report at [129].
[80] Powell report at [166].

on and move about the application area. As indicated by the above statement, claimants consider that the country belongs to them, and accordingly it is their right to occupy it.

[95] It follows that I consider the non-exclusive right to access, be present on, move about on and travel over the application area, established on a prima facie basis.

Non-exclusive right to camp and live temporarily on the area, and to build temporary shelters

[96] The following statement by a claim group member is an example of the material before me that I consider speaks to a right to camp and live temporarily on the application area, and for that purpose, build temporary structures on the area:

> When I was a young person we could move all over our country because we worked for the station owners, and in those days the properties were huge, now they are cut up into little blocks. And we did not need permission to move from one part to another because the pastoralists knew us and this is so even today – they know we are the Aboriginal people who belong to this region and my Grannie [name removed] told me it was the same for her and her parents – we lived mostly in tents – we'd cut trees and make our A-frames and put calico over them – camped at Piggott, Auburn, Burnwood, Jarra, Pinedale, Coondarra, Dykehead, Glenwood, Wells Station, DiDi.[81]

[97] As above, claimants and their forebears have continuously lived on and occupied the application area, including during periods of employment in the pastoral industry. The statement here supports this occupation as inclusive of a right to erect temporary structures for the purposes of living on the area, and camping on the area. In my view this material is sufficient to allow me to consider the right established on a prima facie basis.

Non-exclusive right to hunt, fish and gather on the land and waters of the area for personal, domestic and non-commercial, communal purposes

[98] The following statement by a claim group member is an example of the material before me that I consider speaks to a right to hunt, fish and gather on the land and waters of the area for personal, domestic and non-commercial, communal purposes:

> I have hunted and fished there for bush food with my family and others all my life and still eat my native foods – when family and friends have been out – they bring some to me – out of love and respect for me. I eat porcupine, possum, kangaroo, scrub turkey, fish, turtle, emu, goanna, emu eggs, wallaby, sugarbag. We never catch more than we need. We still get our porcupines when we want one, clean and eat them. We get them along the road, as we are driving out to Piggott. I share with my family, but they have to be there to get some.[82]

[99] It is clear from the material that claimants and their forebears have continuously hunted and fished on the application area. Statements by claimants, in my view, suggest that they consider the ability to do this their right, due to the fact of the application area being the country of their ancestors.[83]

[100] It follows that I consider the right established on a prima facie basis.

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[81] Powell report at [139].
[82] Powell report at [152].
[83] See for example Powell report at [128].

Non-exclusive right to take and use Traditional Natural Resources for personal, domestic and non-commercial, communal purposes

[101] The following statement by a claim group member is an example of the material before me that I consider speaks to a right to take and use Traditional Natural Resources for personal, domestic and non-commercial, communal purposes:

> My father's generation used to make boomerangs, spears, didgeridoos – I saw this when I was a child. Now, my family mostly use the ochre – my son uses ochre for his dance troupe, which came to open the Keeping Place at Cracow [in the Wulli Wulli QUD6006/2000 area]. He asked the Elders permission to use the ochre.[84]

[102] The statement above indicates that natural resources have been taken from the application area for various purposes by claimants today and by their predecessors. It is also clear that use of these resources is in accordance with patterns established by the group's laws and customs, such as seeking Elders' permission.

[103] In light of this material before me, I consider the right to take and use traditional natural resources for personal, domestic and non-commercial, communal purposes established on a prima facie basis.

Non-exclusive right to be buried and bury native title holders within the area

[104] The following statement by a claim group member is an example of the material before me that I consider speaks to a right to be buried and bury native title holders within the area:

> You have to be descended from an ancestor that comes from this country. I pass them [these rights and interests] to my children – through the bloodline. We know who the ancestors are because our old people told us who they were. My Granny always told us her grandparents Bojimba and Narrygn were buried on Narragin [Narayen] Mountain.[85]

[105] I note that Bojimba and Narrygn are apical ancestors named in the claim group description. It is my understanding, therefore, that this right has been exercised by the predecessors of the claim group including back to the time of settlement in the area. Consequently, I consider the material speaks to the right as one handed down through the generations since settlement, and that it is established on a prima facie basis.

Non-exclusive right to teach on the area about the physical and spiritual attributes of the area

[106] The following statement by a claim group member is an example of the material before me that I consider speaks to a right to teach on the area the physical and spiritual attributes of the area:

> Our old people did not do a lot of talking to us when we went out with them – we were expected to learn by being there and watching how our mother and Grannie behaved – like when my mother introduced me to Auburn Falls – I recall how she approached it with reverence and she expected us to follow her in this [behaviour]. – We were brought up by being shown – not just told – and we

[84] Powell report at [150].
[85] Powell report at [128].

> were expected to follow the right behaviour – if we did not we'd get the stick – I learnt in this way that the Auburn Falls is a sacred place – from how my mother behaved there and expected me to behave. Mum showed us the rock pools where we could get water and stone axes and flints – long before that place was made a park. And I learnt from my Uncle [name removed] – he showed me a cave there – and I recall how he approached that cave with great reverence and put his hand up, when he got near.[86]

[107] From this and other statements before me, I understand that members of the claim group, as children, spent considerable time on the application area being taught about features of their country by their parents and grandparents, and aunties and uncles. Claimants also explain how they continue to teach younger generations today in the same way.

[108] In light of this information, I consider the material speaks to the right as one held pursuant to laws and customs passed down through the generations, and that the right is, prima facie, established.

Non-exclusive right to maintain places of importance and areas of significance and protect those places and areas from physical harm

[109] The following statement by a claim group member is an example of the material before me that I consider speaks to a right of the claim group to maintain places of importance and areas of significance and protect those places and areas from physical harm. Speaking of an instance where a Telstra Tower was erected on Mount Narayen, considered a sacred site, the claimant says:

> There are spirits there – and they [Telecom] got a big sign from them when they tried to put a telegraph pole on Mount Narayen – a big storm came and blew it down. My father told me never to go there in the dark – there's a ghost up there.[87]

[110] Claimants speak elsewhere about sacred places within the application area where they adhere to particular protocols when interacting with those sites.[88] My understanding of the material is that they consider it their duty and responsibility to protect these places, as their ancestors remain in the area, and because the country is for future generations.[89]

[111] In light of this information before me, I consider the right established on a prima facie basis.

Non-exclusive right to light fires on the area for domestic purposes

[112] The following statement by a claim group member is an example of the material before me that I consider speaks to a right of the claim group to light fires on the area for domestic purposes including cooking, but not for the purpose of hunting or clearing vegetation:

> The women did all the cooking on an open fire and in the ashes and each family had their own fireplace in front of their tents. We kids were warned not to play with the fire sticks at night – we used to light a long stick – make a fire stick – but we kids were told not to play with these sticks in case the *djandjari* [spirits who inhabit the area] would take us. We would watch Auntie [name

[86] Powell report at [156].
[87] Powell report at [165].
[88] Powell report at [156].
[89] See for example Powell report at [129].

> removed], Mum and Granny [name removed] clean porcupine, goanna, scrub turkey and plain turkey and then cook them in the ashes. We roasted witchetty grubs in the ashes.[90]

[113] Claimants speak in detail of animals they and their predecessors hunted on the application area, and the ways that food was prepared. From this material, I understand the right to light fires for domestic purposes is one that has been passed down in accordance with laws and customs surrounding preparation of food and animals.

[114] It follows that I consider the right established on a prima facie basis.

Non-exclusive right to conduct ceremonies on the area

[115] The following statement by a claim group member is an example of the material before me that I consider speaks to a right of the claim group to conduct ceremonies on the area:

> I used to dig and take things from my area. My old people would use stone axes to get sugarbag and we took bark for huts, grass for beds and dug holes in the sand to get clean water. But now, I want to keep things in my area as they are – no use taking things away. When I was a kid, they would paint themselves up and do their corroboree – Granny [name removed], [name removed], all the men and woman [sic] would be painted up. Men wore their shorts and they sang their own songs. I remember one about Grandfather [name removed] – how he chased cattle around Mount Narayen before he had any whiskers! We'd used boomerangs for beating the rhythm – not like today – now all they [the young ones] know is one song – "Inna Ngunii" – I used to sing that when I was young.[91]

[116] Various statements from claimants describe corroborees they remember being held on the application area.[92] From this material, I understand this right has been exercised across the generations, including on pastoral properties in early settlement times.

[117] It follows that I consider the right established on a prima facie basis.

Non-exclusive right to hold meetings on the area

[118] The following statement by a claim group member is an example of the material before me that I consider speaks to a right of the claim group to hold meetings on the area:

> My husband has the right to go to my area – I expect him to go there and he knows he would feel welcomed there. We welcome spouses at our meetings. He has the greatest respect for my law and custom and he appreciates attending meetings about my tribal business and he remains respectfully silent when he attends – and he is always welcome to be present.[93]

[119] In addition to this information about meetings of the claim group today, the material contains statements from claimants talking about gatherings of their predecessors on the application area, including on pastoral properties. In light of this information before me, I consider the right of claim group members to hold meetings on the application area is established on a prima facie basis.

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[90] Powell report at [174].
[91] Powell report at [148].
[92] Powell report at [191].
[93] Powell report at [179].

Non-exclusive right to take and use the water for personal, domestic and non-commercial, communal purposes

[120] The following statement by a claim group member is an example of the material before me that I consider speaks to a right of the claim group to take and use water from the area for personal, domestic and non-commercial, communal purposes:

> When we were out hunting, if there was no water to drink, or if the water in the creek or the waterhole was muddy, my mother taught us to dig on a sandy part of the creek, about a foot down, until the hollow was filled with water, to get a drink. That water was clean. It's under the ground out there. I have taught this to my children. I have passed all my knowledge to my children because it means that they, like me, know how to get water and food out there…[94]

[121] This statement indicates, in my view, the way in which access to and use of water from the application area, is a practice that has been handed down through the generations by the claimants' predecessors. In this way, I consider the material to support the right as one held pursuant to the traditional laws and customs of the claim group, and that it is established on a prima facie basis.

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

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

[123] 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.'[95]

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

- the material must satisfy the delegate of particular facts, therefore, evidentiary material is 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;[96]
- the physical connection must be shown to be in accordance with the traditional laws and customs of the claim group;[97] and
- the material may need to address an actual presence on the area.[98]

[125] The Powell report at Attachment F contains many statements from claim group members talking about time they have spent on the application area, however for the purposes of this condition, I have focused my attention on one particular member of the group, being [name removed].

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[94] Powell report at [192].
[95] Subsection (a).
[96] *Doepel* at [17].
[97] *Gudjala 2007* at [89].
[98] *Yorta Yorta* at [184].

[126] The Powell report includes the following statements from Ms [name removed], which in my view demonstrate the physical connection she has previously had, and presently has, with the application area. She states:

> I go and ask – tell them [the pastoralists] – I tell them that I'm coming and they appreciate it. I ring up Auburn and Coondarra and Hawkwood and Piggott – all of them station owners – and talk to them – and Boondooma – I always stop and have a cup of tea at Boondooma – I never pass – the owner is [name removed] and I have known him from a kid – I have had many a feed at the place when his mother and father were there. – The station owners knew that they have put their stations on our country and they still know this – you see the [family named removed] at Chinchilla? – They came from Mount Perry before they owned a block on the Auburn and old [name removed] deceased said "I knew this country was the [family name removed]'s country before I bought it.[99]

[127] Elsewhere in the Powell report she says:

> We took my niece, [name removed], to Cockatoo, where her father was born, she videoed it. We took her all round Hawkwood and Auburn, and we showed her the caves – climbed up them – these are caves in our area. We showed her Narayen Mountain, took her to where Narrygn and Bojimba – Grannie [name removed]'s Granny and Grandfather – are buried. They were tribal people. [name removed], Grannie [name removed]'s father, got shot while Bojimba was running away with them. He became the head of the tribe.[100]

[128] And elsewhere, she says:

> I have hunted and fished there for bush food with my family and others all my life and still eat my native foods – when my family and friends have been out – they bring some to me – out of love and respect for me. I eat porcupine, possum, kangaroo, scrub turkey, fish, turtle, emu, goanna, emu eggs, wallaby, sugarbag. We never catch more than we need. We still get out porcupines when we want one, clean and eat them. We get them along the road, as we are driving out to Piggott. I share with my family, but they have to be there to get some.[101]

[129] From these statements, I understand that Ms [name removed] has, as a child spent, and today continues to spend, time on the application area, including at the pastoral stations Auburn, Hawkwood and Boondooma. She also spends time with family at Piggott and has taken a younger member of her family out on the application area, showing her Narayen Mountain and other important places in the area. It follows that I am satisfied Ms [name removed] has a physical connection with the application area.

[130] Section 190B(7) requires, however, that the connection is in accordance with the traditional laws and customs of the native title claim group. In my view, the statements made by Ms [name removed] show that this is the case. In particular, Ms [name removed] explains how she has passed on knowledge of country to her niece, teaching her the attributes of the area in accordance with intergenerational patterns of teaching. She also talks about the relationship she has with pastoralists in the area, which is based on an understanding that the

[99] At [166].
[100] At [160].
[101] At [152].

land and waters of the application area belonged to Ms [name removed] and her forebears before the pastoralists arrived.

[131] As I have discussed in my reasons above at s 190B(5)(b), bloodline connection to country and passing on knowledge of country are both aspects of the system of traditional law and custom asserted by the material. In addition, rights to use the resources of the area, spoken of by Ms [name removed], are touched on in my reasons at s 190B(6), as being rights held pursuant to those same traditional laws and customs. In light of this, I am satisfied Ms [name removed] has a physical connection with the application area that is in accordance with the traditional laws and customs of the claim group.

[132] It follows that I am satisfied at least one member of the claim group currently has, or previously had, a traditional physical connection with some part of the application area.

[133] The requirement at s 190B(7) is met.

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

[134] In my view the application does not offend any of the provisions of ss 61A(1)–(3) and therefore the application satisfies the condition of s 190B(8):

Requirement	**Information addressing requirement**	**Result**
Section 61A(1) No native title determination application if approved determination of native title	Geospatial report	Met
Section 61A(2) Claimant application not to be made that covers any previous exclusive possession act areas	Schedule B, paragraph [1]-[2]	Met – comments below
Section 61A(3) Claimant applications not to claim exclusive possession in areas covered by previous non-exclusive possession acts	Schedule B, paragraph [3]	Met

Section 61A(2)

[135] Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply.

[136] Schedule B lists a number of categories of tenure that are excluded from the application area. Section 23B of the Act defines 'previous exclusive possession act', by also setting out a list of different types of tenure that fall within the definition. From my consideration of the categories listed in Schedule B, they are identical in terms to the categories in the definition. It is my understanding, therefore, that the application area excludes areas subject to previous exclusive possession acts.

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

[137] In my view the application does not offend any of the provisions of ss 190B(9)(a)–(c) and therefore the application meets the condition of s 190B(9):

Requirement	Information addressing requirement	Result
Section 190B(9)(a) No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q	Met
Section 190B(9)(b) Exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P	Met
Section 190B(9)(c) Native title rights and/or interests in the application area have otherwise been extinguished	Schedule B, paragraph [6]	Met

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

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

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

[139] 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. This condition does not require any merit or qualitative assessment of the material to be undertaken.[102]

Section 61

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

Section	Details	Form 1	Result
s 61(1)	Native title claim group	Schedule A, Part A (2)	Met
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Schedule A	Met

Section 62

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

Section 62(1)(a)

[142] The amended application filed in the Federal Court on 30 September 2019 was not accompanied by the required affidavits affirmed by the applicant persons pursuant to s 62(1)(a). On 14 October 2019, the applicant provided directly to the Registrar for the purposes of registration testing, these affidavits, and advised that they had been filed separately to the application. In my view, this does not satisfy the requirement at s 62(1)(a) for the purposes of s 190C(2), noting the wording of the former provision is that '[a] claimant application must be accompanied by an affidavit sworn by the applicant'[103], and the wording of the latter provision is that the 'Registrar must be satisfied' the application 'is accompanied by any affidavit or other document, required by sections 61 and 62.'

[102] *Doepel* [16], [35]–[39].
[103] Emphasis added.

[143] However, as this is an amended application, I do not consider that the failure to provide fresh affidavits is fatal to the application satisfying this requirement. In *Drury*, the Court held that s 62 does not convey a requirement for fresh affidavits to be filed on the occasion of every amendment to an application. In light of this, I consider the requirement met.[104]

Section	Details	Form 1	Result
s 62(1)(a)	Affidavits in prescribed form	Provided directly to the Registrar on 14 October 2019	Met - comments above
s 62(2)(a)	Information about the boundaries of the area	Schedule B and 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	Attachment F	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

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

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

[145] It is only where there is an application meeting all three criteria set out in ss 190C(3)(a), (b) and (c), that is, a 'previous application', that the requirement for me to consider the possibility of common claimants between claim groups arises.[105]

[146] The geospatial assessment identifies one application currently appearing in an entry on the Register of Native Title Claims (the Register) that overlaps the amended application. This is the Wulli Wulli People #2 application, the same application as the one before me, as already recorded on the Register. As it is the same application, in my view it is not an overlapping application for the purposes of s 190C(3). I note that the geospatial overlap record will cease to exist upon registration of this amended application.

[147] The requirement at s 190C(3) is satisfied.

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

[148] I am satisfied the requirements set out in s 190C(4)(b) are met.

[149] For the application to meet the requirements of s 190C(4), the Registrar must be satisfied that the application has been certified by all representative Aboriginal/Torres Strait Islander bodies

[104] *Drury* at [11].
[105] *Strickland FC* at [9].

that could certify the application in performing its functions.[106] If the application has not been certified, the Registrar must be satisfied that 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.[107]

[150] Schedule R includes a statement that the application has not been certified. It is therefore the requirement at s 190C(4)(b) that applies. Where this is the case, as it is here, s 190C(5) imposes further requirements that must be met by the application. In particular, the application must contain a statement that the requirement regarding authorisation (set out in s 190C(4)(b)) has been met,[108] and also contain further information 'briefly' setting out the grounds upon which the Registrar should consider that the authorisation requirement has been met.[109]

[151] Having considered the information in Schedule R, I am satisfied it contains the statement required by s 190C(5)(a). Schedule R also refers to the affidavit of [name removed] (CAR affidavit) at Attachment R. It is my view that the information in Schedule R and in the CAR affidavit is sufficient to meet the requirement at s 190C(5)(b).

[152] The requirement at s 190C(5) is met.

[153] Part A item 2 'Authorisation' states that the applicant was authorised to make this amended application at a meeting in Mundubbera on 3 August 2019. The CAR affidavit provides the following information about the meeting:

- two meetings were held on 3 August 2019 – the first considered the claim group description and whether an additional two apical ancestors should be included in the description, and the second involved a decision by the group to amend the application to reflect the new description, along with other amendments, and a decision to authorise the applicant to make the amended application and deal with all matters arising in relation to it;
- the legal representative for the claim group mailed letters giving notice of the proposed authorisation meetings, and six community meetings to be held in the lead up to 3 August 2019, to 453 persons included in a database held by the legal representative for the Wulli Wulli People #2 claim group;
- the legal representative also sent copies of this correspondence to Queensland South Native Title Services (QSNTS), and QSNTS confirmed these were sent to persons descended from the additional two apical ancestors proposed for inclusion in the claim group description;
- the notice set out the purpose of each of the meetings scheduled for 3 August 2019, gave details for the meetings, and invited the existing claim group (it set out the

[106] Subsection 190C(4)(a).
[107] Subsection 190C(4)(b).
[108] Section 190C(5)(a).
[109] Section 190C(5)(b).

description of that group), and the descendants of the two additional apical ancestors, to attend;

- the meetings of 3 August 2019 were publicly notified, approximately one month prior, in three newspapers relevant to members of the claim group, or circulating in the application area - the terms of the public notice were the same as those in the letters mailed to relevant persons;

- travel and accommodation assistance was offered to persons wishing to attend, and a contact name and phone number given so that people could register their interest for the meetings;

- [name removed], employed as a consultant to assist with the authorisation meetings, attended on 3 August 2019, as did the anthropologist who had prepared the genealogies for the application, Dr Fiona Powell, and the legal representative for the claim group;

- Dr Powell supervised registration of the first and second meeting, and kept registration sheets for the meetings – 137 persons attended the first meeting, and 142 persons attended the second meeting;

- while persons descended from the two additional apical ancestors were in attendance at the first meeting, they were not issued with wrist bands such that they could not vote, and only remained in the room by resolution of the existing claim group members;

- at the first meeting, the legal representative for the group presented to attendees, explaining the purpose and intent behind the two meetings, and providing an update on the application's progress, moving towards a consent determination – a PowerPoint presentation was delivered and it set out the proposed resolutions;

- following this, those eligible to vote resolved that there was no process of decision-making mandated by their traditional laws and customs that must be used for making decisions of this type – they agreed to and adopted a process consistent with processes used at prior meetings of the claim group about the application;

- also at the first meeting, by 'substantial majority', those eligible to vote resolved that the claim group be amended to include the further two apical ancestors;

- at the commencement of the second meeting, those persons descended from the additional two apical ancestors were also given wristbands enabling them to vote;

- also at the second meeting, again the group resolved there was no process pursuant to their traditional laws and customs that must be used for the authorisation of the applicant to make the amended application – they agreed to and adopted the same process that had been used at the first meeting;

- resolutions passed at the second meeting included a decision to amend the application to reflect the new claim group description, to alter the rights and interests described in the application, to change the name of the application, and a decision to re-authorise the existing applicant to make the amended application – other decisions not relating to this amended application were also made; and

- one member of the applicant was not present at the meeting, however she was called by the legal representative immediately following close of the second meeting, and she confirmed her acceptance of being re-appointed and re-authorised as an applicant person to make the amended application.

[154] From the note that follows s 190C(4)(b) referring to the definition of 'authorise' in s 251B, it is my view that the material must speak to that definition. Section 251B provides that the applicant's authority from the rest of the native title claim group to make an application must be given in one of two ways:

(a) in accordance with any traditional process mandated for authorising 'things of this kind' (i.e. authorising an applicant to make a native title determination application), where one exists;[110] or

(b) in any other case, by an agreed or adopted process in relation to authorising things of that kind.[111]

[155] Information in the CAR affidavit and the annexures to the affidavit, explains that at the first meeting, after resolving that a code of conduct would be adopted by the persons in attendance, the group passed a resolution that there was no particular traditional decision-making process that must be followed for making decisions about the application. They then proceeded to agree to and adopt a process of decision-making which involved voting by secret ballot.[112] The CAR affidavit explains that this resolution was passed unanimously by those in attendance.[113]

[156] The information about the second meeting that day, where the applicant was authorised to make the application by all the persons in the native title claim group, set out in the CAR affidavit and also in the PowerPoint presentation at Annexure "CR 10", provides that the same steps were taken in confirming a decision-making process for that meeting, however the process agreed to and adopted differed from that used at the first meeting.[114] That is, the process involved a vote by show of hands as opposed to a secret ballot.[115]

[157] The affidavits affirmed by the applicant persons that were provided directly to the Registrar on 14 October 2019 reflect the process described in the authorisation material as to how the

[110] Section 251B(a).
[111] Section 251B(b).
[112] At [21], and see Meeting 1, Resolution 3, in Annexure "CR 10".
[113] At [21].
[114] At [27].
[115] See Meeting 2 Resolution 3 of Annexure "CR 10".

group determined an appropriate decision-making process.[116] In my view, this information is sufficient in addressing the matters prescribed by s 251B.

[158] Where it is a meeting of the claim group using an agreed to and adopted decision-making process that forms the basis of the applicant's authority to make the application, there is no requirement that all of the members of the group are involved. It is sufficient if all of the members of the group are given every reasonable opportunity to participate in the decision-making process.[117]

[159] Notice of the meetings on 3 August 2019 was given personally and publicly, in more than one newspaper relevant to the application and application area. It is my understanding that the legal representative for the Wulli Wulli People #2 claim group arranged for the personal notices to be mailed out approximately one month prior to the meetings, and that QSNTS arranged for the persons descended from the two proposed additional apical ancestors to be mailed copies of the notice. Travel and accommodation assistance was provided, and persons could register their interest or direct queries to a contact person identified in the notice. In addition, a total of six community meetings were held in the lead up to the authorisation meeting, which sought to give information and background to claimants about the upcoming authorisation meetings.

[160] In my view, as a result of the notice, claim group members had ample time and available assistance to make arrangements to attend where they felt the purpose of the meeting required their attendance. I understand that 142 persons attended the second meeting on 3 August 2019 at which the group decided to authorise the applicant to make the amended application. It follows that I consider all the members of the claim group, as it is described in the application before me, were given every reasonable opportunity to participate in the authorisation meetings held 3 August 2019.

[161] To allow me to be satisfied of the fact of authorisation, the material must provide sufficient detail of the meeting, including how it was notified, but also how it proceeded on the day. In *Ward*, O'Loughlin J posed a number of hypothetical questions indicating the type of matters information about an authorisation meeting must speak to. In that case, the material was 'wholly deficient'.[118] His Honour commented that at least the substance of these questions must be addressed:[119]

> …There is no information about that meeting. 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

[116] At [3].
[117] *Lawson* at [25].
[118] At [24].
[119] At [25].

unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded?[120]

[162] The material before me about the authorisation meeting is detailed and in my view, speaks to all of the matters considered by O'Loughlin J above. Documents accompanying the CAR affidavit include attendance sheets, copies of notices and relevant correspondence, meeting minutes, and a copy of a PowerPoint presentation delivered at the commencement of the meetings held on 3 August 2019. There is nothing in the material to indicate there was any major dissent or disagreement during the course of the meeting, nor have I received any information from any person challenging the facts presented to me in the material.

[163] As set out in the meeting minutes, resolution seven of the second meeting involved a decision by the amended claim group to continue the authority of the existing applicant, to amend the application in accordance with the decisions made at the meetings that day, and make the amended application. Apart from four abstentions from voting, all remaining persons in attendance voted in favour of this resolution.

[164] As to whether the applicant persons are members of the native title claim group, in the s 62(1)(a) affidavits provided directly to the Registrar on 14 October 2019, each deponent makes a statement affirming their membership of the group, at paragraph one.

[165] In light of the above, I am satisfied the applicant is a member of the native title claim group and is authorised to make the amended application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

[166] The requirement at s 190C(4)(b) is met.

End of reasons

[120] At [24].

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Auburn Hawkwood People
NNTT No.	QC2011/005
Federal Court of Australia No.	QUD31/2019

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 September 2011

Date application entered on Register:

16 December 2011

Applicant:

[As per the Schedule]

Applicant's address for service:

[As per the Schedule]

Area covered by application:

[As per the Schedule]

Persons claiming to hold native title:

[As per the Schedule]

Registered native title rights and interests:

[As per the Schedule]

_____

Heidi Evans

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

7 November 2019