

Registration Decision

Application name	Florence Bell & Ors on behalf of the Wakka Wakka People #4 and State of Queensland & Ors (Wakka Wakka People #4)
Name of applicant	Ms Florence Bell, Mr Michael Bond Snr, Ms Patricia Bond, Ms Cynthia Button, Mr Christopher Chapman, Mr Garry Cobbo, Mr Kevin Doolan, Mr Robert Lacey, Ms Lauren Gilson, Mr Winston Mimi, Mr Arnold Murray, Mr Stephen Pickering, Mr Carl Simpson, Ms Cheryl Smith and Ms Barbara Hart
Federal Court of Australia No.	QUD277/2019
NNTT No.	QC2012/003
Date of Decision	6 September 2019

Claim accepted for registration

I have decided the claim in the Wakka Wakka People #4 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 Woods²

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

Aplin on behalf of the Waanyi Peoples v State of Queensland [2010] FCA 625 (*Aplin*)
Commonwealth v Yarmirr (2001) 208 CLR 1; [2001] HCA 56 (*Yarmirr*)
Corunna v Native Title Registrar [2013] FCA 372 (*Corunna*)
Griffiths v Northern Territory of Australia [2007] FCAFC 178 (*Griffiths FC*)
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 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*)
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*)

Background

- [1] The claim in this application is made on behalf of the Wakka Wakka native title claim group. It covers land and waters in southeast Queensland, northwest of Gympie and southwest of Bundaberg.
- [2] This claim was first made on 10 February 2012 and accepted for registration on 5 April 2012. It has been amended several times since then and remains on the Register of Native Title Claims.
- [3] On 26 July 2019, an amended application was filed and on 1 August 2019 the Registrar of the Federal Court of Australia (Court) gave a copy of the amended application to the Native Title Registrar (Registrar) pursuant to s 64(4).
- [4] 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.

Information considered

- [5] I have considered the information in the application and the additional information provided by the applicant, as outlined below.³ I note that the anthropologist's report provided by the applicant was produced for the Wakka Wakka People #2 application (QUD6032/1999), which was dismissed on 3 December 1999. Using the historical data in the Tribunal's geospatial database, I can see that the current Wakka Wakka People #3 and Wakka Wakka People #4 applications now cover the area which was previously covered by Wakka Wakka People #2 application. I am therefore of the view that it is appropriate for me to consider the factual basis material in this report in forming my views as to this application's ability to meet ss 190B(5)–(7).
- [6] I have considered information contained in a geospatial assessment and overlap analysis of the area covered by the application prepared by the Tribunal's Geospatial Services dated 5 August 2019 (geospatial report) and information available through Geospatial Services in relation to locations mentioned in the application.⁴
- [7] There is no information before me obtained as a result of any searches conducted by the Registrar of state or Commonwealth interest registers,⁵ and the Queensland government (state) has not supplied any information as to whether the registration test conditions are satisfied in relation to this claim.⁶

Procedural fairness

- [8] On 5 August 2019, a senior officer of the Tribunal (senior officer) wrote to the relevant minister of the state advising that I would be considering the information in the application in my decision, and should the state wish to supply any information or make any submissions, it should do so by 12 August 2019. Also on 5 August 2019 a representative of the relevant minister advised that the state would not be making any submissions.
- [9] On 16 August 2019, the applicant provided the following documents for my consideration (additional material):
- (a) Affidavit of [name removed], affirmed 13 June 2019 (lawyer's affidavit);
 - (b) Affidavit of [name removed], affirmed 13 June 2019 (research officer's affidavit); and
 - (c) Anthropologist's Report, [name removed], March 2010 (anthropologist's report).
- [10] On 23 August 2019, the senior officer wrote to the representative of relevant minister to advise that I would be considering the additional material when making my decision, and any comment the Minister may wish to make should be provided by 30 August 2019. Also on 23 August 2019, the representative of the relevant minister advised that the state would not be making a submission.
- [11] This concluded the procedural fairness process.

³ Section 190A(3)(a).

⁴ Section 190A(3)(c).

⁵ Section 190A(3)(b).

⁶ Section 190A(3)(c).

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, 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	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

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 native title claim group for the application (the **current application**) was a member of a native title claim group for any previous application'.⁸ 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 of Native Title Claims (the Register) when the current application was made; and

⁷ *Doepel* [16], [35]–[39].

⁸ Emphasis in original.

(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 refers to Attachment R, which is a document titled 'Authorisation', and as no certificate from an Aboriginal/Torres Strait Islander body accompanies the application, I understand I must assess the application against the requirements of s 190C(4)(b).

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

[19] Section 190C(4)(b) requires two issues to be addressed:

- (a) that the applicant be a member of the native title claim group; and
- (b) 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 native title claim group.

[20] 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) has been satisfied 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) above has been met.

[21] Therefore, in order to satisfy s 190C(4)(b), an application must also satisfy s 190C(5).

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

- (a) Attachment R to the application;
- (b) The s 62 affidavits from the members of the applicant which accompany the application;
- (c) The lawyer's affidavit; and
- (d) The research officer's affidavit.

[23] I note that the authorisation meeting held to authorise the applicant to make this amended application was also the authorisation meeting held for the amended Wakka Wakka People #3 application (QUD276/2019). I understand that the reason for holding the same meeting is due

to the claim group descriptions and the applicant members being the same for both applications. For this reason, some of the discussion below references the Wakka Wakka People #3 application, such as the summary of the meeting notice for the authorisation meeting.

Does the application satisfy s 190C(5)?

[24] Paragraph 5 of each of the affidavits which accompany the application states that members of the applicant are ‘authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it’. Part A(2) of the application states that the applicant was authorised by all members of the claim group at an authorisation meeting held on 26 May 2019 at Gayndah.

[25] Paragraphs 7-12 of the affidavits set out the resolutions which were passed at the authorisation meeting on 26 May 2019, including the decision-making process agreed to and adopted by the claim group, and the resolution authorising the members of the applicant to make the application.

[26] I consider the information in paragraph 5 of the affidavits is a statement to the effect that the requirements of s 190C(4)(b) have been met, sufficient for the purposes of s 190C(5)(a). 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.’⁹ I therefore consider the information in paragraphs 7-12 of the affidavits about the authorisation meeting is sufficient for the purposes of s 190C(5)(b). This means s 190C(5) is met.

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

Is the applicant a member of the native title claim group?

[27] Section 190C(4)(b) requires that all the persons comprising the applicant must be members of the claim group.

[28] In each of their affidavits, the persons who comprise the applicant depose that they are members of the claim group. I have not been provided with any material that contradicts those statements and information. It follows that I am satisfied that the members of the applicant are all members of the native title claim group.

Is the applicant authorised to make the application by all the other persons in the native title claim group?

[29] In order to determine whether the applicant is authorised to make the application, it is necessary to identify the decision-making process utilised by the claim group. Section 251B identifies two distinct decision-making processes by which an applicant can be authorised: a process which is mandated by traditional laws and customs, or one which has been agreed to and adopted by the native title claim group. Where a process of decision-making exists under the traditional laws and customs of the claim group, s 251B(a) mandates that process ‘must’ be used.

⁹ Strickland [57].

[30] Section 190C(4)(b) also requires information to show that the claim group have authorised the applicant such that I can be satisfied of the ‘fact of authorisation’.¹⁰ I have summarised the information before me which I consider is relevant to this condition below.

Decision-making process

[31] The s 62 affidavits which accompany the application, Attachment R and the lawyer’s affidavit provide the same information about the decision-making process used to authorise the applicant, which is summarised in the s 62 affidavits as follows:

7. At the Authorisation Meeting, the native title claim group passed resolutions:
 - i. confirming that there is no process of decision-making that, under the traditional laws and customs of the Wakka Wakka People, must be complied with for making decisions of the kind relating to:
 - (a) authorising a native title determination application; or
 - (b) authorising amendments to a native title determination application, including an amendment to include the descendants of one or more apical ancestors to the claim group description for a native title determination application; and
 - ii. confirming that the decision-making process which was agreed to and adopted by the native title claim group for all motions to be considered at the Authorisation Meeting, would be as follows:
 - (a) the decision to be made must be presented in the form of a clearly worded written motion which must be displayed and read out to the meeting;
 - (b) the motion must be moved and seconded by members of the claim group present at the meeting before it is decided on;
 - (c) the motion must be voted upon by a show of hands of the members of the claim group present and entitled to vote at the meeting;
 - (d) the motion will pass only if the number of votes in favour are more than the number of votes against the motion, and abstentions do not count as a vote for or against.

Notice of authorisation meeting

[32] Attachment R provides that Queensland South Native Title Services (QSNTS) gave notice of the authorisation meeting held on 26 May 2019 in the following ways:

- (a) Public notice in the *Koori Mail* on 24 April 2019;
- (b) Public notice in the *South Burnett Times* on 26 April 2019;
- (c) Personal notice by mail to 525 members of the Wakka Wakka claim groups on 3 May 2019;
- (d) Copies of the public notice to six local governments, for display on their notice boards, on 3 May 2019;
- (e) Personal notice by telephone to 296 members of the Wakka Wakka claim group in the two weeks prior to the authorisation meeting; and

¹⁰ *Doepel* [78].

- (f) Copies of the public notice on the QSNTS website and Facebook page from 24 April 2019.
- [33] The lawyer's affidavit provides the same information as Attachment R, and details the following additional means of notification:
- (a) Text messages to 350 members of the Wakka Wakka claim group on 22 May 2019;
 - (b) Copies of the public notice to the solicitor for indigenous respondent [name removed], believed to be spokesperson for the descendants of 'Taabinga Harry';
 - (c) Service of an outline of argument in the Wakka Wakka People #4 application on the solicitor of [name removed], believed to be descended from 'Nellie, Mother of Elsie Fitzgerald/Edwards', which included details of the authorisation meeting and that the inclusion of Nellie was listed as an agenda item.¹¹
- [34] Annexed to the lawyer's affidavit are copies of the various forms of the notice, including the public notice as published in the Koori Mail and the South Burnett Times; the letter sent to members of the claim group; the letter sent to the local councils; and the content and delivery outcome of each of the text messages sent to the claim group members.
- [35] The public notice is titled 'Wakka Wakka People #3 and Wakka Wakka People #4 Native Title Authorisation Meeting'. It includes a map with the respective claim areas labelled, along with a number of towns and cities, the Auburn and Burnett Rivers, and the Bruce Highway. It lists the ancestors of the claim group as it was then described and invites all members of the Wakka Wakka People as described to attend the authorisation meeting. The date, venue and time of the meeting are clearly set out. The stated purpose of the meeting includes:
- (a) Consideration of the inclusion of 'Taabinga Harry' and 'Nellie, mother of Elsie Fitzgerald/Edwards' as apical ancestors, and amend apical ancestor Maggie Hart to 'Mother of Maggie Hart (Grandmother of Crabbie Chapman and Henry Chapman)';
 - (b) Authorisation of the above amendments to the claim group description; and
 - (c) Authorisation of persons to be, or continue to be, the applicant.
- [36] The notice explains that if the claim group decides to amend the claim group description, the descendants of those newly added apical ancestors will be invited to attend the remainder of the authorisation meeting. The notice further explains that any such descendants are invited to register their attendance but will be required to remain outside until such time as the amendment to the claim group description is authorised.
- [37] The notice also includes the details of an Information Session scheduled for 25 May 2019 and states that people unable to attend the Information Session can request an appointment with QSNTS regarding the anthropological and legal advice relating to the decisions to be made at the authorisation meeting. The notice also provides details of a chartered bus service departing from Cherbourg for the day of authorisation meeting.

¹¹ Lawyer's affidavit [13]–[15].

Conduct of authorisation meeting

[38] Attachment R provides the following information about the conduct of the authorisation meeting:

- (a) It was attended by 76 members of the Wakka Wakka People;
- (b) Attendees were required to meet the criteria of the then current claim group description and were registered according to their relevant apical ancestor and given a coloured wrist band;
- (c) Descendants of the proposed additional apical ancestors were not invited to register and enter the meeting until after the claim group authorised the amendment of the claim to include those ancestors, unless they were already in the claim group through an existing Wakka Wakka ancestor;
- (d) Information was provided regarding anthropological evidence which supported the amendment to the claim group description;
- (e) Legal advice was provided regarding the requirements of s 251B;
- (f) After discussion about the requirements of s 251B, a resolution was passed that there is no traditional process of decision-making which must be complied with for making decision of the kind relating to authorising a native title determination application or authorisation amendments to a native title determination application;
- (g) The agreed to and adopted decision making process (cited above in relation to s 190C(5)) was passed by an unanimous resolution;
- (h) Votes for each motion were counted by a show of hands, and only hands with coloured wristbands were counted;
- (i) Resolutions were passed by majority to amend the claim group description, and the meeting was then adjourned to allow for the descendants of those ancestors to register and join the meeting;
- (j) Six additional people joined the authorisation meeting as a result of the amendment to the claim group description;
- (k) A resolution authorising the existing members of the applicant to continue as the applicant was then passed by majority.

[39] The lawyer's affidavit and the research officer's affidavit provide the same information about the conduct of the authorisation meeting as is outlined in Attachment R. The lawyer's affidavit includes further details about the participation of [name removed] and five other unnamed people. According to the affidavit, the lawyer explained to these people prior to the commencement of the authorisation meeting, that they were not permitted to attend until such time as the existing claim group authorised their ancestors' inclusion in the claim group description, after which they all exited the meeting venue.¹² The lawyer's affidavit further details how, after the resolutions were passed to amend the claim group description, he and other QSNTS staff went outside the meeting venue to advise [name removed] and the others

¹² Lawyer's affidavit [30]–[33].

of the outcome, and that these people then registered their attendance and participated in the remainder of the authorisation meeting.¹³

- [40] Annexed to the lawyer's affidavit is a document titled 'Summary of Resolutions: Wakka Wakka #3 and #4 Authorisation Meeting (Gayndah) Sunday 26 May 2019'. It details each of the motions put forward and the resolutions passed at the authorisation meeting, including the names of the people who moved and seconded each resolution and whether the resolutions were passed unanimously. For the resolutions which were not passed unanimously, the number of votes for, against and abstaining are recorded. The document is signed by Mr [name removed], the independent chairperson of the authorisation meeting, with a statement that he certifies the document contains an accurate record of the resolutions passed.

Consideration

- [41] With regard to the decision-making process, the resolutions appear to have been passed in accordance with the decision-making process agreed to and adopted by the claim group described in the affidavits of the members of the applicant. I note the resolution confirming there is no traditional decision-making process which must be used was passed unanimously. In my view, the material before me is clear and consistent about how the decision-making process was agreed to and adopted by the claim group and accords with s 251B(b).
- [42] 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.
- [43] I consider Attachment R and the lawyer's affidavit provides sufficient detail of the conduct of the authorisation meeting, including the resolutions passed and whether each was passed unanimously or by majority. Details of the registration of attendees and vote counting processes are also included which in my view demonstrates that the resolutions, including the decision to authorise the applicant, were undertaken in line with the agreed and adopted decision-making process of the claim group.
- [44] 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?¹⁴

- [45] In my view, there is sufficient information to address the substance of all of those questions, such that I can be satisfied of the 'fact of authorisation', particularly given the level of detail provided in the lawyer's affidavit.¹⁵ It follows that I am satisfied that the applicant is

¹³ Ibid [45]–[48].

¹⁴ *Ward v Northern Territory* [25]–[26].

¹⁵ *Doepel* [78].

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.

Conclusion

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

Section 190B: conditions about merits of the claim

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

[47] 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.

[48] 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.¹⁶

Does the information about the external boundary meet this condition?

[49] Schedule B refers to Attachment B, which is titled 'QUD91/2012 Wakka Wakka People #4 – (Amended May 2019)', prepared by QSNTS and dated 23 May 2019. It references land parcels, local government boundaries, sub-catchment boundaries, roads, watercourses, ridgelines and coordinate points. Coordinates are referenced to GDA94 in decimal degrees expressed to six (6) decimal places.¹⁷

[50] Schedule C refers to Attachment C, which contains an A3 colour map titled "Native Title Determination Application QUD91/2012 Wakka Wakka People #4" prepared by QSNTS and dated 13 May 2019. It includes:

- (a) The application area depicted as a dark blue outline and stipple and identified in the legend as such;
- (b) A monochrome general topographic background image;
- (c) Water catchment boundaries depicted as a thin light blue line and labelled in blue;
- (d) Local Government Authority boundaries depicted as a thin dashed purple line and labelled in purple;
- (e) Scalebar, northpoint, legend and locality plan; and
- (f) Notes relating to the source, currency and datum of data used to prepare the map.

¹⁶ *Doepel* [122].

¹⁷ Geocentric Datum of Australia 1994.

[51] 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?

[52] Schedule B lists general exclusions including areas which are subject to freehold estates, various types of leases, and areas where native title has been validly extinguished.

[53] I note French J's comment regarding s 190B(2): '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 hearing of the application'.¹⁸ Following this reasoning, I am satisfied the areas affected by the general exclusions can be ascertained at the appropriate time.

[54] Attachment B specifically excludes any lands or waters subject to:

- (a) QUD6026/2001 Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People as determined by the Federal Court on 28 November 2017;
- (b) QUD31/2019 Wulli Wulli People #2 as accepted for registration 20 September 2017;
- (c) QUD621/2011 Wakka Wakka People #3 as accepted for registration 2 June 2016;
- (d) QUD619/2017 Wulli Wulli People #3 as accepted for registration 23 February 2018; and
- (e) QUD20/2019 Kabi Kabi First Nation Traditional Owners Native Title Claim Group as accepted for registration 8 February 2019.

[55] In my view, the exclusion of lands or waters covered by the above claims is clear from the description.

Conclusion

[56] 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

[57] 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.

[58] 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.¹⁹

[59] Schedule A states:

¹⁸ *Strickland* [55].

¹⁹ *Wakaman* [34].

The native title claim group is made up of families whose members identify as Wakka Wakka in accordance with traditional laws acknowledged and traditional customs observed by them. Membership is based on the principle of cognatic descent (i.e. descent traced through either mother or father).

This application is brought on behalf Aboriginal people whose members identify as Wakka Wakka People, who are descended from the following ancestors: [list of 28 people, some with references to their immediate descendants].

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

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

[61] From the above description, I understand an individual is a member the native title claim group by virtue of being a descendant of one of the named apical ancestors and through self-identification as a Wakka Wakka person in accordance with their traditional laws and customs.

Descent

[62] 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).²⁰ 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.

[63] The description does not specify whether ‘descendants’ is limited to biological descendants or includes descendants by adoption, but does refer to the traditional laws and customs of the claim group, which are further outlined in Attachment ‘F and M’ to the application. That attachment includes information about adoption under traditional laws and customs, and I consider it is by that ‘set of rules or principles’ that it can be ascertained whether an adopted person is a member of the claim group.²¹ In reaching this view I have also considered the judicial guidance that is appropriate to construe the requirements of the Native Title Act beneficially.²²

Self-identification

[64] The claim group description specifies that the members must ‘identify as Wakka Wakka in accordance with traditional laws acknowledged and traditional customs observed by them’, in addition to being descendants of the named apical ancestors. I therefore understand that self-identification operates as a qualifier on membership, and that determining whether a person identifies as a member of the Wakka Wakka People could be ascertained by undertaking factual enquiries with the individual in question, to determine whether they assert Wakka Wakka identity or conduct themselves in accordance with Wakka Wakka traditional laws and customs.²³

²⁰ *WA v NTR* [67].

²¹ *Ward v Registrar* [25].

²² *Kanak* [73].

²³ *Aplin* [266].

Conclusion

[65] I am satisfied the application describes the persons in the native title 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

[66] 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 on a prima facie basis.

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

Exclusive Possession

[67] From the description in paragraph 1 of Schedule E, I understand that exclusive possession is claimed in any areas covered by the application where there has been no prior extinguishment, or where any such extinguishment must be disregarded, such as areas where ss 47–47B apply.

Non-exclusive rights

[68] From the description in paragraph 2 of Schedule E, I understand that the listed non-exclusive rights are claimed in any areas where exclusive possession cannot be claimed. Paragraph 3 specifies the meaning of particular terms which are used in the description of the non-exclusive rights, such as ‘Traditional Natural Resource’, which in my view, clarifies the content of the claimed non-exclusive rights.

Limitations

[69] I understand from paragraph 4 of Schedule E that the claimed rights and interests are subject to particular limitations, specifically the valid laws of Queensland and the Commonwealth, and to rights conferred under those laws.

Conclusion

[70] 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

[71] 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.

[72] 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'.²⁴

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

[73] 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 European settlement;²⁵
- (b) there is 'an association between the whole group and the area', although not 'all members must have such association at all times';²⁶ 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'.²⁷

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

[74] Schedule F refers to Attachment 'F and M', which is a document titled 'General Description of Native Title Rights and Interests Claims Tradition Physical Connection [sic]'. I will refer to this document as 'Attachment F'. There is also information relevant to this condition in the anthropologist's report.

Association of the predecessors of the claim group with the claim area

[75] Attachment F contains a table which sets out the names, language speaking group, area of association and approximate birth date, for 14 of the 18 apical ancestors / ancestor pairs named in Schedule A.

[76] The anthropologist's report contains this same table along with the another table with the data sorted by date of birth, which shows Kitty, mother of Jenny Lind as the eldest of the ancestors, born approximately 1825, through to Lucky Law, the youngest, born in approximately 1905 at Ban Ban Springs.²⁸

[77] The anthropologist's report also asserts the following:

- (a) Settlement or 'effective sovereignty' occurred in the claim area around the 1840s;²⁹
- (b) The area associated with the Wakka Wakka language group since sovereignty is that of the upper Burnett River basin and its tributaries including Barambah Creek, the Boyne and Auburn Rivers;³⁰

²⁴ *Doepel* [16]–[17]; *Gudjala 2008* [83], [92].

²⁵ *Gudjala 2007* [52].

²⁶ *Ibid.*

²⁷ *Martin* [26]; *Corunna* [39], [45].

²⁸ Anthropologist's report [784]–[785].

²⁹ *Ibid* [41].

³⁰ *Ibid* [164], [168]–[169].

- (c) Early observers including Mathew in 1887, Tennant Kelly in 1935 and Borchardt in 1938 described the spiritual significance of particular waterholes and their association with both ‘clever men’ and the rainbow serpent in and around the claim area;³¹
- (d) Current claim group members described to the author the association of their predecessors (and of themselves), with locations in and around the claim area, including:
- i. Hawkwood station, which one claimant describes as his grandmother’s country and that she spoke the Wakka Wakka language;
 - ii. Cherbourg, described by a claimant as ‘always Wakka Wakka for a long time’; and
 - iii. Gayndah, Mingo Crossing and Blandy Mountains which are described as location markers within ‘Mimi country’, within which the descendants of apical ancestor MiMi claim rights.³²
- (e) Claimants also describe the boundaries of Wakka Wakka country, as they were taught by their predecessors, as follows:
- i. Mary River in the east;
 - ii. The Auburn Range in the west;
 - iii. Cooyar in the south;
 - iv. Bunya Mountains in the south west; and
 - v. The Burnett River and Ban Ban Springs and in the north.³³
- (f) Current claim group members showed the author the areas with which they were associated as a result of the location of the birthplaces of some of their ancestors, including at locations on Mt Debateable and Mt Gayndah;³⁴
- (g) The sons of apical ancestor MiMi are remembered as being clever men, the youngest of whom died at Hawkwood station in 1939;³⁵
- (h) One claimant describes a waterhole on Auburn station associated with one of his ancestors, which was shown to him by his father;³⁶
- (i) Tindale recorded a number of people who spoke the Wakka Wakka language on his ‘Cherbourg sheets’ in 1938, including details of apical ancestor Boubijan Cobbo’s country as ‘at Botidjin Stn to Gayndah, Kilkivan’;³⁷
- (j) Appendix B to the anthropological report contains a table of places and areas identified by the claimants, including places where ancestors were born and are buried, including sites at Eidsvold, Coonambula Station and Mt Gayndah;³⁸

³¹ Ibid [220]–[221].

³² Ibid [302]–[314].

³³ Ibid.

³⁴ Ibid [390], [392].

³⁵ Ibid [552].

³⁶ Ibid [553].

³⁷ Ibid [709].

- (k) The author concludes that Wakka Wakka country can be broadly described as the drainage basin of the Burnett River and its tributaries east to the present location of Paradise Dam.³⁹

Association of the current claim group with the claim area

[78] With regard to the association of the current claim group, the anthropologist's report asserts the following:

- (a) Claim group members assert rights to different parts of the claim area, based on descent, and these areas are set out in a table of 'home areas', for example a descendant of MiMi states 'Mundubbera and Gayndah. Mt Debatable round in a horseshoe and south to the railway bridge. That's the Mimi water,';⁴⁰
- (b) Claim group members have a spiritual association with sites in the claim area which are linked to particular spiritual narratives passed down by their predecessors, the motifs of which are set out in a table and include the locations of Mundubbera, Barambah Creek, Gayndah and Ban Ban Springs;⁴¹
- (c) Appendix B, described above, also includes details of spiritual associations which current claimants have with particular locations, such as waterholes, as well as the location of particular resources that the claimants use, such as ochre, again as a result of knowledge passed down by their predecessors.⁴²

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

[79] 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.⁴³ I do not consider this application is of that nature. In my view, the information before me describes in a sufficient level of detail the association of the claim group with the claim area, both at the time of sovereignty and since that time. 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?

[80] Using information available from the Tribunal's geospatial database, I can see that locations mentioned in the anthropologist's report are spread across and around the areas which are claimed in the Wakka Wakka People #3 and Wakka Wakka People #4 applications. I can see that the anthropologist's conclusions, based on the historical record and interviews with current claimants, that Wakka Wakka country covers the drainage basin of the Burnett River and its tributaries and east to Paradise Dam, broadly accords with the external boundaries of the two current Wakka Wakka People applications.

[81] The apical ancestors, members of the intervening generations and current claim group members are described with reference to particular parts of the claim area. For example,

³⁸ Ibid, Appendix B.

³⁹ Ibid [315].

⁴⁰ Ibid [339], Table 11.1.

⁴¹ Ibid [492], Table 12.2.

⁴² Ibid, Appendix B.

⁴³ *Martin* [25].

apical ancestor Maggie Hart is estimated to have been born around 1863 and is buried at Perlinga Station, in accordance with her wish to be buried on her own country.⁴⁴ Her descendants showed the author the location of the gravesite and claimed a strong spiritual connection to the area.⁴⁵ I understand from the anthropologist's report that Perlinga Station is now part of Coonambula Station, which I can see in the geospatial database covers an area in the north west of the Wakka Wakka People #3 claim, and an area in the south west of the Wakka Wakka People #4 claim.

[82] I understand from the anthropologist's report that settlement in the claim area occurred much later than the acquisition of British sovereignty in 1788, as it was not until the 1840s that contact occurred with Europeans.⁴⁶ In the anthropologist's report, several of the apical ancestors are estimated to have been born before or in the very early years of settlement, namely Kitty, mother of Jenny Lind in 1825; Kitty, mother of Jack Bulong in 1836; and Tommy Hawkwood and Mick Buck in 1840. The apical ancestors are recorded as being from different parts of Wakka Wakka country, including Eidsvold, Kingaroy, Cherbourg, Gayndah and Hawkwood.⁴⁷ In my view, the apical ancestors who were born around the time of settlement likely had the same association with the claim 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.⁴⁸ There is also no information nor submissions before me to suggest that such an inference should not be made.

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

[83] In my view, the factual basis is sufficient to support the assertion that the claim group currently has an association with the claim area. In forming this view I have considered the information in the anthropologist's report about the physical and spiritual connection to parts of the claim area which current claim group members describe. For example, the claimants showed the author, or described in detail, numerous waterholes in Wakka Wakka country which have significant spiritual narratives attached.⁴⁹ Many claimants describe learning from their predecessors at locations around Wakka Wakka country, and state that aspects of Wakka Wakka culture such as corroborees have continued on Wakka Wakka country.⁵⁰

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

[84] 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.⁵¹ It is not a requirement that the whole of the claim group have an association at all times with the whole of the claim area.

⁴⁴ Anthropologist's report [637].

⁴⁵ Ibid.

⁴⁶ Ibid [41].

⁴⁷ Ibid [783], Table 16.2.

⁴⁸ *Harrington-Smith* [294]–[296], *Kanak* [73].

⁴⁹ Anthropologist's report [486], for example.

⁵⁰ Ibid [530]–[535].

⁵¹ *Corunna* [31].

[85] In my view, there is sufficient information in the anthropologist's report to support an association by the claim group, past and present, with the whole of the area claimed in the Wakka Wakka People #3 and Wakka Wakka People #4 applications. As the report was originally produced for the larger Wakka Wakka People #2 application (since dismissed), it contains details of various types of associations with locations spread across the extent of the area described as 'Wakka Wakka country'. I note the references, both historical and recent, to the communities and townships which are spread across the two current Wakka Wakka claim areas in all directions, including Murgon, Cherbourg, Kingaroy, Manumbar, Ban Ban, Biggenden, Gayndah and Eidsvold.

Conclusion - s 190B(5)(a)

[86] In my view, the information provided by the applicant is sufficient to support the assertion that the claim group have, and its predecessors had, an association with the claim area. This is because the material demonstrates sufficient geographical particularity to locations where claim group members and their predecessors were born, lived, participated in corroborees 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 claim area. Based on the detailed information in the anthropologist's report about the spiritual narratives which claim group members attach to various waterholes across Wakka Wakka country and the information about these same narratives in the historical record, 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)?

[87] To meet s 190B(5)(b), the factual basis must be sufficient to support an assertion that there exist *traditional laws acknowledged by*, and *traditional customs observed by*, the native title claim group that give rise to 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.⁵² Applying the 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).⁵³

[88] 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:

- (a) '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*'; and
- (b) '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*

⁵² Emphasis added.

⁵³ *Gudjala 2007* [26], [62]–[66], which was not criticised by Full Court on appeal in *Gudjala 2008*.

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'.⁵⁴

[89] 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.⁵⁵

[90] 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 claim 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?

[91] The anthropologist's report identifies the society in the claim area as one which comprises of three interrelated components:

- (a) Recruitment to the group according to rules which mandate descent from Wakka Wakka ancestors;
- (b) Association with the Wakka Wakka language; and
- (c) The exercise of rights by members of the group in bounded areas of country.⁵⁶

[92] The anthropologist's opinion, having reviewed the relevant historical material including the work of J Mathew, RH Mathews and W Schmidt, is that '[t]he Wakka Wakka society at sovereignty was...one whose members shared a fundamental known quality: a perceived commonality of language which gave rise to the use of a diacritic of language use as a label of identity'.⁵⁷

[93] The anthropologist's report states that the apical ancestors of the claim group are described by Tindale and others as being of the Wakka Wakka language group.⁵⁸

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

[94] The anthropologist's report provides the following information in support of the assertion of traditional laws and customs:

- (a) Rights and interests in land

⁵⁴ *Yorta Yorta* [46]–[47], emphasis added.

⁵⁵ *Gudjala 2009* [40].

⁵⁶ Anthropologist's report [299].

⁵⁷ *Ibid* [149].

⁵⁸ *Ibid* [610]–[756].

- i. The historical records support the view that, at sovereignty, 'rights to country were exercised by members of country groups recruited by reference to descent from forebears';⁵⁹
- ii. At sovereignty, the rights of members of the country group included the right to enter and use all the resources of the land, as well as control its use by others;⁶⁰
- iii. One claimant explained to the author that being Wakka Wakka was a matter of descent, stating 'that's my birth rights; traced back in the bloodline. That's how you get to be Wakka Wakka...';⁶¹
- iv. Another claimant described how distinct groups had authority over and could 'speak for' different areas marked by indicative boundaries.⁶²

(b) Kinship rules

- i. Early ethnographers described how Aboriginal people in south east Queensland organised their social relations through the use of named social categories which were assigned to an individual at birth;⁶³
- ii. Social categories were used to identify potential spouses and those whom a person should not marry;⁶⁴
- iii. Authority was characterised by a 'gerontocratic formation of senior men' whose qualifications were likely based on ritual experience and age;⁶⁵
- iv. Senior claimants explained to the author that marriage with those 'close up' was not permitted and that they ensured that the next generation understand the importance of this 'very strong rule';⁶⁶
- v. Claimants were of the view that senior members or 'elders' of each family had authority to make decisions, and that today senior women had more prominence than they did in the past with respect to decision making.⁶⁷

(c) Totem affiliation

- i. Tennant Kelly writing about the Cherbourg area in 1935, recorded that food taboos included a prohibition on eating one's totem animal;⁶⁸
- ii. Shirley recorded in 1897 that two totems associated with people who spoke the 'Wakar tongue' were the koala and the kookaburra;⁶⁹

⁵⁹ Ibid [199].

⁶⁰ Ibid [201].

⁶¹ Ibid [291].

⁶² Ibid [289].

⁶³ Ibid [241].

⁶⁴ Ibid [243].

⁶⁵ Ibid [277].

⁶⁶ Ibid [581]–[585].

⁶⁷ Ibid [594]–[596].

⁶⁸ Ibid [219].

⁶⁹ Ibid [262].

- iii. Winterbotham described how use of the natural resource associated with the totem rested with the 'totemite'. For example, Winterbotham's informant's totem was the bee and so he could give permission for others to take honey, although he could not eat it himself;⁷⁰
- iv. A claim group member showed the author the grave of her apical ancestor Maggie Hart, which has two birds engraved on the plaque, the scrub turkey and the crow, which are the totems associated with Maggie Hart's family;⁷¹
- v. Another claimant explained that there is a prohibition on eating one's totem, and '[i]f I hunted one I'd say I was sorry to him. If I don't do this I won't be sleeping properly either'.⁷²

(d) Spiritual beliefs connected to country

- i. In 1887, Mathew gave an account of beliefs held about the rainbow serpent along the Mary River (close to the claim area), which was associated with particular waterholes;⁷³
- ii. In 1904, Cameron recorded beliefs about a male spirit 'who lives in a spring near Ban Ban, [the people] go to the water and cry out and if then he shows his hand, they will not bathe or drink lest he should drag them in';⁷⁴
- iii. Mathew, Tennant Kelly and Borchardt, whose writings cover the period 1887 to 1938, recorded stories of powerful clever men associated with the rainbow serpent and thus with particular waterholes, of which a clever man was considered the 'owner';⁷⁵
- iv. A claimant described to the author that when she was growing up she was instructed by the old people to stay well away from particular areas for fear of becoming sick. One such place is known as 'nest of snake';⁷⁶
- v. A claimant stated that when in country you should 'sing out' in the Wakka Wakka language so as not to be tormented by the spirits;⁷⁷
- vi. Another claimant describes how he was taught to avoid particular waterholes by his father and uncles and he has taught all of his children and grandchildren the same avoidance rules.⁷⁸

(e) Ceremonial practices

- i. Mathew and Cameron recorded initiatory rituals in the late 1800s and early 1900s at ritual grounds known as 'bora';⁷⁹

⁷⁰ Ibid [266].

⁷¹ Ibid [494].

⁷² Ibid [496].

⁷³ Ibid [207], [214].

⁷⁴ Ibid [209].

⁷⁵ Ibid [220].

⁷⁶ Ibid [440].

⁷⁷ Ibid [452].

⁷⁸ Ibid [478].

⁷⁹ Ibid [226].

- ii. Corroborees across the region have been recorded since 1887, including at Cherbourg in the 1920s and 1930s;⁸⁰
- iii. While initiation ceremonies are no longer carried out, the location of bora grounds are known to claimants and are considered spiritually and culturally significant;⁸¹
- iv. Claim group members described to the author their participation in corroborees which they were taught by their predecessors and continue to practice today, and which they teach Wakka Wakka children;⁸²
- v. In the author's view, the practice of corroborees 'appears to have been unbroken since European observers made mention of them at the end of the 19th century'.⁸³

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?

[95] 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 claim area. The factual basis material asserts that in and around the claim area this society was identifiable through the use of the Wakka Wakka language, adherence to descent-based rules pertaining to rights and interests in land, kinship rules and totem affiliation, among other things. In my view, the level of detail in the factual basis material 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 1840s, 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?

[96] As discussed above at s 190B(5)(a), I consider the factual basis shows that the apical ancestors were born in or around the claim area around the time of settlement and 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 claim area at that time and earlier. It follows that it is reasonable to infer there is a link between the pre-sovereignty society and the apical ancestors at the time of settlement. I understand that the current claim group members are descendants of the apical ancestors, thus demonstrating the requisite link between them.

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

[97] I consider the anthropologist's report provides descriptions of laws and customs observed in and around the claim area in the early years of settlement. The anthropologist's report also demonstrates how the laws and customs have been passed down to and observed by the

⁸⁰ Ibid [229].

⁸¹ Ibid [527].

⁸² Ibid [528]–[533].

⁸³ Ibid [567].

successive generations of the claim group, with specific examples provided from the historical record and from current claim group members, as summarised above. The information about how rights and interests in land were inherited by the predecessors reflects the current claimants' understanding that rights are gained through the 'bloodline'.⁸⁴ The emphasis the current claim group members give to their totems and the kinship rules reflects those which were recorded as being observed by the predecessors, such as the prohibition on eating one's totem. Similarly the belief in the rainbow serpent, its association with particular waterholes and the prescription to avoid those places is reflected throughout the historical records across the generations since early settlement and in the information from the current claimants. Overall, I consider the detailed accounts from claimants about their totemic associations, the acquisition of rights to country through one's predecessors and rules relating to marriage and kinship, reflect to a large degree those ascribed to the claim group by contemporary observers at the time of settlement and in the subsequent decades.

[98] 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.⁸⁵ This is because there are examples provided about the observation of the various laws and customs by successive generations of the claim 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, through teaching, oral transmission and common practice. I consider that it is reasonable to infer 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)

[99] I am satisfied the factual basis is sufficient to support the assertion that there was a pre-sovereignty society in the claim area, as asserted at Attachment F. I am satisfied there is a link between the pre-sovereignty society in the claim 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 there exist traditional laws acknowledged by, and traditional customs observed by the native title claim group. This means s 190B(5)(b) is met.

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

[100] 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.⁸⁶ 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 European settlement.⁸⁷

⁸⁴ Ibid [291].

⁸⁵ *Yorta Yorta* [46]–[47].

⁸⁶ *Gudjala 2009* [29].

⁸⁷ *Gudjala 2007* [82].

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

[101] As summarised above in relation to ss 190B(5)(a)–(b), the factual basis demonstrates an ongoing association with the claim area, identifies the relevant pre-sovereignty society and supports the existence of traditional laws and customs. Attachment F 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. For example, the numerous examples provided by claimants about the prohibition on swimming in particular waterholes because of the potentially dangerous consequences, reflects very strongly the accounts which were recorded by the early observers. The continuing observance of the rules relating to descent- based rights to land, kinship and totemic affiliations provide further 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 claim area.

Conclusion – s 190B(5)(c)

[102] 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 claim 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 claim 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 claim area.⁸⁸ 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

[103] 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

[104] 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 or interest’ is one that is held under traditional laws acknowledged and traditional customs observed by the native title claim group.

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

- (a) it requires some measure of the material available in support of the claim;⁸⁹
- (b) it appears to impose a more onerous test to be applied to the individual rights and interests claimed;⁹⁰ and

⁸⁸ *Gudjala 2009* [31].

⁸⁹ *Doepel* [126].

⁹⁰ *Ibid* [132].

(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’.⁹¹

[106] 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.⁹² 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?

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 s 238, ss 47, 47A or 47B apply), the Wakka Wakka People claim the right to possess, occupy, use and enjoy the land and traditional waters of the application area as against the whole world, pursuant to the traditional laws and customs of the claim group.

[107] I consider the comments in *Yarmirr* are relevant to my assessment of the prima facie existence of this right. Namely, that a claimed right of exclusive possession is not required to be supported by ‘some enforceable means of excluding from its enjoyment those who are not its holders’; and that an inquiry into how a right is observed ‘seems directed more to identifying practices that are regarded as socially acceptable’.⁹³

[108] Further, I note the Full Court’s observations in *Griffiths FC* that:

[i]f control of access to country flows from spiritual necessity because of the harm that “the country” will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive. The relationship to country is essentially a “spiritual affair”. It is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people.⁹⁴

[109] The anthropologist’s report asserts that at the time of settlement, there is existed an association between the Wakka Wakka people and the land and waters now covered by the Wakka Wakka People’s applications, which I have considered in my reasons above at s 190B(5)(a).

[110] The anthropologist’s report further asserts that the Wakka Wakka people maintain the right to exclude others from their country. According to the anthropologist’s report, the claim group continue to observe their ancestral landholding systems where ‘[r]ights to country were exercised by members of country groups recruited by reference to descent’.⁹⁵ These rights are described as ‘exercisable and defensible’.⁹⁶ Further, those ‘who were not members of the relevant country group were required to seek permission prior to entering, gathering or

⁹¹ Ibid [135].

⁹² Section 186(1)(g).

⁹³ *Yarmirr* [16].

⁹⁴ *Griffiths FC* [127].

⁹⁵ Anthropologist’s report [199].

⁹⁶ Ibid [200].

hunting on the country of the group' and '[t]respass was considered a breach of customary law and sanctions applied to those who transgressed that law'.⁹⁷

[111] According to the anthropologist's report, 'country-specific knowledge' is a 'determining factor' in one's ability to assert rights to Wakka Wakka country, and to have the authority to 'speak for country' is a function of the possession of the relevant knowledge.⁹⁸ The anthropologist's report also describes the spiritual aspect of this right, explaining that outsiders seek permission to enter country in part to 'gain some certainty in an otherwise uncertain spiritual environment'.⁹⁹ Claimants described to the author the importance of seeking permission to enter country, and of the consequences that can result from trespass and taking things from country without permission, including sickness and 'trouble'.¹⁰⁰

[112] In my view, there is sufficient information in the anthropologist's report to show that Wakka Wakka people, past and present, have exercised a right to exclude people from their country and to 'speak for country' in a manner similar to that which has been described in the case law.

[113] I therefore consider this right is prima facie established.

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

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

[114] As discussed above at s 190B(5)(a), the anthropologist's report details information from the historic record about the apical ancestors of the claim group living in and around the claim area in the early years of settlement. There is also information about the claimants and their predecessors camping on the claim area, at locations including St John Creek and McRitchie Creek.¹⁰¹ I consider it reasonable to infer that camping includes erecting shelters.

[115] I therefore consider this right is prima facie established.

(b) Take, use, share and exchange Traditional Natural Resources

(k) hunt

(l) fish

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

(n) cultivate and harvest native flora

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

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

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

⁹⁷ Ibid.

⁹⁸ Ibid [406]–[411].

⁹⁹ Ibid [463].

¹⁰⁰ Ibid [444]–[449].

¹⁰¹ Ibid Appendix B.

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

[116] The anthropologist's report contains descriptions of claimants hunting, fishing and gathering other natural products in and around the claim area. One claimant describes the Wakka Wakka method of preparing porcupine, and describes a good location to find it near Cherbourg.¹⁰² There are references to plants used for medicinal purposes and to sites where claimants collect ochre.¹⁰³

[117] Besides fish and other water-based resources, I infer that water is taken for personal and domestic purposes such as drinking and cooking.

[118] The anthropologist's report states that the knowledge and rules pertaining to the use of natural resources 'are rooted in practices which may be supposed were evident before the time of effective sovereignty'.¹⁰⁴

[119] I therefore consider these rights are prima facie established.

(c) conduct burial rites

(d) conduct ceremonies

(e) hold meetings

(f) participate in cultural activities

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

[120] As discussed above at s 190B(5)(b), there is information in the anthropologist's report about claim group members, past and present, participating in ceremonies and cultural activities, such as corroborees, in the claim area. Many claimants described how they were taught about attributes of the claim area from their predecessors, and have passed this knowledge onto the younger generations, for example the narratives attached to significant waterholes, and information about totemic animals.

[121] I therefore consider these rights are prima facie established.

(h) speak for and make non-exclusive decisions

[122] As discussed above in relation to the claimed right to exclusive possession, the anthropological report describes how claimants observe the rights of those with the relevant knowledge to 'speak for country'. In my view this same information supports the existence of a non-exclusive right. Further, as discussed above at s 190B(5)(b), according to the anthropologist's report authority to make decisions is vested in people with seniority and the requisite knowledge of country, both now and at the time of settlement.

[123] I therefore consider this right is prima facie established.

¹⁰² Ibid [795].

¹⁰³ Ibid [815], [819].

¹⁰⁴ Ibid [827].

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

[124] Throughout the anthropological report there are references to visits to significant sites by the author with members of the claim group, such as graves, waterholes and bora grounds. According to the anthropologist, possessing knowledge of the spiritual dimension of places 'remains central to the management of country, as I think it was in times past'.¹⁰⁵ One claimant states 'knowing where things are is essential so we can protect it and so we tell our kids about it'.¹⁰⁶

[125] I consider this right is prima facie established.

(j) light fires for domestic purposes including cooking

[126] As discussed above, a claimant described to the anthropologist the Wakka Wakka method of preparing and cooking a porcupine learnt from his predecessors, which included the use of fire. Another claimant describes hearing stories from the old people 'round the camp fire'.¹⁰⁷

[127] I consider this right is prima facie established.

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

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

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

[128] As discussed above, there are descriptions in the anthropologist's report to claim group members past and present participating in corroborees and other ceremonies on the claim area, and the observance of such performances and activities by non-claim group members, including people from neighbouring groups and the early ethnographers.

[129] I consider this right is prima facie established.

Conclusion

[130] I am satisfied the application contains sufficient information about all 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 the rights were observed in the early years of settlement as well as in recent times. 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

[131] To meet s 190B(7), the Registrar must be satisfied at least one member of the native title claim group:

¹⁰⁵ Ibid [429].

¹⁰⁶ Ibid [443].

¹⁰⁷ Ibid [488].

- (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.

[132] 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.¹⁰⁸

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

[133] Based on the material 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 in the anthropologist's report about claim group members living in the claim area, using its natural resources such as animals, fish and plants, demonstrates there is a physical connection to the claim area.

[134] In addition, annexed to this application is an affidavit from a man who identifies as a member of the Wakka Wakka People, descended from apical ancestors Maggie West, King Billy and Maria of Boondooma (connection affidavit). According to Schedule A, King Billy and Maria of Boondooma are the parents of Tommy Dodd. According to the connection affidavit, the deponent was born in 1942 at Eidsvold in the claim area.

[135] The deponent states he was raised on Auburn Station until he was nine, at which time he was removed to Cherbourg mission. He was sent back to Auburn Station to work when he was approximately 17 years old. Auburn and Hawkwood stations extend into the area covered by the current Wakka Wakka People #3 and Wakka Wakka People #4 claims, and Cherbourg lies within the Wakka Wakka People #3 claim area.

[136] He deposes the following in relation to his predecessors:

- (a) His maternal great-grandfather Tommy Dodd was a Prison Warden at Cherbourg and a well-known Wakka Wakka elder;
- (b) His paternal grandmother Maggie West died in 1914;
- (c) His aunt was born on Auburn Station in 1907;
- (d) His mother was born on Hawkwood Station in 1923;
- (e) His father was born at Auburn Station in around 1895 and died at Eidsvold around 1967;

[137] He also deposes:

- (a) Wakka Wakka was his first language, which his parents and other family members also spoke;
- (b) His father taught him about Wakka Wakka spirituality and showed him significant places on Wakka Wakka country, including caves, waterholes and burial sites;

¹⁰⁸ Doepel [18], *Gudjala* 2009 [84].

(c) His uncle was a clever man, associated with a significant water hole, and when the deponent visits the waterhole he has to 'sing out' to let his uncle know what he is doing;

(d) He takes younger members of his family to visit the places he was shown by his father;

[138] Based on the information in the anthropologist's report and the connection affidavit, I consider the claim group members' connection with the claim area is 'traditional' in the sense required by s 190B(7). The connection affidavit provides a specific example of this traditional physical connection. I consider the claimants' knowledge of the claim area has been passed to them from the predecessors of the claim group while spending time on the lands and waters of the claim area. As I was satisfied at s 190B(5)(b) that the factual basis is sufficient to support an assertion that the laws and customs of the predecessors of the claim group have been passed down to the current members of the claim group, it follows that I am satisfied the current claim group members' connection with the claim area is in accordance with those traditional laws and customs.

Conclusion

[139] 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 claim 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

[140] 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 if 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 1 states that previous exclusive possession act areas, such as freehold estates, are excluded from the claim area.	Met
s 61A(3)	Claimant application not to claim possession to the exclusion of all others in previous non-exclusive possession act areas	Schedule B, paragraph 3 states that exclusive possession is not claimed over areas which are subject to valid previous non-exclusive possession acts.	Met

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

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

Section	Requirement	Information	Result
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s 190B(9)(a)	No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q states 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 6 states that areas where native title has been otherwise extinguished are excluded from the application. There is no information in the application that discloses to me that native title rights and interests in the claim area have otherwise been extinguished.	Met

End of reasons

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Wakka Wakka People #4
NNTT No.	QC2012/003
Federal Court of Australia No.	QUD277/2019
Date of Registration Decision	6 September 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:

26 July 2019

Date application entered on Register:

6 September 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:

As per Schedule

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.