Registration Decision

National Native Title Tribunal

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; Mr Garry Cobbo; Mr Kevin Doolan; Mr Robert Lacey; Ms Lauren Gilson; Mr Winston Mimi; Mr Stephen Pickering; Mr Carl Simpson; Ms Cheryl Smith; Ms Judith Conlon; Mr James Chapman; Ms Elsie Prince; Ms Marissa Cobbo; Mr Sidney Smith; Ms Katrina Watson
Federal Court of Australia No.	QUD277/2019
NNTT No.	QC2012/003
Date of Decision	28 February 2020

Claim accepted for registration

I have decided the claim in the Wakka Wakka People #4 application satisfies all the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).[1] Therefore the claim must be accepted for registration and will remain on the Register of Native Title Claims.

Katy Woods[2]

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

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

Reasons for Decision

Cases Cited

Aplin on behalf of the Waanyi Peoples v State of Queensland [2010] FCA 625 (***Aplin***)

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

Northern Territory of Australia v Doepel [2003] FCA 1384 (***Doepel***)

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

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 Ward (2002) 213 CLR 1; [2002] HCA 28 (***Ward HC***)

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 (**claim group**). It covers approximately 5,656 square kilometres in southeast Queensland, northwest of Gympie and southwest of Bundaberg (**application area**).

[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 (**Register**).

[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). On 6 September 2019, I decided that the amended application passed all the conditions in ss 190B–190C of the Native Title Act (**registration test**) and thus the claim remained on the Register.

[4] On 30 January 2020, a further amended application was filed which was provided to the Registrar pursuant to s 64(4) on 3 February 2020. This is the application currently before me. Because of the history of the combination and amendments, this application is described in the Form 1 as the **'**Fourth Further Amended Native Title Determination Application'. For convenience, I will refer to it as '**the application**'.

[5] 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.

[6] As discussed in my reasons below, I consider that the claim in the application satisfies all of the conditions in ss 190B–190C and therefore it must be accepted for registration.[3] Attachment A contains information that will be included in the Register.

Procedural fairness

[7] On 5 February 2020, a senior officer of the Tribunal (**senior officer**) wrote to the relevant minister of the Queensland government (**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 February 2020.

[8] Also on 5 February 2020, the senior officer wrote to the representative of the applicant to advise that any further information to which the applicant wished me to have regard, should be received by 12 February 2020.

[9] The outline of the factual basis of the claim is included in Schedule F and Attachment 'F & M' has not been amended. In these circumstances, I consider it appropriate to have regard to the additional factual basis material the applicant had previously provided in support of the claim, specifically the following document:

(a) Anthropologist's Report, Kingsley Palmer, March 2010 (**anthropologist's report**).

[10] I also consider it is appropriate for me to have regard to the public notice of the authorisation meeting of the claim group advertised on 20 November 2019 described in Attachment R and available to me on the website of the Koori Mail newspaper (**meeting notice**).

[11] Therefore, on 13 February 2020, the senior officer wrote to the State to advise that I would be considering the anthropologist's report and the meeting notice in my decision, and any comment the State may wish to make on these documents should be provided by 19 February 2020.

[12] No submissions or comments were received from either the State or the applicant, and so this concluded the procedural fairness process.

Information considered

[13] I have considered the information in the application and the anthropologist's report previously supplied by the applicant directly to the Registrar, as described above.[4] I have considered the public notice of the authorisation meeting, also described above.[5]

[14] 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 6 February 2020 (**geospatial report**) and information available through Geospatial Services in relation to locations mentioned in the application.[6]

[3] Section 190A(6).
[4] Section 190A(3)(a).
[5] Section 190A(3)(c).
[6] Ibid.

[15] There is no information before me obtained from searches of State or Commonwealth interest registers,[7] and as noted above, the State has not supplied any information as to whether the registration test conditions are satisfied in relation to this claim.[8]

[16] I have compared the application currently before me with the amended application which I previously tested for registration, as described above. I am satisfied that the substantive content of the two applications is identical, other than the content of Schedules A, E and R, and the affidavits of the applicant members which accompany the application (**s 62 affidavits**). I have considered the statements of law which I included in the reasons I prepared for my decision of 6 September 2019 to accept the amended application for registration (**my previous reasons**). I am of the view that those statements remain accurate and were correctly applied, and so I refer to and rely on those statements of law at particular conditions in my reasons below. I have considered the application before me against each registration condition afresh, however, in the interests of brevity, I refer to and rely on my previous reasons at particular conditions where it is appropriate and convenient to do so.

Section 190C: conditions about procedures and other matters

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

[17] 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.[9] I have not addressed s 61(5) as I consider the matters covered by that condition are matters for the Court.

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

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

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

Section	Details	Information	Result
s 62(1)(a)	Affidavits in prescribed form	Section 62 affidavits	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 & M	Met

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

Section	Details	Information	Result
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

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

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

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

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

[21] 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

[22] 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; or

(b) the applicant is a member of the 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 claim group.

[23] 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).

[24] From Attachment R, I understand that the meeting of the claim group to authorise the applicant to make the application was held on 8 December 2019 (**authorisation meeting**). I therefore do not rely on my previous reasons at this condition, as I previously considered an earlier authorisation meeting held on 26 May 2019.

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

[25] 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.

[26] 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.

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

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

(a) Attachment R to the application;

(b) The s 62 affidavits; and

(c) The meeting notice.

Does the application satisfy s 190C(5)?

[29] Paragraph 1 of Attachment R states that each member of the applicant is a member of the claim group and is authorised to make the application and deal with matters arising in relation to it, by all other persons in the claim group. I consider this statement is sufficient for the purposes of s 190C(5)(a).

[30] Attachment R also sets out the grounds on which the Registrar should consider that s 190C(4)(b) has been met, namely as a result of substantial research leading up to the authorisation meeting, the notice and the conduct of that meeting, including the decision-making process which was agreed to and adopted by the claim group to authorise the members of the applicant.[10]

[31] In *Strickland*, French J observed 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'.[11] I therefore consider the information in Attachment R about the authorisation of the applicant 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?

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

[33] In each of s 62 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 claim group.

[10] Attachment R [4]–[16], [35]–[51].
[11] *Strickland* [57].

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

[34] 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 claim group. 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'.[12] I have summarised the information before me which I consider is relevant to this condition below.

Decision-making process

[35] Attachment R states that at the authorisation meeting, the claim group confirmed there is no traditional decision-making process, and agreed to and adopted a decision-making process of majority vote by a show of hands of members of the claim group present and at least 18 years of age.[13] The application therefore identifies the type of decision-making process provided for in s 251B(b).

Notice of authorisation meeting

[36] Attachment R states that Queensland South Native Title Services (**QSNTS**) gave notice of the authorisation meeting in the following ways:

(a) Public notice in the *Koori Mail* on 20 November 2019;

(b) Public notice in the *Courier Mail* on 16 November 2019;

(c) Personal notice by mail to 527 members of the claim group for whom QSNTS had postal addresses, on 15 November 2019;

(d) Public notice to six local governments, for display on their notice boards, on 22 November 2019;

(e) Personal notice by telephone to 296 members of the claim group in the two weeks prior to the authorisation meeting;

(f) Personal notice by text message to 357 members of the claim on 5 December 2019; and

(g) Public notice on the QSNTS website and Facebook page from 25 November 2019.

[37] The meeting notice is titled 'Wakka Wakka People #3 and Wakka Wakka People #4 Native Title Authorisation Meetings'. It includes a map with the respective application areas labelled, along with a number of towns and cities and the Bruce and Burnett Highways. It includes the previous description of the claim group and invites all members to attend the authorisation meeting. The date, venue and time of the meeting are clearly set out.

[38] The meeting notice sets out two meetings for 8 December 2019, the purposes of which were:

[12] *Doepel* [78].
[13] Attachment R [27].

(a) **Meeting #1**: To authorise amendments of the claim group description to the wording which now appears in Schedule A (in summary, adding a criterion of connection to the application area, and removing the criterion of self-identification as a Wakka Wakka person); and

(b) **Meeting #2**: To authorise persons to be, or continue to be, the applicant.

[39] The notice explains that if the claim group authorises the amendments to the claim group description in Meeting #1, then all members of the 'amended' claim group are invited to attend Meeting #2 to authorise the applicant.

[40] The notice provides a freecall number, a contact name for registration and details of a chartered bus service departing from Cherbourg for the day of the authorisation meeting.

Conduct of authorisation meeting

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

(a) It was attended by 83 members of the claim group;

(b) Attendees were registered according to their relevant apical ancestor and given a coloured wrist band;

(c) At Meeting #1:

i. information was provided about anthropological research which supported the amendment to the claim group description, and legal advice was provided about the requirements of s 251B.

ii. Following the provision of the s 251B legal advice, the attendees resolved by Motion #4 that there is no traditional decision-making process which must be complied with, and agreed to and adopted the decision-making process summarised above.

iii. Using the agreed to and adopted decision-making process, the attendees resolved to amend the claim group description to that which now appears in Schedule A.

(d) At Meeting #2:

i. No additional members joined the authorisation meeting following the amendment of the claim group description in Meeting #1;

ii. Using the agreed to and adopted decision-making process, the attendees resolved to authorise the members of the applicant to make the application and deal with all matters arising in relation to it.[14]

[42] The s 62 affidavits contain the same information about the authorisation meeting and the adoption of an agreed to decision-making process by the claim group.[15]

[14] Attachment R [17]–[51].
[15] Section 62 affidavits [6]–[10].

Consideration

[43] 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.

[44] In my view, Attachment R 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 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.

[45] 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? [16]

[46] 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'.[17] It follows that I am satisfied that the applicant is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the claim group.

Conclusion

[47] 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

[48] At paragraphs [47]–[48] of my previous reasons, I set out my understanding of the Registrar's task at this condition. I am satisfied that the law has not changed and that my understanding remains correct. The geospatial report confirms that the description and map have not been amended. I therefore consider it appropriate to adopt my previous reasons at this condition.

[16] *Ward v Northern Territory* [25]–[26].
[17] *Doepel* [78].

Does the information about the external boundary meet this condition?

[49] At paragraphs [49]–[51] of my previous reasons, I was satisfied that the written description in Schedule B and Attachment B, and the map in Attachment C, were consistent and enabled identification of the external boundary of the application area with reasonable certainty. Having considered Schedule B, Attachment B and Attachment C afresh, I remain of that view.

Does the information about excluded areas meet this condition?

[50] At paragraphs [52]–[55] of my previous reasons, I was satisfied that the information about the exclusions from the application area found in Schedule B and Attachment B were sufficient to meet the requirements of this condition. I have considered the information in Schedule B and Attachment B afresh and remain of that view.

Conclusion

[51] 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

[52] To meet s 190B(3), the Registrar must be satisfied that:

(a) the persons in the claim group are named in the application; or

(b) the persons in the claim group are described sufficiently clearly such that it can be ascertained whether any particular person is in the claim group.

[53] 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.[18]

[54] In the amended application which I previously considered, the claim group description in Schedule A read as follows:

> 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].

[55] In the application now before me, the description in Schedule A now reads:

> The native title claim group on behalf of whom this application is made are referred to in this application as the Wakka Wakka People. The Wakka Wakka People are the Aboriginal people who have a connection to the application area in accordance with their traditional laws acknowledged and traditional customs observed and are descendants of one or more of the following ancestors [list of 28 people, some with references to their immediate descendants].

[18] *Wakaman* [34].

[56] It follows from this description that s 190B(3)(b) is applicable. I have examined this application against the earlier version and am satisfied that the list of apical ancestors in Schedule A has not been amended. However, as the first criterion for membership has been amended, I will not rely on my previous reasons at this condition.

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

[57] From the description in Schedule A, I understand an individual is a member of the claim group when two criteria are met: being a descendant of one of the named apical ancestors and having a connection with the application area in accordance with the claim group's traditional laws and customs.

Descent

[58] 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 will therefore consider this criterion first, despite its placement at the end of the description.

[59] 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).[19] I consider that factual enquiries and genealogical research would lead to the identification of the people who meet this criterion.

[60] The description does not specify whether 'descendants' is limited to biological descendants or includes descendants by adoption, but the description does refer to the traditional laws and customs of the claim group, which are further outlined in Attachment 'F & 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.[20]

Connection

[61] The first criterion in Schedule A requires a person to have a connection to the application area in accordance with the traditional laws and customs of the claim group. Justice Dowsett observed in *Aplin* that '[a]s to substantive matters concerning membership, the claim group must act in accordance with traditional laws and customs'.[21] From Attachment F & M, I understand that the traditional laws and customs prescribe the authority of claim group members to 'speak for' different 'home areas' of the application area, based on their connection to that area.[22] Having regard to this information, I consider that the traditional laws and customs will operate to enable identification of the people who meet this subjective criterion at the appropriate time.

[19] *WA v NTR* [67].
[20] *Ward v Registrar* [25].
[21] *Aplin* [256].
[22] Attachment F & M [28].

Conclusion

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

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

[63] 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. I also understand it is open to me to read Schedule E 'as a whole' so there is 'no inherent or explicit contradiction'.[23]

[64] Schedule E, which requires applicants to describe the native title rights and interests which are claimed, has been amended. I therefore do not rely on my previous reasons at this condition.

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

Exclusive Possession

[65] From the description in paragraph 1(a) of Schedule E, I understand that in areas where there has been no prior extinguishment, or where any such extinguishment must be disregarded, and other than in relation to water, exclusive possession is claimed. I therefore understand that exclusive possession is only claimed in areas of land and that exclusive possession is not claimed in relation to any water in those areas.

Non-exclusive rights

[66] From the description in paragraph 1(b) of Schedule E, I understand that within areas where exclusive possession can be recognised, non-exclusive rights are claimed in relation to water, including the right to hunt, fish and gather from that water, for personal, domestic and non-commercial communal purposes.

[67] 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.

[68] Paragraph 3 specifies the meaning of particular terms which are used in the description of the non-exclusive rights, such as '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 the State and the Commonwealth, and to rights conferred under those laws.

[23] *Doepel* [92], [123].

Conclusion

[70] Reading Schedule E as a whole, 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 claim group have, and their predecessors had, an association with the application area; and

(b) that there exist traditional laws acknowledged and traditional customs observed by the claim group that give rise to their claimed native title rights and interests; and

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

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

[72] In paragraph [73] of my previous reasons I set out my understanding of the Registrar's task at s 190B(5)(a). I am satisfied that the law has not changed and that my understanding of the task at this condition remains correct.

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

[73] In my previous reasons, I considered the information provided in support of the assertion of s 190B(5)(a) was found in Schedule F, Attachment F & M, and in the anthropologist's report. I set out the relevant information at paragraph [74] of my previous reasons. I have read the information in the application before me and am satisfied it contains the same factual basis information at Schedule F and Attachment F & M. As discussed above, the anthropologist's report speaks to the application area and I remain of the view that it is appropriate for me to have regard to it.

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

[74] I note that despite the amendment of the first criterion of the claim group description in Schedule A, the apical ancestors of the claim group remain the same. The same factual basis material is relied on for this application, and a relatively short period of time has passed since I considered the previous version of application. It is therefore my view that it is appropriate to adopt my previous reasons in relation to this fresh consideration of the condition of s 190B(5)(a).

[75] At paragraphs [79]–[85] of my previous reasons, I considered that the factual basis was sufficient to support the assertion at s 190B(5)(a). In reaching that view I considered the factual basis supported:

(a) an association between the claim group and the area at sovereignty and since that time;

(b) an association between the claim group and the area currently; and

(c) an association, both past and present, with the <u>whole</u> area claimed.

Conclusion - s 190B(5)(a)

[76] I have reviewed my previous reasons and remain satisfied that there is sufficient factual basis to support an assertion of both a physical and a spiritual association of the claim group to the whole application area, which means s 190B(5)(a) is met.

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

[77] In paragraphs [87]–[90] of my previous reasons I set out my understanding of the Registrar's task at s 190B(5)(b). I am satisfied that the law has not changed and that my understanding of the task at this condition remains correct.

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

[78] In my previous reasons, I considered that the information provided in support of the assertion of s 190B(5)(b) was primarily found in the anthropologist's report. I summarised that information at paragraphs [91]–[94] of my previous reasons.

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

[79] I consider it appropriate to adopt my previous reasons in relation to s 190B(5)(b) for the same reasons identified in relation to s 190B(5)(a) above, including that the same factual basis is relied upon and only a short period of time has passed since I last applied the registration test to the claim.

[80] At paragraphs [95]–[98] of my previous reasons, I considered there was sufficient information to:

(a) address the identity of a pre-sovereignty society for the area;

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

(c) support the assertion of the existence of 'traditional laws and customs'.

Conclusion – s 190B(5)(b)

[81] I have reviewed my previous reasons and remain satisfied that the factual basis is sufficient to support an 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)?

[82] In paragraph [100] of my previous reasons I set out my understanding of the Registrar's task at s 190B(5)(c). I am satisfied that the law has not changed and that my understanding of the task at this condition remains correct.

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

[83] At paragraph [101] of my previous reasons, I noted that the relevant factual basis material for s 190B(5)(c) was the same as that which I considered relevant for ss 190B(5)(a)–(b). I also considered there was sufficient information to support the assertion of continuity of

traditional laws and customs. Having reviewed the information before me, I am of the view that it is appropriate to adopt my previous reasons in my fresh consideration of this condition.

Conclusion – s 190B(5)(c)

[84] I have reviewed my previous reasons and remain satisfied that the factual basis is sufficient to support the assertion that the claim group have continued to hold their native title rights in accordance with traditional laws and customs since settlement in the application area. This means s 190B(5)(c) is met.

Conclusion

[85] 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

[86] 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.

[87] The rights and interests in Schedule E have been amended. I consider that the amended rights and interests are generally of the same nature as those which were previously claimed, for example, the right to 'access, live, camp, erect shelters, exist, move and be present on the application area' now reads 'access, be present on, move about on and travel over the area'. The right to conduct ceremonies now reads 'conduct ceremonies on the area'. However, noting that the task at s 190B(6) imposes 'a more onerous test' than that at s 190B(5), I have considered each of the claimed rights and have not relied on my earlier reasons at this condition.[24]

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

(a) it requires some measure of the material available in support of the claim;[25] and

(b) 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'.[26]

[89] 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.[27] I have grouped rights together in my consideration below where it is convenient to do so.

[24] *Doepel* [136].
[25] *Doepel* [126].
[26] Ibid [135].
[27] Section 186(1)(g).

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

1.(a) Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s238, ss47, 47A or 47B apply): a. other than in relation to Water, the right to possession, occupation, use and enjoyment of the area to the exclusion of all others;

[90] There has been significant judicial guidance in relation to claims of exclusive possession. I note in particular the comments in *Ward HC*, 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.[28]

[91] In *Sampi*, French J held:

> [T]he right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation.[29]

[92] The Full Court held in *Griffiths FC* that the existence of a right to exclusive possession depends on consideration of what the evidence discloses about the content of a claim group's traditional law and custom.[30]

[93] Attachment F & M asserts that at the time of settlement, there existed an association between the Wakka Wakka people and application area.[31] 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'.[32] These rights are described as 'exercisable and defensible'.[33] Further, those 'who were not members of the relevant country group were required to seek permission prior to entering, gathering or hunting on the country of the group' and '[t]respass was considered a breach of customary law and sanctions applied to those who transgressed that law'.[34]

[94] The anthropologist's report states that '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.[35] 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'.[36] Claimants described to the author the importance of seeking permission to

[28] *Ward HC* [88].
[29] *Sampi* [1072].
[30] *Griffiths FC* [71].
[31] Attachment F & M [1]–[4].
[32] Anthropologist's report [199].
[33] Ibid [200].
[34] Ibid.
[35] Ibid [406]–[411].
[36] Ibid [463].

enter country, and of the consequences that can result from trespass and taking things from country without permission, including sickness and 'trouble'.[37]

[95] 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 cited above.

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

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

(a) access, be present on, move about on and travel over the area;

(b) camp, and live temporarily on the area as part of camping, and for that purpose build temporary shelters;

[97] Attachment F and the anthropologist's report details information from the historic record about the apical ancestors of the claim group living in and around the application area in the early years of settlement.[38] There is also information about the claimants and their predecessors camping on the application area, at locations including St John Creek and McRitchie Creek.[39] I consider it reasonable to infer that camping includes erecting shelters.

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

1.(b) in relation to Water, the non-exclusive rights to:

i. hunt, fish and gather from the Water of the area;

ii. take and use the Natural Resources of the Water in the area; and

iii. take and use the Water of the area,

for personal, domestic and non-commercial communal purposes.

2.(c) hunt, fish and gather on the land and waters of the area for personal, domestic and non-commercial communal purposes;

(d) take, use, share and exchange Natural Resources from the land and waters of the area for personal, domestic and non-commercial communal purposes;

(e) take and use the Water of the area for personal, domestic and non-commercial communal purposes;

(k) light fires on the area for domestic purposes including cooking, but not for the purpose of hunting or clearing vegetation;

[99] The anthropologist's report contains descriptions of claimants hunting, fishing and gathering other natural products in and around the application area.[40] A claimant described to the anthropologist the Wakka Wakka method of preparing and cooking a porcupine learnt from

[37] Ibid [444]–[449].
[38] Attachment F & M, Table 1; Anthropologist's report [784]–[785].
[39] Anthropologist's Report, Appendix B.
[40] Ibid [795]–[824].

his predecessors, which included the use of fire.[41] There are references to plants used for medicinal purposes and to sites where claimants collect ochre.[42] Another claimant describes hearing stories from the old people 'round the camp fire'.[43]

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

[101] The anthropologist's report states that the knowledge and rules pertaining to the use of natural resources 'are rooted in practice which it may reasonable [sic] be supposed were evident before the time of effective sovereignty'.[44]

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

(f) conduct ceremonies on the area;

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

(j) hold meetings on the area;

[103] There is information in the anthropologist's report about claim group members, past and present, participating in meetings and ceremonies, such as corroborees, in the application area.[45] Many claimants described how they were taught about attributes of the application 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.[46]

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

(g) be buried and bury members of the native title claim group within the area;

[105] The anthropologist's report describes a tree burial of an ancestor of the claim group, on a mountain which now bears that ancestor's name, and elsewhere states that there is evidence that tree burials were part of customary practice in the application area.[47] Claimants explained to the anthropologist that aspects of traditional burial practices continue to be observed by the claim group today.[48]

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

(h) maintain places of importance and areas of significance to the members of the native title claim group under their traditional laws and customs and protect those places and areas from physical harm;

[107] 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, some of which I have referenced above. According to the anthropologist, possessing knowledge of the spiritual dimension of places 'remains central to the management of country, as I think it

[41] Ibid [795].
[42] Ibid [815], [819].
[43] Ibid [488].
[44] Ibid [827].
[45] Ibid [530]–[535].
[46] Ibid [486], [553], [494]–[496].
[47] Ibid [217], [232]–[233].
[48] Ibid [550].

was in times past'.[49] One claimant states 'knowing where things are is essential so we can protect it and so we tell our kids about it'.[50]

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

(l) be accompanied onto the area by those persons who, though not members of the native title claim group, are persons required or permitted under the traditional laws acknowledged and traditional customs observed by the members of the native title claim group to be present on the area.

[109] As discussed above, there are descriptions in the anthropologist's report to claim group members participating in corroborees and other ceremonies on the application area. The observance of such performances by non-claim group members on the application area, including people from neighbouring groups and the early ethnographers in my view demonstrates the existence of this right.[51]

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

Conclusion

[111] According to 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). As set out above, 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 under the traditional laws and customs. 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. This means that the claim rights are established prima facie as 'native title rights and interests' and so s 190B(6) is met.

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

[112] In paragraphs [131]–[132] of my previous reasons I set out my understanding of the Registrar's task at s 190B(7). I am satisfied that the law has not changed and that my understanding of the task at this condition remains correct.

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

[113] At paragraphs [133]–[138] of my previous reasons, I considered that at least one claim group member has or had a physical connection to the application area. I also considered the claim group members' connection with the application area is 'traditional' in the sense required by s 190B(7). Given the factual basis for this application is the same as that previously considered, I am of the view that it is appropriate to adopt my previous reasons in this fresh consideration of this condition.

[49] Ibid [429].
[50] Ibid [443].
[51] Ibid [226], [229], [567].

Conclusion

[114] I have reviewed the information before me and my previous reasons and I remain satisfied at least one member of the native title claim group currently has or had a traditional physical connection with a part of the application area as required by s 190B(7)(a), and so s 190B(7) is met.

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

[115] At paragraph [140] of my previous reasons, I considered that the application complied with the provisions of ss 61A(1)–(3), and thus met the requirements of s 190B(8). I have reviewed my previous reasons and consider it is appropriate to adopt my conclusions at this condition, as the content of the relevant Schedules is identical in the application currently before me. I also consider that my understanding of the Registrar's task was correct and the law has not changed. In addition, the geospatial report states, and I have verified, there has been no determination over any part of the application area, which is relevant to this fresh consideration of s 61A(1). I am therefore satisfied that the application meets the requirements of s 190B(8).

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

[116] At paragraph [141] of my previous reasons, I considered that the application met the requirements of s 190B(9). I have reviewed my previous reasons and consider it is appropriate to adopt my conclusions at this condition, as the content of the relevant Schedules is identical in the application currently before me. I also consider that my understanding of the Registrar's task was correct and the law has not changed. I am therefore satisfied that the application meets the requirements of s 190B(9).

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	28 February 2020

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:

10 February 2012

Date application entered on Register:

5 April 2012

Applicant:

As per Register

Applicant's address for service:

As per Register

Area covered by application:

As per Register

Persons claiming to hold native title:

As per Register

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.