Registration Decision

National Native Title Tribunal

Application name	Patrick Malone & Ors v State of Queensland & Ors (**Clermont-Belyando**)
Name of applicant	Mr Patrick Malone; Ms Irene Simpson; Ms Lyndell Turbane; Ms Priscilla Gyemore; Mr Gregory Dunrobin; Ms Elizabeth McAvoy; Mr Norman Johnson Jnr; Ms Ida Bligh
Federal Court of Australia No.	QUD25/2019
NNTT No.	QC2004/006
Date of Decision	7 May 2020

Claim accepted for registration

I have decided the claim in the Clermont-Belyando 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

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 9) [2007] FCA 31 (***Harrington-Smith***)
Kanak v National Native Title Tribunal (1995) 61 FCR 103; [1995] FCA 1624 (***Kanak***)
Martin v Native Title Registrar [2001] FCA 16 (***Martin***)
Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422; [2002] HCA 58 (***Yorta Yorta***)
Noble v Mundraby [2005] FCAFC 212 (***Noble v Mundraby***)
Northern Territory of Australia v Doepel [2003] FCA 1384 (***Doepel***)
Strickland v Native Title Registrar [1999] FCA 1530 (***Strickland***)
Wakaman People 2 v Native Title Registrar and Authorised Delegate [2006] FCA 1198 (***Wakaman***)
Ward v 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***)

Background

[1] The claim in this application is made on behalf of the Clermont-Belyando native title claim group (**claim group**). It covers an area of approximately 30,000 square kilometres in Queensland in the vicinity of Clermont (**application area**).

[2] This claim was first made on 27 May 2004 and entered onto the Register of Native Title Claims (**Register**) on 5 July 2004. At that time it was described as the 'Wangan and Jagalingou People' claim. On 14 August 2014, an amended application was filed, which was accepted for registration on 24 October 2014. A further amended application was filed on 18 July 2016 to update the name of one of the applicant members, and the Register was updated pursuant to a decision under s 190A(6A).

[3] A further amended application was filed on 23 September 2019 which amended a number of Schedules including the description of the claim group in Schedule A. The Registrar of the Federal Court (**Court**) gave a copy of the application to the Native Title Registrar (**Registrar**) on 25 September 2019, pursuant to s 64(4). This referral triggered the Registrar's duty to consider the claim in the amended application.[3] I considered the application and formed the preliminary view that the claim may not satisfy the requirements of s 190B(4), as two alternative lists of non-exclusive rights appeared to be claimed in Schedule E. A senior officer of the National Native Title Tribunal (**Tribunal**) wrote to the applicant on 16 December 2019 and provided my preliminary view.

[3] Section 190A(1).

[4] Before I was able to make a decision with regard to the application filed on 23 September 2019, another further amended application was filed on 20 February 2020, from which one of the lists of non-exclusive rights was removed from Schedule E. The Court gave a copy of this application to the Registrar that same day, and this is the version of the application currently before me.

[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 (**the registration test**).

[6] The application area is affected by a s 29 future act notice. This means that, in accordance with s 190A(2)(f), I must finish considering the claim before the end of four months of the date of that notice, that is, before 8 May 2020.

[7] 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

[8] On 24 February 2020, a senior officer of the Tribunal wrote to the relevant minister of the State of Queensland (**State**) advising that any submissions on the application's ability to pass the registration test should be made by 28 February 2020.

[9] Also on 24 February 2020, the senior officer wrote to the representative of the applicant requesting confirmation by 28 February 2020 as to whether the applicant wished me to have regard to any or all of the material previously provided to the Registrar for the purpose of registration testing earlier versions of the claim, or to consider any further material.

[10] Also on 24 February 2020, the representative of the applicant advised that the applicant wished me to have regard to the following material (**additional material**):

(a) Affidavit of [name removed], filed 30 November 2016 (**Claimant 1 affidavit**);
(b) Affidavit of [name removed], filed 30 March 2017 (**Claimant 2 affidavit**);
(c) Affidavit of [name removed], filed 30 November 2016 (**Claimant 3 affidavit #1)**;
(d) Affidavit of [named removed], filed 31 March 2017 (**Claimant 3 affidavit #2**);
(e) Affidavit of [name removed], filed 30 November 2016 (**Claimant 4 affidavit**);
(f) Statement of Claim (Second Further Amended), filed 13 September 2019 (**Statement of Claim**); and
(g) Annotated affidavit of [named removed], filed 30 November 2016 (**Claimant 5 affidavit**).

[11] I considered the additional material and formed the preliminary view that it contained information relevant to the conditions of the registration test. Therefore, on 25 February 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 10 March 2020.

[4] Section 190A(6).

[12] On 26 February 2020, the representative of the State advised the senior officer that the State would not be making submissions.

[13] This concluded the procedural fairness process.

Information considered

[14] I have considered the information in the application and the additional material provided by the applicant, 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 24 February 2020 (**geospatial report**) and information available in the Tribunal's geospatial database in relation to locations mentioned in the application.[6]

[15] 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

[16] 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.

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

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

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

Section	Details	Information	Result
s 62(1)(a)	Affidavits in prescribed form	Section 62 affidavits filed with application	Met
s 62(2)(a)	Information about the boundaries of the area	Schedule B, Attachment B	Met
s 62(2)(b)	Map of external boundaries of the area	Attachment C	Met
s 62(2)(c)	Searches	Schedule D	Met

[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].

Section	Details	Information	Result
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 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

[19] 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.

[20] The geospatial report states and my own searches confirm there is one application which overlaps the current application, being the QUD2020/001 Clermont-Belyando Area Native Title Claim Group #2 application. This application therefore meets the requirements of s 190C(3)(a). However, there was no entry for the claim in that application on the Register when the current application was made, and so does not meet the definition of a 'previous application' under s 190C(3). This means that the issue of common claimants does not arise and so s 190C(3) is met.

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

[21] 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.

[22] Schedule R requires applicants to provide the details of the certification or authorisation of the claim. I understand from Schedule 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)?

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

(a) that the applicant be 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.

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

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

Does the application satisfy s 190C(5)?

[26] The s 62 affidavits from the members of the applicant (**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 9–16, the process by which the members of the applicant were authorised to make the application.

[27] 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?

[28] 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 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?

[29] In order to determine whether the applicant is authorised to make the application, it is necessary to identify the decision-making process utilised by the claim group. Section 251B identifies two distinct decision-making processes by which an applicant can be authorised: a process which is mandated by traditional laws and customs, or one which has been agreed to and adopted by the 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 authorisation'.[11] I have summarised the information before me which I consider is relevant to this condition below.

[10] *Strickland* [57].
[11] *Doepel* [78].

Decision-making process

[30] Attachment R describes two meetings of the claim group: Authorisation Meeting #1, held on 31 August 2019 which resulted in amendments to the claim group description; and Authorisation Meeting #2, held on 1 September 2019 to authorise the applicant to make this application, along with other amendments to the application.[12]

[31] 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 is described as follows:

(a) The claim group agreed to adopt a decision-making process of majority vote by show of hands by the members of the claim group present, aged 18 years and over and entitled to vote, for all decisions except for authorising the applicant;[14]

(b) For the decision to authorise the applicant, the claim group agreed to adopt a decision-making process whereby:

1. The descendants of each apical ancestor would meet and authorise one of its members according to their internal decision-making process, as one of the persons to jointly comprise the applicant (**sub-meetings**);

2. Attendees could only vote once and only in one of the sub-meetings of which they were a member;

3. The claim group would then ratify the eight nominated representatives as the applicant.[15]

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

Notice of authorisation meeting

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

(a) Public notice:

1. in the Courier Mail on 10 August 2019;

2. in the Koori Mail on 13 August 2019;

3. in the South Burnett Times on 13 August 2019; and

4. on QSNTS's website from 13 August 2019.[16]

(b) Personal notice:

1. by mail to 253 members of the claim group on 15 August 2019;

[12] Attachment R [1]–[3].
[13] Ibid [24].
[14] Ibid [25].
[15] Ibid [28].
[16] Ibid [5], [11]–[14].

2. by telephone to 135 members of the claim group in the week preceeding the authorisation meetings; and

3. by SMS to 217 members of the claim group in the week preceeding the authorisation meetings.

[34] According to Attachment R, the notified purpose of Authorisation Meeting #1 was to amend the claim group description and all the members of the claim group as it was then described were invited to participate.[17] The notified purpose of Authorisation Meeting #2 was to authorise the applicant and consider other amendments to the application, and the members of the claim group, as constituted as a result of the amendments proposed for Authorisation Meeting #1, were invited to participate.[18]

Conduct of authorisation meeting

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

(a) The meetings were well attended, with:

1. 214 people registering at Authorisation Meeting #1, with 13 of the 14 apical ancestors represented (there being no known descendants for one of the apical ancestors); and

2. 193 people registering at Authorisation Meeting #2, with all eight of the apical ancestors of the newly-described claim group represented.[19]

(b) QSNTS staff oversaw the registration process, a barrister acted as Chair and legal advice was provided before voting started.[20]

[36] With regard to the authorisation of the applicant at Authorisation Meeting #2, Attachment R states:

(a) attendees were registered according to their relevant apical ancestor and given a coloured wrist band;[21]

(b) after the decision-making process described above was agreed to by the attendees, the meeting adjourned to allow each of the eight sub-meetings to occur, and following those sub-meetings, the meeting reconvened and authorised the eight people nominated at the sub-meetings to be the applicant.[22]

[37] I note the s 62 affidavits contain further information about the sub-meetings, namely that each of the applicant members was nominated by their relevant family group by a majority vote.[23]

[17] Ibid [6], [19].
[18] Ibid [7], [20].
[19] Ibid [19]–[20].
[20] Ibid [21]–[23].
[21] Ibid [18].
[22] Ibid [29]–[31].
[23] Section 62 affidavits [15].

Consideration

[38] 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 Attachment R, I consider the notice of the meetings was sufficiently clear as to enable the details and purpose of the authorisation meetings to be understood. In my view, this is demonstrated by the level of attendance at the authorisation meetings, including by the descendants of the apical ancestors who were proposed to be removed from the claim group description at Authorisation Meeting #1.

[39] I consider that Attachment R and the s 62 affidavits provide sufficient detail of the conduct of the authorisation meetings. I note the decision to authorise the applicant differed to the other decisions made, in that it required the individual applicant members to first be authorised at one of the sub-meetings by their family group. This appears to be a similar decision-making process as was considered by the Full Court in *Noble v Mundraby.* In that case, 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]

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

[41] Further, 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? [25]

[42] 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'.[26] It follows that I am satisfied that the applicant is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the claim group.

Conclusion

[43] As I consider the requirements of s 190C(5) and 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.

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[24] *Noble v Mundraby* [18].
[25] *Ward v Northern Territory* [25]–[26].
[26] *Doepel* [78].

Section 190B: conditions about merits of the claim

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

[44] To meet s 190B(2), the Registrar must be satisfied the information and map contained in the application are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

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

(a) the external boundary of the area where native title rights and interests are claimed; and
(b) any areas within the external boundary over which no claim is made.[27]

Does the information about the external boundary meet this condition?

[46] Schedule B refers to Attachment B, which describes the application area by metes and bounds referring to the boundaries of the underlying Representative Aboriginal and Torres Strait Islander Bodies, native title determination applications, cadastral boundaries, topographical features and coordinate points to six decimal places referenced to the AGD84.[28]

[47] Schedule C refers to Attachment C, which contains a map prepared by the Tribunal's Geospatial Services titled 'Wangan & Jagalingou People'. The map is dated 22 December 2003 and includes:

(a) The application area depicted with a bold black outline;

(b) Adjacent native title determination applications colour coded and labelled;

(c) Topographic background;

(d) Scalebar, northpoint, coordinate grid and location diagram; and

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

[48] The assessment in the geospatial report is that the map and description are consistent and identify the application area with reasonable certainty. I have considered the map and description and I agree with that assessment. In my view, the inclusion on the map of the claim group's previous name, 'Wangan & Jagalingou People', does not affect the application's ability to meet this condition.

Does the information about excluded areas meet this condition?

[49] Schedule B states that the application does not cover areas where native title has been extinguished or areas which are subject to valid previous exclusive possession acts and previous non-exclusive possession acts.

[27] *Doepel* [122].
[28] Australian Geocentric Datum 1984.

[50] 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'.[29] Following this reasoning, I am satisfied the areas affected by the general exclusion clauses in Schedule B can be ascertained at the appropriate time.

Conclusion

[51] 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

[52] To meet s 190B(3), the Registrar must be satisfied that the persons in the claim group are named in the application or are described sufficiently clearly so 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.[30]

[54] Schedule A states:

> The native title claim group comprises the descendants of one or more of the following people: [list of seven apical ancestors and one apical pair, some with reference to their alias names or immediate descendants].

[55] 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.

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

[56] 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).[31] I therefore consider that factual enquiries and genealogical research would enable to members of the claim group to be ascertained.

Conclusion

[57] 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.

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[29] *Strickland* [55].
[30] *Wakaman* [34].
[31] *WA v NTR* [67].

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

[58] 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.[32]

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

[59] From the description in paragraph 1 of Schedule E, I understand that exclusive possession is claimed in any areas covered by the application where there has been no extinguishment or where s 238 or ss 47–47B apply. I understand that a broad claim to exclusive possession such as this, does not offend s 190B(4).[33]

[60] From paragraph 2 of Schedule E, I understand that the 12 non-exclusive rights listed are claimed in areas where exclusive possession cannot be recognised. The non-exclusive rights form an exhaustive list, and in my view there is no inherent or explicit contradiction within the description.[34]

[61] Paragraph 3 of Schedule E qualifies that the claimed rights and interests are subject to the laws of the State and the Commonwealth and the traditional laws and customs of the claim group.

Conclusion

[62] 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

[63] 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.

[32] *Doepel* [16].
[33] *Strickland* [60].
[34] *Doepel* [123].

[64] 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'.[35]

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

[65] Schedule F refers to Attachment F/M, which for convenience I will refer to as 'Attachment F' in my reasons below. Schedule G lists six activities which the claim group undertake on the application area. The additional material provides more detailed information about the factual basis of the claim and so my reasons below will focus on the information in those documents.

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

[66] 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;[36]

(b) there is 'an association between the whole group and the area', although not 'all members must have such association at all times';[37] 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'.[38]

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

[67] Attachment F provides that in 1842, the Moreton Bay district, which included the application area, was opened for settlement and first contact between the claim group and Europeans occurred around this time.[39]

[68] The additional material provides:

(a) Before the assertion of sovereignty, the apical ancestors of the claim group held rights and interests in the application area under their traditional laws and customs;[40]

(b) The grandfather of Claimant 1 was born at Logan Downs station to apical ancestors [name removed] and [name removed];[41]

(c) Claimant 1's father was born in Clermont in 1915, where Claimant 1's paternal uncle and aunt were also born;[42]

(d) Claimant 1's father worked on the railway line around Emerald and Alpha;[43]

[35] *Doepel* [16]–[17]; *Gudjala 2008* [83], [92].
[36] *Gudjala 2007* [52].
[37] Ibid.
[38] *Martin* [26]; *Corunna* [39], [45].
[39] Attachment F [7].
[40] Statement of claim [17].
[41] Claimant 1 affidavit [6]–[8].
[42] Claimant 1 affidavit [4], [10].
[43] Claimant 1 affidavit [19].

(e) Apical ancestor [name removed] was born near Alpha and she met her husband, apical ancestor [name removed], at Logan Downs Station;[44]

(f) Claimant 3's grandfather was apical ancestor [named removed] who was born in Clermont and married there, and worked on Logan Downs Station, Dunrobin Station, Crogan Downs Station and Capella;[45]

(g) Claimant 3's father, who was born at Clermont, recalled people camping on the banks of Sandy Creek when he was a child, prior to his removal to Cherbourg in 1935;[46]

(h) Apical ancestor [name removed] lived at Alpha at a camp near the bridge, before he was removed to Cherbourg in 1914 with his wife, children and grandchildren. He was later buried in the Alpha area;[47]

(i) Claimant 5's grandfather, who was the grandson of apical ancestor [name removed], regularly took his children camping around Clermont and taught them about various places on country;[48]

(j) The female predecessors of the claim group gave birth under specific trees in the application area which would have their bark marked accordingly;[49]

(k) The male predecessors of the claim group met for ceremonies at bora rings in the application area;[50]

(l) The remains of predecessors of the claim group were placed in particular trees in the application area, which can be identified by scars on their bark.[51]

Association of the current claim group with the claim area

[69] With regard to the association of the current claim group, the additional material provides:

(a) Some of the descendants of [apical ancestor's name removed], including Claimant 4, returned from Cherbourg mission and elsewhere to live in the application area;[52]

(b) Claimant 4 was told the boundaries of his country by his grandmother in the 1970s, during visits to the area.[53]

(c) When he was a child, Claimant 5 was taken around Clermont, Wolfang, Peak Downs and Capella by his uncle and father, who taught him the relevant dreaming stories as well as hunting and tool-making skills;[54]

(d) There is a creation dreaming story connected to the water sources of the application area, including the Belyando River and Doongmabulla Springs, which has been handed down to the current members of the claim group by their predecessors;[55]

[44] Claimant 1 affidavit [22]–[23].
[45] Claimant 3 affidavit #1 [7]–[9], [50].
[46] Claimant 3 affidavit #1 [5], [10]–[13].
[47] Claimant 4 affidavit [3], [6], [10], [40].
[48] Claimant 5 affidavit [8], [17].
[49] Claimant 1 affidavit [76]–[80]; Claimant 2 affidavit [115]; Claimant 3 affidavit #2 [10]–[12].
[50] Claimant 1 affidavit [82].
[51] Claimant 3 affidavit #2 [13].
[52] Claimant 4 affidavit [24].
[53] Claimant 4 affidavit [83], [86].
[54] Claimant 5 affidavit [19], [57].

(e) The claim group's creation being is associated with bottle trees, which grow throughout the application area;[56]

(f) Claimants know the location of burial trees on the application area;[57]

(g) There are a number of women's sites in and around Alpha, and female claimants know the location of the birthing trees of their predecessors, which are considered to be sacred sites;[58]

(h) Male claimants know the locations of bora rings used by their predecessors for meetings and ceremonies;[59]

(i) Members of the claim group are associated with different parts of the application area through their totems, which they inherit from their forebears;[60]

(j) Claim group members collect ochre from a particular place in the application area;[61]

(k) Claimants today participate in cultural heritage work and conduct ceremonies on the application area.[62]

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

[70] 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.[63] 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.[64]

[71] From information in the Tribunal's geospatial database I can see that locations mentioned in the additional material are relevant to the application area, for example:

(a) Clermont and Wolfang lie in the north east of the application area;

(b) The Belyando River enters the application area in the north west and runs through the application area from north to south;

(c) Alpha lies in the south west of the application area;

(d) Emerald lies approximately 65 kilometres to the south;

(e) Logan Downs Station extended into the north east of the application area;

(f) Dunrobin Station extended into the west of the application area, around the location of what is now the township of Dunrobin;

(g) Capella lies approximately 20 kilometres south of the south eastern portion of the application area;

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[55] Claimant 1 affidavit [58]; Claimant 4 affidavit [97].
[56] Claimant 2 affidavit [113]; Claimant 4 affidavit [83].
[57] Claimant 3 affidavit #2 [15].
[58] Claimant 1 affidavit [28], [76]–[81].
[59] Claimant 4 affidavit [96].
[60] Claimant 1 affidavit [73]–[74].
[61] Claimant 1 affidavit [53].
[62] Claimant 1 affidavit [94], Claimant 4 affidavit [100].
[63] *Martin* [25].
[64] *Gudjala 2007* [40].

(h) Peak Downs extends into the most eastern part of the application area; and

(i) Doongmabulla Springs lies in the far north west of the application area.

[72] 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?

[73] Settlement in the application area is asserted to have occurred in the 1840s, much later than the acquisition of British sovereignty in 1788. Based on the birth dates of the claimants' grandparents, I can infer that their own parents and grandparents, who include the apical ancestors, were born before, or in the very early decades of settlement. In my view, the apical ancestors would have had a similar association with the application area as their forebears who were alive at the time of sovereignty. In making this retrospective inference I have considered the judicial guidance of Lindgren J on making such inferences in *Harrington-Smith*, and of French J in *Kanak* on construing the Native Title Act beneficially.[65]

[74] I note the information about predecessors working on the pastoral stations which covered the application area and their association with these stations, which in some cases has been reflected in their names, for example [name removed] and [name removed]. According to the claimants' affidavits, a number of their predecessors were born in the application area and endeavoured to return there once they were no longer confined to the Cherbourg mission. In my view, it appears that the forced removal of people from the application area did not permanently diminish their association with the area. For example, apical ancestor [name removed] was buried in the Alpha area where he had lived before he and his family were removed to Cherbourg. I consider [name removed]'s burial location demonstrates that he and his family had an ongoing association with that area. I also note the information about members of the intervening generations of the claim group regularly taking their children and grandchildren onto the application area for camping and to teach them traditional skills. Overall, I consider there are sufficient examples provided in the additional material to show that the predecessors of the claim group had an association with the application area both at sovereignty and since that time.

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

[75] I consider the factual basis is sufficient to support the assertion that the claim group currently has an association with the application area. In forming this view I have considered the information about the physical and spiritual connection to the application area which current claim group members describe. I note the information about the dreaming stories which traverse the application area through various waterways, and the spiritual significance of bottle trees. The claimants depose that these stories have been passed down to them from their predecessors, and in my view, this information demonstrates an ongoing spiritual association with the application area. I also note the information about current claimants living in or visiting the application area regularly, their participation in ceremonies and cultural

[65] *Harrington-Smith* [294]–[296]; *Kanak* [73].

heritage work, and their knowledge of the location of the sacred trees used by their predecessors for different purposes.

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

[76] 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.[66] It is not a requirement that every member of the claim group have an association with the entire application area at all times.

[77] 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. I note the references to the pastoral stations which historically overlapped the application area and to the townships which now reflect the areas of those pastoral stations, such as Dunrobin. From the Tribunal's geospatial database I can see that the locations mentioned in the additional material are spread across the application area and extend beyond it in all directions. I am therefore satisfied the factual basis is sufficient to support an association with the whole area claimed.

Conclusion - s 190B(5)(a)

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

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

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

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

> [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*.

[66] *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.[67]

[81] 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.[68]

[82] 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.[69]

[83] 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)

[84] Attachment F asserts that the body of laws and customs acknowledged and observed by the claim group have been passed down through the generations by word of mouth and common practice, and has its origins in the normative rules which existed prior to sovereignty.[70]

[85] Attachment F further asserts that the laws and customs of the claim group give rise to communally held rights and interests in the application area, principally through patrilineal descent.[71]

[86] The additional material provides:

(a) The apical ancestors taught the claim group's laws and customs to their immediate descendants, which has in turn been passed down through the generations to the current claimants;[72]

[67] *Yorta Yorta* [46]–[47], emphasis added.
[68] *Warrie* [105], [107], emphasis added.
[69] *Gudjala 2009* [40].
[70] Attachment F [13(1)–(2)].
[71] Ibid [8(2)].
[72] Claimant 1 affidavit, [9]

(b) The claim group members were taught that their predecessors traded animals, tools and wives with neighbouring groups, including the 'mountain people' who in turn traded with people from more distant areas;[73]

(c) The predecessors of the claim group followed a kinship system which underpinned the society's social rules and prescribed particular relationships, which continue to be enforced by the claim group. For example, Claimant 4 was told by his elders 'which girls I could and couldn't go with';[74]

(d) Apical ancestors [name removed] and [name removed] were from different 'skin groups' and different parts of the application area, and so their marriage demonstrates the 'correct way to marry', which the claim group continues to follow;[75]

(e) Apical ancestor [name removed] came from Alpha and married a woman from a neighbouring group; their son was likewise married in accordance with the group's laws and customs;[76]

(f) The kinship system is linked to the totemic relationships which individuals and families have with particular parts of the application area, which in turn gives rise to rights and interests in that area; today, these relationships dictate which people can do cultural heritage work in particular areas;[77]

(g) Access to particular locations and sacred trees in the application area are prescribed by gender and the presence of spirits, and the rules and spiritual consequences of improper access were taught to the claim group members by their predecessors;[78]

(h) Claimants were taught about the location of ochre in the application area from their predecessors and continue to use it in corroborees and smoking ceremonies at funerals;[79]

(i) The totemic relationships prescribe the killing of particular animals by particular people, for example, the people who are totemites for the emu are prohibited from harming or eating them;[80]

(j) Rules about how funerals are arranged and proceed were observed by the predecessors of the claim group, including performing the dance of the deceased person's totem and placing their bones in particular trees. Today, claimants continue to organise funerals based on the rules of the kinship system and observe some of the same customs, including those recorded historically by Tennant Kelly;[81]

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[73] Claimant 1 affidavit [85]–[87].
[74] Claimant 1 affidavit [14], [29]–[30], [37]–[38]; Claimant 3 affidavit #1 [17]–[19]; Claimant 3 affidavit #2 [7]–[8]; Claimant 4 affidavit [17], [30]; Claimant 5 affidavit [29]–[36].
[75] Claimant 1 affidavit [38]–[43].
[76] Claimant 4 affidavit [44], [86].
[77] Claimant 1 affidavit [23]–[24]; Claimant 2 affidavit [93]; Claimant 3 affidavit #1 [42]; Claimant 3 affidavit #2 [59]; Claimant 5 affidavit [38]–[41], [46].
[78] Claimant 1 affidavit [48], [58]–[59], [63]–[64], [82]; Claimant 3 affidavit #1 [22], [41], [51]; Claimant 3 affidavit #2 [17]; Claimant 4 affidavit [87], [101].
[79] Claimant 1 affidavit [50], [53]–[57].
[80] Claimant 1 affidavit [67]–[68], [70]; Claimant 4 affidavit [55]–[56].
[81] Claimant 2 affidavit [116]–[118]; Claimant 4 affidavit [106].

(k) Claimants were taught rules pertaining to the use of resources in the application area and the associated dreaming stories, from their predecessors, including a prohibition on taking things from other people's country and rules for the distribution of catches such as freshwater turtle;[82]

(l) Claimants learnt hunting and gathering skills from their predecessors on the application area, concurrent with the passing down of knowledge about particular families' connections to particular areas and the relevant dreaming stories;[83]

(m) As children, male claimants learnt to make and throw boomerangs by watching the old men harvest wood from an appropriate tree, make them over the fire and then hold throwing competitions;[84]

(n) Claimants have taught their children and grandchildren the laws and customs of their predecessors, including the prohibitions on accessing particular places and the marriage rules, as well as the traditional dances, ceremonies, hunting and fishing skills and dreaming stories of the application area.[85]

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?

[87] There is ample information in the application and additional information about the apical ancestors, including the location of their birth, marriages, work history and children. Attachment F and the additional material describes some of the laws and customs of the society into which the apical ancestors were born, including the operation of the kinship system and the regional trade network. In my view it is reasonable to infer that those same laws and customs existed prior to sovereignty and were taught to the apical ancestors by their predecessors in much the same way as they in turn taught them to the subsequent generations. I therefore consider there is a link between the apical ancestors and the society of people who lived in and around the application area prior to European settlement. The additional material describes the current claim group as the people who have inherited rights in the application area, and have been taught the laws and customs by their predecessors. In my view this information sufficiently demonstrates a 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'?

[88] 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. Settlement of the application area occurred relatively recently and the great grandchildren of some of the apical ancestors are now senior claim group members. These claimants describe how they were taught the laws and customs from their predecessors, including how rights to land are

[82] Claimant 2 affidavit [105]–[107]; Claimant 3 affidavit #1 [60].
[83] Claimant 4 affidavit [14]; Claimant 5 affidavit [17], [19], [25]–[26], [57].
[84] Claimant 4 affidavit [70]–[73].
[85] Claimant 1 affidavit [51], [91]–[92]; Claimant 3 affidavit #1 [66] Claimant 4 affidavit [30], [52], [80], [93].

acquired, the kinship system, and the rules of normative conduct in relation to locations in the application area.

[89] 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.[86] 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. The belief in the creation being which inhabits the waters of the application area, and the observation of rules to manage spiritual misfortune through avoidance of particular places, are salient examples. There are also many examples provided of claimants learning from their predecessors the rules of hunting, fishing and accessing resources in particular ways, and taking their children onto the application area and teaching them these practices. 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'.

Conclusion – s 190B(5)(b)

[90] 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)?

[91] Meeting the requirements of this condition relies on whether there is a sufficient factual basis to support the assertion at s 190B(5)(b), that there exist traditional laws and customs which give rise to the claimed native title rights and interests.[87] 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.[88]

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

[92] As summarised above in relation to ss 190B(5)(a)–(b), the factual basis demonstrates an ongoing association with the application area, identifies 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.

[93] As noted above, the current claim group includes the great grandchildren of some of the apical ancestors. 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.

[94] The additional material provides examples of how the laws and customs have been passed down to current members of the claim group by their predecessors through oral transmission

[86] *Yorta Yorta* [46]–[47].
[87] *Gudjala 2009* [29].
[88] *Gudjala 2007* [82].

and common practice. The continuing and strong observance of the kinship system and the associated totemic relationships which the claim group has maintained is an example which I consider is particularly relevant to s 190B(5)(c), given the period of forced removal from country. The knowledge that claimants hold about significant sites and sacred trees in the application area and the mythological stories about such places, which they have learned from their predecessors, also supports the continued observance of the traditional laws and customs.

[95] 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)

[96] I am satisfied the factual basis is sufficient to support the assertion that the claim group have continued to hold their native title rights in accordance with traditional laws and customs since 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

[97] 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

[98] 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.

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

(a) it requires some measure of the material available in support of the claim;[89]

(b) it appears to impose a more onerous test to be applied to the individual rights and interests claimed;[90] and

(c) the words 'prima facie' mean 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'.[91]

[100] 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

[89] *Doepel* [126].
[90] Ibid [132].
[91] Ibid [135].

each individual right and interest, noting that as long as some rights can be prima facie established, the requirements of s 190B(6) will be met. Only those rights and interests I consider can be established prima facie will be entered on the Register.[92] 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. Over areas where a claim to exclusive possession can be recognised… the claim group claim the right to possess, occupy, use and enjoy the lands and waters of the claim area to the exclusion of all others

[101] 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*'.[93]

[102] 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.[94]

[103] The Full Court 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.[95] I therefore understand 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.

[104] As discussed above at s 190B(5), spiritual beliefs about creative beings who inhabit the landscape and set the rules which govern traditional life have been passed down to the current claimants by their predecessors. These beliefs give rise to normative behaviours to manage the risk of supernatural misfortune which may result from unauthorised entry to country. One claimant describes the operation of this right as follows:

> People these days will still speak to people who have connection to their country to get permission to go on their country. Out of respect I would make sure I had their permission before I went on their country. We expect the same respect in return. The repercussions if they don't get permission before going on to someone else's country are that bad spirits will follow you back. When you get permission to go on country you are told where not to go, such as culturally significant areas. If you stumbled upon a culturally significant area, like a place where you shouldn't go, then bad spirits could make you very sick.[96]

[92] Section 186(1)(g).
[93] *Ward HC* [93], emphasis added.
[94] *Griffiths FC* [127].
[95] Attachment F [71].
[96] Claimant 2 affidavit [109].

[105] From the information in the application and additional material, I understand that as the descendants of the apical ancestors and the holders of the relevant spiritual knowledge, the claim group members can speak to the relevant spirits and enable safe access to country. One claimant explains: '[w]hen I go out on country, I talk to the spirits… to say that I'm just there for a visit and to let the spirits know what we're doing. The elders in my family [taught me that]'.[97]

[106] Through observance of these protocols, I understand the claim group can exercise control over others' safe access to the application area. I therefore consider the claimants are the 'gatekeepers for the purpose of preventing harm', as described in *Griffiths FC* above, and that the content of the traditional laws and customs shows how a right of exclusive possession operates in relation to the application area.

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

2. Over areas where a claim to exclusive possession cannot be recognised, rights:

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

(b) To camp, and erect temporary shelters, on the claim area for that purpose;

(l) To live on the claim area.

[108] In my reasons above at s 190B(5)(b), I have referenced numerous examples of claimants, past and present, living at locations within the application area and travelling within the application area to camp and conduct other activities. I consider it is reasonable to infer that while camping, the claim group members erect temporary shelters. One applicant also recalls people living in a tin humpy near Clermont when he was young.[98]

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

(c) To hunt, fish and gather in the claim area for personal, domestic and non-commercial communal purposes;

(d) To take, use and share natural resources from the claim area for personal, domestic and non-commercial communal purposes;

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

[110] The claimants in their affidavits describe how they continue to hunt, fish and gather numerous resources in the application area in the manner they were taught by their predecessors, including kangaroo, jewfish, turtle and saltbush.[99] Claimants also describe the collection of water using paperbark, which they learned from their predecessors.[100]

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

[97] Claimant 4 affidavit [103].
[98] Ibid [25].
[99] Claimant 3 affidavit #1 [52]–[61].
[100] Claimant 5 affidavit [19].

(f) To hold meetings on the claim area;

(g) To conduct ceremonies on the claim area;

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

[112] As discussed above at s 190B(5)(b), the claimants were taught the physical and spiritual attributes of the application area by their predecessors, including during visits to the area. Claimants teach this knowledge to their descendants, including the spiritual consequences of failing to observe normative laws and customs.[101]

[113] Also discussed above are the occasions at which claimants would meet on the application area, including for funerals and other ceremonies which continue to be held in accordance with the claim group's laws and customs, for example the kinship rules which prescribe the organisation of funerals.[102]

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

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

[115] As discussed above at s 190B(5)(b), the laws and customs of the claim group give rise to rights and interests in the application area, and these rights are held communally by different families within the claim group in relation to different parts of the application area. One claimant states: 'I was taught by my parents and elders that we have rights and obligations to our country through our bloodline, our totems and our moeity'.[103] I understand that those obligations extend to the protection of particular places within the application area, and that today claimants exercise this right by participating in cultural heritage work.[104]

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

(j) To bury, and be buried by, native title claimants on the claim area;

[117] As discussed above at s 190B(5)(a), predecessors of the claim group, including some of the apical ancestors, are buried at locations in the application area known to the current claim group, including in burial trees which are considered to be sacred sites. As discussed at s 190B(5)(b), claimants know the burial rites practiced by their predecessors, which were recorded historically, and continue to practise some of these rites today.[105]

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

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

[119] As discussed above at s 190B(5)(b), claimants describe learning from their predecessors how to use fire in the production of boomerangs; and elsewhere they describe the use of fire to heat up stones for cooking.[106]

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[101] Claimant 3 affidavit #1 [62]–[66].
[102] Claimant 2 affidavit [118].
[103] Claimant 1 affidavit [24].
[104] Ibid [94].
[105] Claimant 4 affidavit [106].
[106] Claimant 4 affidavit [70]–[73]; Claimant 5 affidavit [19].

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

Conclusion

[121] 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

[122] 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.

[123] 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.[107]

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

[124] Schedule M, which asks applicants to outline the traditional physical connection between claim group members and the application area, refers to Attachment F. Based on the information in Attachment F and the further information found in the 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 significant sites, and using its various natural resources.

[125] 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

[126] 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.

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

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

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

Section	Requirement	Information	Result
s 61A(1)	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, paragraph (b) states that areas subject to 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 (c) states that exclusive possession 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

[128] 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 'None', so I understand the applicant does not claim any minerals, petroleum or gas wholly owned by the Crown.	Met
s 190B(9)(b)	Exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P states 'None', so I understand that no claim of exclusive possession is made in relation to any offshore place.	Met
s 190B(9)(c)	Native title rights and/or interests in the claim area have otherwise been extinguished	Schedule B paragraph (a) 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	Clermont Belyando
NNTT No.	QC2004/006
Federal Court of Australia No.	QUD25/2019
Date of Registration Decision	7 May 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:

20 February 2020

Date application entered on Register:

7 May 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.