Registration Decision

National Native Title Tribunal

Application name	Allan Sailor & Ors on behalf of the Wangkamahdla People and State of Queensland & Ors (**Wangkamahdla People**)
Name of applicant	Allan Sailor, Avelina Tarrago, Christine Doyle, Isabel Tarrago, Jason Emblen, Kerry Quartpot, Mona Aplin, Trevor Dempsey, Tarsha-Rae Marshall
Federal Court of Australia No.	QUD52/2016
NNTT No.	QC2016/001
Date of Decision	3 June 2020

Claim accepted for registration

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

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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***)
Burragubba on behalf of the Wangan and Jagalingou People v State of Queensland [2017] FCA 373 (***Burragubba***)
Corunna v Native Title Registrar [2013] FCA 372 (***Corunna***)
Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People [2019] FCAFC 177 (***Warrie***)
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 5) [2003] FCA 218 (***Harrington-Smith No 5***)
Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9) [2007] FCA 31 (***Harrington-Smith No 9***)
Kanak v National Native Title Tribunal (1995) 61 FCR 103; [1995] FCA 1624 (***Kanak***)
Martin v Native Title Registrar [2001] FCA 16 (***Martin***)
Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422; [2002] HCA 58 (***Yorta Yorta***)
Noble v Mundraby [2005] FCAFC 212 (***Noble v Mundraby***)
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 Native Title Registrar (1999) 95 FCR 93; [1999] FCA 1591 (***WA v NTR***)
Western Australia v Ward (2002) 213 CLR 1; [2002] HCA 28 (***Ward HC***)
Weribone on behalf of the Mandandanji People v State of Queensland [2013] FCA 255 (***Weribone***)

Background

[1] The claim in this application is made on behalf of the Wangkamahdla People native title claim group (**claim group**). It covers an area of approximately 29,000 square kilometres in western Queensland, abutting the Northern Territory border (**application area**).

[2] This claim was first made on 20 January 2016 and subsequently entered onto the Register of Native Title Claims (**Register**) on 3 March 2016. At that time it was described as the 'Wangkamahdla Nation' claim.

[3] The amended application currently before me was filed on 25 March 2020. The Registrar of the Federal Court (**Court**) gave a copy of the application to the Native Title Registrar (**Registrar**) on 25 March 2020, pursuant to s 64(4). This referral has triggered the Registrar's duty to consider the claim in the amended application.[3]

[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

[3] Section 190A(1).

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 (**the registration test**).

[5] As discussed in my reasons below, I consider that the claim in the application satisfies all of the conditions of the registration test and therefore it must be accepted for registration.[4] Attachment A contains information that will be included in the Register.

Procedural fairness

[6] On 31 March 2020, a senior officer of the National Native Title Tribunal (**Tribunal**) wrote to the representative of the State of Queensland (**State**) advising that any submissions on the application's ability to pass the registration test should be made by 6 April 2020.

[7] Also on 31 March 2020, the senior officer wrote to the applicant's representative to advise that any additional information to which the applicant wished me to have regard should be provided by 6 April 2020.

[8] On 6 April 2020, the applicant's representative requested an additional day to provide submissions. I considered that the requested extension of time was reasonable and would not affect any third party interests. Therefore, on 6 April 2020 the senior officer wrote to the representative of the applicant and advised that I had granted an extension of time until 7 April 2020.

[9] On 7 April 2020, the applicant's representative advised that the applicant wished me to have regard to the following documents (**additional material**):

(a) Affidavit of [name removed], deposed 22 May 2013 (**Claimant 1 affidavit**);
(b) Affidavit of [name removed], deposed 10 December 2015 (**Claimant 2 affidavit**);
(c) Affidavit of [name removed], deposed 10 December 2015 (**Claimant 3 affidavit**);
(d) An updated version of the document titled 'Attachment F/M', which had been filed with the application. (I will refer to this updated version as **Attachment F** to differentiate between the two documents in my reasons below.)

[10] I considered the additional material and formed the preliminary view that it contained information relevant to the conditions of the registration test. Therefore, on 8 April 2020, the senior officer wrote to the representative of the State to advise that the applicant had provided the additional material for my consideration, and that any comments or submissions on the additional material should be received by 17 April 2020.

[11] On 8 April 2020, the representative of the State advised the senior officer that the State would not be making submissions.

[12] On 15 May 2020, the senior officer wrote to the applicant's representative to advise that there were certain deficiencies in the application which, in my preliminary view, may prevent the application from meeting all of the conditions in the registration test, and invited the applicant to provide further information by 22 May 2020.

[13] On 19 May 2020, the applicant's representative advised that the applicant wished me to have regard to the following document:

[4] Section 190A(6).

(a) Affidavit of Jessica Ling, deposed 19 February 2020 (**authorisation affidavit**).

[14] I considered the authorisation affidavit and formed the preliminary view that it contained information relevant to the registration test, specifically to the condition at s 190C(4). Therefore, on 20 May 2020, the senior officer wrote to the representative of the State to advise that the applicant has provided the authorisation affidavit for my consideration, and that any comments on that document should be received by 27 May 2020.

[15] No response was received from the State regarding the authorisation affidavit and so this concluded the procedural fairness process.

Information considered

[16] I have considered the information in the application, the additional material and authorisation affidavit provided by the applicant, as outlined above.[5] I have also considered information contained in a geospatial assessment and overlap analysis of the application area prepared by the Tribunal's Geospatial Services dated 30 March 2020 (**geospatial report**), information available in the Tribunal's geospatial database in relation to locations mentioned in the application, and information available on the Register.[6]

[17] There is no information before me 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]

Section 190C: conditions about procedures and other matters

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

[18] 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.

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

Section	Details	Information	Result
s 61(1)	Native title claim group have authorised the applicant	Part A, Schedule A, s 62 affidavits filed with application (**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

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

[20] 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
s 62(2)(f)	Activities	Schedule G, Attachment F/M	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

[21] 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.

[22] 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). This means that there are no 'previous applications' which I must consider and the issue of common claimants does not arise. I am therefore satisfied that s 190C(3) is met.

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

[23] 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.

[24] Schedule R requires applicants to provide the details of the certification or authorisation of the claim. I understand from Schedule R and Attachment R that the application is not certified and I must therefore consider whether the claim has been authorised in accordance with s 190C(4)(b).

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

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

(a) that the applicant is a member of the 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 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 met unless the application:

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

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

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

Does the application satisfy s 190C(5)?

[28] The s 62 affidavits each state at paragraph 1 that the deponent is a member of the claim group. The s 62 affidavits also set out at paragraphs 3–4, the process by which the members of the applicant were authorised to make the application.

[29] 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'.[10] I therefore consider the information in the s 62 affidavits is sufficient for both limbs of s 190C(5). 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?

[30] Section 190C(4)(b) requires that all the persons comprising the applicant must be members of the claim group. As discussed above, paragraph 1 of each of the s 62 affidavits contains such a statement. I have not been provided with any material that contradicts those statements. It follows that I am satisfied that the members of the applicant are all members of the claim group.

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

[31] 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 has authorised the applicant such that I can be satisfied of the 'fact of

[10] *Strickland* [57].

authorisation'.[11] I have summarised the information before me which I consider is relevant to this condition below.

Decision-making process

[32] Attachment R describes two meetings of the claim group held on 17 November 2019: **Authorisation Meeting #1**, to amend the claim group description, and **Authorisation Meeting #2**, to authorise the applicant to make this amended application, in addition to some other matters pertaining to the claim, including changing the name from 'Wangkamahdla Nation' to 'Wangkamahdla People'.[12]

[33] Attachment R states that at both authorisation meetings the claim group confirmed there is no traditional decision-making process that the claim group must use.[13] The decision-making process agreed to and adopted by the claim group is described as follows:

(a) the decision to be made will be put in the form of a clearly worded written motion;

(b) the motion will be displayed and read out to the meeting;

(c) each apical ancestor descent group will meet separately to discuss the motion and decide their vote in relation to the motion according to its own processes;

(d) each apical ancestor descent group has one (1) vote (for or against the motion);

(e) no one person or apical ancestor descent group has a right of veto;

(f) the Chairperson will ask for a representative from each apical ancestor descent group to inform the meeting of that apical ancestor descent group's vote;

(g) the Chairperson will count the votes from each apical ancestor descent group;

(h) a decision of the majority of those apical ancestor descent groups in attendance will be an authoritative decision of the Claim Group; and

(i) a 'majority' is defined to mean more than 50% of the apical ancestor descent groups in attendance at the meeting and who vote on the motion.[14]

[34] According to Attachment R, for the decision to authorise the applicant, the claim group agreed to adopt a different decision-making process, whereby (in summary):

(a) the applicant will comprise one representative for each apical ancestor descent group in attendance;

(b) each apical ancestor descent group will meet separately to discuss whom they wish to nominate as a member of the applicant;

(c) the Chairperson will call for the nomination from each descent group;

(d) the Chairperson will ask the nominees if they accept the nomination for the position of applicant member;

(e) the list of nominees who have accepted their nomination for the position of a member of the applicant will be read out and displayed to the meeting;

[11] *Doepel* [78].
[12] Attachment R, [7]–[9].
[13] Ibid [29], [39].
[14] Ibid [29].

(f) the meeting will then be asked to authorise the applicant as read out and displayed to the meeting using the agreed to and adopted voting process outlined above.[15]

[35] The decision-making process was therefore one agreed to and adopted by the claim group, which is the process permitted by s 251B(b).

Notice of authorisation meeting

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

(a) Public notice:

1. in the Koori Mail on 23 October 2019;
2. in the North West Star on 24 October 2019; and
3. on the QSNTS website from 23 October 2019.

(b) Personal notice:

1. by mail to 227 members of the claim group on 25 and 29 October 2019;
2. by telephone call to 164 members of the claim group over the two weeks prior to the authorisation meetings; and
3. by SMS to 84 members of the claim group on 14 November 2019.[16]

[37] Copies of the notice, as it appeared in the various publications, on the QSNTS website, and in the correspondence to the members of the claim group, are included in the authorisation affidavit.[17] The notice clearly states that two separate authorisation meetings would be held on 17 November 2019, with the details of the venue and time for each meeting set out. The members of the claim group as it was previously described were invited to Authorisation Meeting #1 and the notice explains that if the proposed changes to the claim group description were authorised, then the members of the newly described claim group were invited to attend Authorisation Meeting #2.

[38] The purpose of both meetings is set out in the notice, with one of the stated purposes of Authorisation Meeting #2 being to authorise the applicant to make this amended application. The notice includes a map of the application area, details of an Information Session scheduled for the day prior to the authorisation meetings, and two contact numbers for enquiries, one of which is a free call number.

Conduct of authorisation meeting

[39] Attachment R provides the following information about the conduct of the authorisation meetings:

(a) The meetings were well attended, with:

[15] Ibid [42].
[16] Ibid [10]–[15].
[17] Authorisation affidavit [108]–[121].

1. 51 people registering for and attending Authorisation Meeting #1, with 11 of the 15 apical ancestor descent groups represented (two groups having no known descendants).[18]

2. 50 people registering for and attending Authorisation Meeting #2, with 16 of the 22 apical ancestor descent groups which comprise the newly-described claim group represented.[19]

(b) A QSNTS research officer oversaw the registration process, the QSNTS Chief Operating Officer acted as Chairperson, and QSNTS solicitors provided legal advice before voting started at each meeting.[20]

[40] With regard to the authorisation of the applicant at Authorisation Meeting #2, Attachment R and the authorisation affidavit provide:

(a) Attendees were registered according to their relevant apical ancestor descent group and given a wrist band;[21]

(b) By Resolution #10, the members of the applicant were authorised by the claim group using the agreed to and adopted process for that decision as outlined above.[22]

Consideration

[41] I consider the notice of the authorisation meetings 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 meetings. From the information in the authorisation affidavit, I consider the content of the notice was sufficiently clear as to enable the details and purpose of the authorisation meetings to be understood. In my view, the notice provided the members of the claim group a reasonable opportunity to decide whether to attend the authorisation meetings.[23]

[42] I also consider that the material before me provides sufficient detail of the conduct of the authorisation meetings. I note the decision to authorise the applicant differed slightly to the other decisions made, insofar as each descent group nominated an individual to be a member of the applicant, those individuals were then required to accept the nomination, following which the claim group voted to authorise them to make the application in accordance with the process otherwise agreed to. In *Noble v Mundraby,* the Full Court held:

> Section 251B does not require proof of a system of decision-making beyond proof of the process used to arrive at the particular decision in question. The section accommodates a situation where a native title claim group agrees to follow a particular procedure for a particular decision even if other procedures are normally used for other decisions.[24]

[43] In my view, the material before me shows that the decision to authorise the applicant was undertaken in line with the agreed and adopted decision-making process of the claim group for that decision. Following the reasoning of the Full Court, there is no issue with this decision-

[18] Attachment R, annexure 'JML-2'.
[19] Ibid [34]–[35].
[20] Ibid [22], [25], [27]–[28], [36], [38].
[21] Ibid [22]–[23].
[22] Authorisation affidavit, annexure 'JML-12', [11]–[12].
[23] *Burragubba* [29]–[32]; *Weribone* [40]–[41].
[24] *Noble v Mundraby* [18].

making process differing from the process used by the claim group for other decisions at the authorisation meetings.

[44] I note that Resolution #10 authorised 13 applicant members, whereas Part A of the application before me lists only nine of those individuals. The application is accompanied by s 62 affidavits from those same nine people. In this regard, Attachment R explains that one of the persons nominated wrote to QSNTS on 21 January 2020 advising that he was no longer willing to continue as a member of the applicant.[25] A copy of this letter is annexed to the authorisation affidavit.[26]

[45] Attachment R also states that three other people nominated have been 'deemed unwilling' to continue as applicant members because they did not provide a s 62 affidavit.[27] Annexed to the authorisation affidavit are copies of letters sent to these three individuals from QSNTS in January 2020, referring to previous correspondence and the previous attempts at telephone contact which QSNTS had made following the authorisation meeting.[28] Each of those letters state that, if the enclosed s 62 affidavit is not signed, witnessed and returned by 22 January 2020, the letter recipient would be deemed to be 'incapable, unable or unwilling' to continue as a member of the applicant.[29]

[46] Attachment R explains that the terms and conditions for the appointment of the applicant provide that if one or more members of the applicant 'is incapable, unable or unwilling to continue to act, [then] the remaining Applicants may continue to act as the Applicant … without the need to convene an authorisation meeting'.[30] The minutes of Authorisation Meeting #2 annexed to the authorisation affidavit show that the terms and conditions for the appointment of the applicant were passed by the attendees by majority in Resolution #8.[31]

[47] In my view, the information before me sufficiently explains why only nine of the 13 authorised people are named in the application as applicant members, and that the claim group has authorised these remaining members to continue as the applicant in these circumstances. I have received no information which disputes this understanding and note that the Court has accepted the filing of the application accompanied by the nine affidavits.

[48] Finally, 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 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? [32]

[25] Attachment R [46].
[26] Authorisation affidavit, annexure 'JML-14'.
[27] Attachment R [47].
[28] Authorisation affidavit, annexures 'JML-15', 'JML-17'and 'JML-18'.
[29] Ibid.
[30] Attachment R [41].
[31] Authorisation affidavit, annexure 'JML-12', [8]–[9].
[32] *Ward v Northern Territory* [25]–[26].

[49] In my view, there is sufficient information before me to address the substance of all of those questions, such that I can be satisfied of the 'fact of authorisation'.[33] 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

[50] 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

[51] 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.

[52] 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.[34]

Does the information about the external boundary meet this condition?

[53] Schedule B refers to Attachment B, which describes the application area by metes and bounds referring to the native title determinations, cadastral boundaries and the Queensland / Northern Territory border, dated 20 November 2015.

[54] Schedule C refers to Attachment C, which contains a map titled 'Proposed – Native Title Determination Application'. The map is also dated 20 November 2015 and includes:

(a) The application area depicted by a bold blue outline and light blue fill;

(b) Topographic background with native title determinations shown in orange;

(c) Scalebar, northpoint, coordinate grid and legend; and

(d) Notes relating to the source, currency and datum of data used to prepare the map.

[55] 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.

[33] *Doepel* [78].
[34] Ibid [122].

Does the information about excluded areas meet this condition?

[56] Schedule B states that the application does not cover areas where native title has been extinguished, areas subject to previous exclusive possession acts or previous non-exclusive possession acts, except where ss 23B(9)–(10) or ss 47–47B apply.

[57] With regard to general exclusion clauses of this nature, French J commented that 'it is unrealistic to expect a concluded definition of the areas subject to these provisions to be given in the application. Their applicability to any area will require findings of fact and law to be made as part of the hearing of the application'.[35] Following this reasoning, I am satisfied the areas affected by the general exclusion clauses in Schedule B can be ascertained at the appropriate time.

[58] Attachment B specifically excludes the land and waters covered by the following determinations of native title:

(a) QUD6115/1998 Bularnu Waluwarra & Wangkayujuru People;
(b) QUD6025/1999 Pitta Pitta People;
(c) QUD6033/2002 Mithaka People; and
(d) SAD6016/1998 The Wangkangurru/Yarluyandi Native Title Claim.

[59] In my view, the specific exclusions are clear from Attachment B.

Conclusion

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

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

[61] To meet s 190B(3), the Registrar must be satisfied that the persons in the claim group are either named in the application or are described sufficiently clearly so that it can be ascertained whether any particular person is in the claim group.

[62] 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.[36]

[63] Schedule A states:

> The Native Title Claim Group are the descendants (including such people descended by social parenthood or rearing up who are recognised and accepted in accordance with traditional law and custom) of the following ancestors: [list of 22 apical ancestors with reference to some of their immediate descendants].

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

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[35] *Strickland* [55].
[36] *Wakaman* [34].

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

[65] The Court has previously held that describing a claim group with reference to descent from named ancestors, including by adoption, satisfies the requirements of s 190B(3)(b).[37] I consider that factual enquiries and genealogical research would enable these members of the claim group to be ascertained.

[66] From Schedule A, I understand that it is under their traditional laws and customs that the claim group would decide whether to recognise and accept a person 'descended by social parenthood or rearing up' as a member of the claim group. This part of the claim group description therefore includes a subjective element. The Court has held that '[a]s to substantive matters concerning membership, the claim group must act in accordance with traditional laws and customs' and that membership must be based on group acceptance.[38] It appears from Schedule A that the claim group's traditional laws and customs will provide the appropriate 'set of rules or principles' for determining whether a person 'descended by social parenthood or rearing up' is a member of the claim group.[39]

Conclusion

[67] 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

[68] To meet s 190B(4), the Registrar must be satisfied the description contained in the application is sufficient to allow the claimed native title rights and interests to be identified. I have not considered whether the rights and interests claimed can be considered 'native title rights and interests' in accordance with s 223 as I consider that is part of the task at s 190B(6), where I must decide whether each of the claimed rights is established as a native title right on a prima facie basis. I note that my consideration of this condition is confined to information found in the application.[40]

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

[69] From the description in paragraph 1(a) of Schedule E, I understand that exclusive possession is only claimed in areas of land where it can be recognised, and that exclusive possession is not claimed in relation to any water in those areas.

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

[71] From paragraph 2 of Schedule E, I understand that the listed non-exclusive rights are claimed in any areas where exclusive possession cannot be recognised.

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[37] *WA v NTR* [67].
[38] *Aplin* [256], [259].
[39] *Ward v Registrar* [25].
[40] *Doepel* [16].

Conclusion

[72] In my view, the claimed native title rights are understandable and have meaning.[41] I am therefore 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

[73] 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 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 claim group that give rise to the claim to 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.

[74] 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'.[42]

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

[75] Schedule F provides a brief outline of the factual basis of the claim. Schedule G lists four activities which the claim group undertake on the application area. Schedule F refers to Attachment F/M, however as explained above, the applicant has provided an updated version of that attachment in the additional material, which I will refer to as Attachment F in my reasons below. Attachment F, and the other documents in the additional material, provide more detailed information about the factual basis of the claim and so my reasons will focus on the information in those documents.

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

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

(a) the claim group presently has an association with the application area, and the claim group's predecessors have had an association with the application area since sovereignty or European settlement;[43]

(b) there is 'an association between the whole group and the area', although not 'all members must have such association at all times';[44] 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'.[45]

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[41] Ibid [99].
[42] *Doepel* [16]–[17]; *Gudjala 2008* [83], [92].
[43] *Gudjala 2007* [52].
[44] Ibid.
[45] *Martin* [26]; *Corunna* [39], [45].

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

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

[77] Attachment F provides that European settlement in the application area occurred in the late 1870s–1880s, with the establishment of Glengyle and Sandringham stations in the southern part of the application area in 1876, and Glenormiston Station in the northern part in 1877.[46]

[78] Trading routes traversing the application area were recorded by Roth in the 1890s, with trade in grindstones, boomerangs and cured pituri plant documented in the Toko Ranges and Mulligan River regions of the application area.[47]

[79] The apical ancestors are all documented in the historical record as being 'firmly associated' with the application area at the time of settlement,[48] for example:

(a) King Peter is estimated to have been born in 1862 and is associated with Glenormiston Station and the Toko Ranges;

(b) Kitty Bedourie is estimated to have been born in 1863 and is associated with Bedourie and the Mulligan River;

(c) Jimmy Mantandi is estimated to have been born between 1853 and 1855, and is associated with the Simpson Desert, Mulligan River and Kalidawarry waterhole.[49]

[80] Claimant 1 provides:

(a) His father was working as a stockman in the application area, including at Glenormiston Station, when he was born in 1932.[50]

(b) He recalls camping at locations in and around the application area as a child, at which time there were 'a lot of old people' living at the foot of the Toko Ranges in an area associated with the water snake dreaming.[51]

(c) Claimant 1's father was told the dreaming stories by his own father, apical ancestor [name removed], which are linked to particular locations in the application area where rainmaking ceremonies take place.[52]

[81] Claimant 2 recalls fishing with his grandmother along the Georgina River, branches of which flow through the eastern part of the application area from north to south, and how she taught him to catch fish using the burnt leaves of a particular tree which grew in the area.[53]

[82] Claimant 3 provides:

(a) All of her grandparents spent most of their lives on Glenormiston Station and both of her parents were born in the area – her mother at an outstation of Glenormiston in 1903 and her father on the Mulligan River.[54]

[46] Attachment F, [2], [8]–[9].
[47] Ibid [14]–[15].
[48] Ibid [25].
[49] Ibid [27].
[50] Claimant 1 affidavit [4].
[51] Ibid [49]–[50].
[52] Ibid [52].
[53] Claimant 2 affidavit [8], [14].
[54] Claimant 3 affidavit [6], [7], [9].

(b) Her mother was a cook at Glenormiston for nearly 30 years, while her father was head stockman and would muster cattle across Glenormiston and other stations in and around the north of the application area including Roxborough and Linda Downs.[55]

(c) Her mother was responsible for a dreaming story which travels from south to north through the sandhills on the eastern side of the application area and is associated with the pituri plant which grows in the region.[56]

Association of the current claim group with the claim area

[83] With regard to the association of the current claim group, Claimant 1's affidavit provides:

(a) His father rode him around when he was a child and taught him about his traditional country, including the location of waterholes and springs; and that his country includes Pituri Creek, Linda Creek, and the upper reaches of the Mulligan River at the bottom of the Toko Range.[57]

(b) His parents and 'the old people' taught him and his siblings how to hunt goanna and harvest wild fruit whilst they were living on Glenormiston and Linda Downs stations.[58]

(c) He worked on Roxborough and Glenormiston stations as a stockman with his brother from the time he was a teenager, and frequently visits the application area, which is 'still home for me'.[59]

(d) His father showed him the path of a particular dreaming story attached to a spring which travels through Roxborough Downs in the northern part of the application area; and another dreaming which travels from the north through to the central part of the application area, across the area covered by Carandotta and Glenormiston stations.[60]

[84] Claimant 2's affidavit provides that he stated working on various stations which cover the application area in 1977, and now does cultural heritage walks with other claim group members on Sandringham and Ethabuka stations in the south of the application area, Carlo and Craven Peaks in the central and central west, as well as on Glenormiston which covers the north and north eastern part of the application area.[61]

[85] Claimant 3's affidavit provides:

(a) She spent her childhood at Glenormiston and returned after boarding school to work there as an adult and still visits the area regularly with her children and grandchildren.[62]

(b) Her father taught her the dreaming story of her totem animal, which is associated with Ethabuka in the centre of the application area and Lake Idamea in the north, which she has now passed onto her children.[63]

[55] Ibid [13]–[14].
[56] Ibid [20].
[57] Claimant 1 affidavit [12]–[14], [31].
[58] Ibid [15].
[59] Ibid [20]–[28].
[60] Ibid [48], [52].
[61] Claimant 2 affidavit [34]–[36].
[62] Claimant 3 affidavit [15].
[63] Ibid [18].

(c) Her 'old people' told her the location of birthing sites in Wangakamahdla country and she visits these places to 'look after things'.[64]

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

[86] 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.[65] I do not consider this application is of that nature. In my view, the information before me addresses the relationship the claim group claims to have with the application area, in a sufficient level of detail, both at the time of settlement and since that time.[66] From information in the Tribunal's geospatial database I can see that locations mentioned in the additional material are relevant to the application area, in particular that the stations on which the claimants and their predecessors lived and worked cover the entirety of the application area, with the exception of a relatively small area in the south west corner, which is now part of Munga-Thirri national park. I have considered whether there is information sufficient to support the requirements of s 190B(5)(a) below.

Is the factual basis sufficient to support an association between the claim group at sovereignty and since that time with the area?

[87] Settlement in the application area is asserted to have occurred in the 1870s-1880s, nearly a century after the acquisition of British sovereignty in 1788. As summarised above, Attachment F sets out the association the apical ancestors of the claim group had with various parts of the application area in the early decades of settlement. In my view, it is reasonable to infer that the apical ancestors had much the same association as their own predecessors who would have been alive at the time of sovereignty. I consider that the observation of established trade routes in the application area in the early decades of settlement further supports making this inference. I also have considered the judicial guidance of Lindgren J on making such inferences in *Harrington-Smith No 9*, and of French J in *Kanak* on construing the Native Title Act beneficially.[67]

[88] In addition, Attachment F and the information from the claimants shows that the predecessors of the claim group were living and working on the pastoral stations which covered the application area from the time of settlement onwards. There is information about claim group members, their parents and grandparents camping on the application area and exploiting its resources through hunting and fishing, thus supporting an association between the claim group and the application area since the time of settlement.

Is the factual basis sufficient to support an association between the claim group and the area currently?

[89] I consider the factual basis is sufficient to support the assertion that the claim group currently has an association with the application area. The claimants' affidavits in particular point to an ongoing association with the area maintained through regular visits and cultural heritage work. The claimants continue to look after important locations on the application area which

[64] Ibid [24].
[65] *Martin* [25].
[66] *Gudjala 2007* [40].
[67] *Harrington-Smith No 9* [294]–[296]; *Kanak* [73].

were shown to them by their predecessors. The claimants' affidavits also discuss how this association is being maintained by teaching the younger generations whilst on country.

Is the factual basis sufficient to support an association, both past and present, with the whole area claimed?

[90] 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 application area as a whole.[68] It is not a requirement that every member of the claim group have an association with the entire application area at all times.

[91] In my view, there is sufficient information in the application to support an association by the claim group, past and present, with the application area as a whole. In addition to the references to the pastoral stations which cover the vast majority of the application area, I note the information about the dreaming stories which traverse the application area and are linked to particular features of the area such as lakes, sand hills and the pituri tree. The additional material shows that the current claimants hold knowledge of these dreaming stories and through them, maintain a spiritual association with the application area. In my view, such information supports an association with the entire area claimed.

Conclusion - s 190B(5)(a)

[92] I consider that the information before me is sufficient to support the assertion that the claim group have, and its predecessors had, an association with the application area. This is because the material demonstrates sufficient geographical particularity to locations where claim group members and their predecessors were born, lived and worked. I am satisfied there is sufficient factual basis to support an assertion of a physical association of the claim group to the whole application area. 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)?

[93] To meet s 190B(5)(b), the factual basis must be sufficient to support an assertion that there exist traditional laws acknowledged and traditional customs observed by the claim group that gives 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.

[94] 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:

> [I]t 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*.

[68] *Corunna* [31].

> [T]he normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a *continuous existence and vitality since sovereignty*. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist.[69]

[95] In *Warrie*, the Full Court held that:

> Where a rule, or practice or behaviour in relation to the identified land and waters arises from traditional law, and has normative content, then it can be capable of satisfying para (a) of s 223(1).
>
> *[A] claim group must establish that the traditional law and custom which gives rise to their rights and interests in that land and waters stems from rules that have a normative character*, there is no further gloss or overarching requirement, and no further rigidity. The Native Title Act in terms does not require establishment of some overarching "society" that can only be described in one way and with which members of a claim group are forever fixed in relation to any other land and waters over which they assert native title.[70]

[96] In *Gudjala 2009*, Dowsett J held 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.[71]

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

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

(b) the continued observance of normative rules by the successive generations of the 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 at s 190B(5)(b)

[98] Attachment F provides that the predecessors of the claim group were part of a regional society comprised of local landholding groups which followed common laws and customs in relation to inheritance of rights to land by descent, trade, marriage and ceremony.[72] The current claim group continue to observe these laws and customs and have inherited rights in the application area through their descent from the apical ancestors.[73] Claimant 1 explains: 'You take your country through your parents and grandparents. The old fella [my father] taught me that'.[74] Claimant 2 states that his grandmother's country was in the northern part of the application area, and that people would have to ask her permission in order to access it.[75]

[99] According to Attachment F, the pre-sovereignty society was organised into a 'dual division' system, with further organisation of individuals and families according to totem and moiety systems which prescribed normative behaviours.[76] The current claim group continue to

[69] *Yorta Yorta* [46]–[47], emphasis added.
[70] *Warrie* [105], [107], emphasis added.
[71] *Gudjala 2009* [40].
[72] Attachment F [18], [21], [29].
[73] Ibid [26], [29], [33].
[74] Claimant 1 affidavit [30].
[75] Claimant 2 affidavit [6].
[76] Attachment F [35].

identify their members in accordance with these systems and follow the relevant laws. For example, Claimant 3 explains that her father taught her the dreaming story for her totem animal and forbade her from harming it or eating its meat. She in turn has taught these rules to her children.[77] Claimant 3's affidavit also explains how her predecessors taught her the rules of the dual division system and how failure to adhere to those laws, through marrying the 'wrong skin' for example, would result in being 'socially shunned'.[78]

[100] Claimants have received from their predecessors the spiritual stories which underpin their laws and customs and mandate social behaviours regarding access and use of country, such as avoiding particular areas, fulfilling obligations to look after certain places and talking to the spirits which inhabit the landscape.[79] Claimant 3 explains how she must avoid men's sites and has responsibility to look after some dreaming sites and other important places on the application area, for which her children are now also responsible.[80] Another claimant explains that spiritual unrest and sickness can result from disturbing sacred places or taking artefacts.[81]

[101] As discussed above at s 190B)(5)(a), established trade routes through the application area and surrounding region were observed in the early years of settlement.[82] One claimant recalls his father and brother trading pituri plant for blankets with the neighbouring Pitta Pitta people.[83]

[102] Claimant 3 recalls participating in rainmaking ceremonies in the application area along with her sister, parents, grandparents and other claim group members.[84] Claimant 1 describes in detail the role his grandfather and other predecessors played in men's only rainmaking ceremonies.[85] Today, claimants participate in ceremonies held across the region, including those specifically held for men or women.[86]

[103] In the early settlement period, the use of pituri, grindstones, boomerangs and the existence of 'native wells' were observed in the application area.[87] The claimants describe how they continue to use pituri for medicinal purposes, prepared in the manner taught to them by their predecessors, and which they have in turn taught to their children.[88] Claimant 3 recalls her 'old people' using grinding stones to mill seeds, and teaching her the correct methods of fishing and collecting bush foods.[89] Claimant 1 explains how his father taught him the location of waterholes and springs as well as how to hunt animals and harvest wild fruit.[90] He also learnt how to make spears and boomerangs by watching his father and the old people make them.[91]

[77] Claimant 3 affidavit [18], [44].
[78] Ibid [47].
[79] Attachment F [46]–[47].
[80] Claimant 3 affidavit [23]–[24], [49].
[81] Attachment F [49].
[82] Ibid [14]–[15].
[83] Ibid [49].
[84] Claimant 3 affidavit [42]–[43].
[85] Claimant 1 affidavit [70]–[72].
[86] Attachment F, [49]; Claimant 1 affidavit, [61]–[72].
[87] Attachment F, [11], [14]–[15].
[88] Claimant 3 affidavit [37]; Claimant 2 affidavit [14].
[89] Claimant 3 affidavit [25]–[38].
[90] Claimant 1 affidavit [14]–[15].
[91] Ibid [77].

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

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

[104] In my view, the additional material describes the pre-sovereignty society which existed in the application area and describes the claim group's predecessors' place in that society and their participation in its trade and ceremonial activities. The material also describes how the claim group are linked to the apical ancestors and, as their descendants, have inherited rights and interests in their country, including the application area. In *Harrington-Smith No 5*, Lingren J observed that '[i]t is conceivable that the traditional laws and customs under which the rights and interests claimed are held might, in whole or in part, be also traditional laws and customs of a wider population, without that wider population being a part of the claim group'.[92] In my view, the factual basis of this application demonstrates that while the claim group's law and customs were and are observed across a broader society, rights to land are held at localised levels under those laws, and in relation to the application area, they are held by this claim group. Considering all the information before me, I am satisfied that the factual basis addresses the link between the current claim group, the apical ancestors and the society which existed in the application area prior to British sovereignty.

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

[105] I consider the material before me demonstrates how the laws and customs have been observed by successive generations of the claim group in the application area. The rules of social organisation observed at the time of settlement and the associated normative behaviours continue to be observed by the claim group today, who know the 'skin system' and place social sanctions on 'wrong' marriages. The material demonstrates how the land tenure system, through which rights and interests in an area are inherited, has been observed since settlement; and how the spiritual beliefs which underpin the laws and customs provide rules for safely accessing country and prescribe certain behaviours at particular places, such as speaking to the spirits.

[106] In my view, there is also sufficient information to show the laws and customs of the claim group are 'traditional' in the *Yorta Yorta* sense.[93] This is because there are examples provided about the predecessors of the claim group handing down the laws and customs to members of the current claim group. Claimants describe learning the dreaming stories of the application area and how they continue to follow the rules which those stories ordain, such as the prohibition on eating the meat of one's totem. Claimants also describe how they have learnt from their predecessors how to hunt, fish, gather bush foods and make bush medicine. I consider it is reasonable to infer that the predecessors of the current claim group acquired their knowledge of the laws and customs in much the same way as they passed it on to their descendants, through teaching, oral transmission and common practice, thus supporting the assertion that the laws and customs are 'traditional'.

[92] *Harrington-Smith No 5* [53].
[93] *Yorta Yorta* [46]–[47].

Conclusion – s 190B(5)(b)

[107] I am satisfied that the factual basis supports a link between the pre-sovereignty society in the application area, the apical ancestors and the current members of the claim group. I am also satisfied the factual basis supports the assertion that there exist traditional laws acknowledged and traditional customs observed by the claim group. This means s 190B(5)(b) is met.

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

[108] 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.[94] It also requires a sufficient factual basis to support an assertion that there has been continuity in the observance of traditional laws and customs going back to sovereignty or at least to European settlement.[95]

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

[109] As summarised above in relation to ss 190B(5)(a)–(b), the factual basis demonstrates an ongoing association with the application area; identifies a link between the pre-sovereignty society in the application area, the apical ancestors and the claim group; and supports the existence of traditional laws and customs. As noted above, settlement in the application area occurred in the 1870s–1880s. In my view, an inference of continuity can more easily be made when only a few generations separate the current claim group from those who were alive at the time of settlement.

[110] The additional material provides many examples of how the laws and customs have been passed down to current members of the claim group by their predecessors through teaching, oral transmission and common practice, including the rules of social organisation, inheritance of rights and responsibilities to land and particular methods of hunting, fishing and preparing bush medicines. I have extracted several such examples in my s 190B(5)(b) reasoning above. The material also demonstrates that the current claim group have passed down these laws and customs to the younger generations. For example, Claimant 2 describes how he was taught the correct method to fish and when to catch goanna.[96] He states that he takes his children and grandchildren out onto country and 'teach the kids the things that Granny taught me'.[97]

[111] In my view, there are sufficient examples in the information before me of how laws and customs have been observed by the claim group, substantially uninterrupted, since at least settlement in the application area.

Conclusion – s 190B(5)(c)

[112] 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

[94] *Gudjala 2009* [29].
[95] *Gudjala 2007* [82].
[96] Claimant 2 affidavit [14], [22].
[97] Ibid [26]–[27].

since at least the time of European settlement in the application area. The application demonstrates that claimants possess knowledge about how the previous generations acknowledged and observed their laws and customs in relation to the application area. 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

[113] 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

[114] 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.

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

(a) it requires some measure of the material available in support of the claim;[98]

(b) it appears to impose a more onerous test to be applied to the individual rights and interests claimed;[99] and

(c) the words 'prima facie' mean 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'.[100]

[116] 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.[101] In my reasons below I have grouped rights together where it is appropriate and convenient to do so.

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

1. For exclusive areas, a. Other than in relation to Water, the right to possession, occupation, use and enjoyment of the area to the exclusion of all others;

[117] I note the majority's comment in *Ward HC* that '[t]he expression "possession, occupation, use and enjoyment … to the exclusion of all others" is a composite expression directed to describing a particular measure of *control over access to land*'.[102]

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

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[98] *Doepel* [126].
[99] Ibid [132].
[100] Ibid [135].
[101] Section 186(1)(g).
[102] *Ward HC* [93], emphasis added.

> [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.[103]

[119] I also 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. The question of exclusivity depends upon the ability of the [native title holders] effectively to exclude from their country people not of their community. If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have … an exclusive right of possession, use and occupation.[104]

[120] The Full Court also held in *Griffiths FC* that demonstrating the existence of exclusive rights depends on the consideration of what the evidence discloses about the right's content under traditional laws and customs.[105] I therefore understand from the case law that I must consider whether the material demonstrates that the traditional laws and customs of the claim group permit them to exercise control over others' access to the land and waters of the application area.

[121] As discussed at s 190B(5)(b) above, the claim group's laws and customs mandate behaviours regarding access to country, such as avoiding particular areas, fulfilling obligations to look after certain places and talking to the spirits which inhabit the landscape.[106] Under the laws and customs, the claim group, like their predecessors, have inherited rights in the application area based on their relationship with the resident spiritual ancestors.[107] One claimant explains: 'when outsiders visit Wangkamahdla they should be invited. They should ask for permission beforehand. Outsiders will need to be rubbed down for their protection by a Wangkamahdla elder with authority to invite them onto country'.[108] Another claimant states: 'some people go wrong way and do things without asking … Those people will get sick because of the spirits'.[109] In my view, this information demonstrates how the claim group's traditional laws and customs permit them to exercise control over others' access to the application area – the claimants act as 'gatekeepers for the purpose of preventing harm' as described in *Griffiths FC*, and are able to make decisions about access to the land, as discussed in *Ward HC* and *Sampi*.

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

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[103] *Sampi* [1072].
[104] *Griffiths FC* [127].
[105] Ibid [71].
[106] Attachment F [46]–[47].
[107] Ibid [45].
[108] Ibid [49].
[109] Ibid.

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;

d. take Natural Resources from the land and waters of the area;

e. take and use the water of the area for personal, domestic and non-commercial communal purposes;

[123] As discussed above, there are examples in Attachment F and in the claimant's affidavits of claim group members hunting, fishing and gathering natural resources on the application area. Also in Attachment F, a claimant describes how she was taught by her mother the dreaming story for Lake Idamea in the application area, and how to catch fish there using nets made from bulrushes.[110] Another claimant describes how his father taught him to dig a soak for water when creeks are dry, and how to treat it so it can be used for drinking purposes.[111] A senior claimant describes how she continues to gather bush food on the application area with her sister and younger family members, and describes the use of pituri and its links to a particular dreaming story associated with the application area.[112]

[124] I consider these rights are prima facie established.

2. For non-exclusive areas:

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;

[125] Above in my consideration of s 190B(5), I have extracted examples of claim group members, past and present, accessing and travelling over the application area to hunt, fish, participate in ceremonies as well as for work purposes. In addition, in Attachment F, a claimant recalls camping with her grandmother and mother on Glenormiston 'for weeks at a time', while another claimant recalls making humpies on the application area for shelter, which he still does 'anytime'.[113]

[126] I consider these rights are prima facie established.

f. conduct ceremonies on the area;

j. hold meetings on the area.

[127] I have extracted above at s 190B(5)(b) information from claimants about their participation in ceremonies, including those restricted to particular genders. Attachment F provides further

[110] Ibid.
[111] Ibid.
[112] Ibid.
[113] Ibid.

examples, including that claim group members meet on the application area for corroborees and rain ceremonies.[114]

[128] I consider these rights are prima facie established.

g. bury native title holders within the area;

[129] In Attachment F, a claimant describes how it was important to return her grandmother's remains to country 'so her spirit could settle'.[115] Another claimant explains that she scattered her mother's ashes on the application area during the 1980s because 'that's where Mum wanted to go back to, her country'.[116]

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

h. maintain places of importance and areas of signification to the Native Title Holders under their traditional laws and customs and protect those places and areas from physical harm

[131] Attachment F provides information from a senior claimant who states she has responsibility to protect particular dreaming sites and other important places, and that her son likewise has this responsibility.[117] Another claimant states that her mother told her that she has specific responsibility to protect particular women's sites from harm.[118]

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

Teach on the area the physical and spiritual attributes of the area

[133] In my consideration of s 190B(5) above, I have extracted examples from the material of claimants being taught the traditional laws and customs from their predecessors whilst on the application area, which included learning about the area's physical and spiritual attributes. Attachment F provides further examples, including one of a claimant who was taught to cook goanna by his father and has in turn taught this method to his son.[119] Another claimant describes learning the dreaming stories from his grandmother and now takes his own children and grandchildren onto country to teach them the things his grandmother and other old people taught him.[120]

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

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

[135] Attachment F provides examples of how claim group members use fire on the application area, including for traditional practices such as 'smoking' a fishing line, and also for cooking fish, witchetty grubs, goanna and kangaroo using particular methods taught to them by their predecessors.[121]

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

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[114] Ibid.
[115] Ibid.
[116] Ibid.
[117] Ibid.
[118] Ibid.
[119] Ibid.
[120] Ibid.
[121] Ibid.

Conclusion

[137] I am satisfied that all of the claimed rights and interests are established on a prima facie basis, and that they can be considered 'native title rights and interests' in accordance with the definition in s 223. This is because I am satisfied that the claim group continue to observe traditional laws and customs, and the claimed rights and interests are held pursuant to those traditional laws and customs. This means that s 190B(6) is met.

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

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

(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or

(b) previously had and would reasonably have been expected currently to have such a connection but for things done by the Crown, a statutory authority of the Crown or any holder of or person acting on behalf of the holder of a lease, other than the creation of an interest in relation to land or waters.

[139] 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.[122]

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

[140] Based on the information in the application and additional material, I consider at least one claim group member has or had a traditional physical connection to the land and waters covered by the application. As summarised above at s 190B(5) and s 190B(6), there is information before me which describes current claimants visiting the application area and its important sites, and using its various natural resources such as pituri, fish and goanna.

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

Conclusion

[142] 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

[143] 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

[122] *Doepel* [18]; *Gudjala 2009* [84].

s 61A(1)	Claimant application not to be made covering areas of 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, paragraphs 1–2 state that areas covered by valid previous exclusive possession acts are excluded from the application.	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 subject to valid previous non-exclusive possession acts.	Met

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

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

Section	**Requirement**	**Information**	**Result**
s 190B(9)(a)	No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q states that the application does not make any claim to ownership of 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 the application does not make any claim to an 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 the application excludes all areas where native title has been extinguished.	Met

End of reasons

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Wangkamahdla People
NNTT No.	QC2016/001
Federal Court of Australia No.	QUD52/2016
Date of Registration Decision	3 June 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:

25 March 2020

Date application entered on Register:

3 June 2020

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

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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.