

# Registration Decision

<b>Application name</b>	Florence Bell and Ors on behalf of the Wakka Wakka People #3 and State of Queensland & Ors ( <b>Wakka Wakka People #3</b> )
<b>Name of applicant</b>	Florence Bell, Michael Bond Snr, Gary Cobbo, Robert Lacey, Stephen Pickering, Carl Simpson, Cheryl Smith, James Chapman, Marissa Cobbo, Sidney Smith, Katrina Watson, Robert West, Edwin James MiMi, Irene Simpson, Shane Dynevor Jnr, Patricia Bond
<b>Federal Court of Australia No.</b>	QUD276/2019
<b>NNTT No.</b>	QC2016/003
<b>Date of Decision</b>	19 November 2021

## Claim accepted for registration

I have decided the claim in the amended Wakka Wakka People #3 application satisfies all the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).<sup>1</sup> Therefore the claim must be accepted for registration and will remain on the Register of Native Title Claims.

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Katy Woods<sup>2</sup>

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<sup>1</sup> All legislative references are to the *Native Title Act 1993* (Cth) (**Native Title Act**), unless stated otherwise.

<sup>2</sup> Delegate of the Native Title Registrar pursuant to ss 190–190D of the Native Title Act under an instrument of delegation dated 19 May 2021 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**)  
*Bell v Native Title Registrar* [2021] FCA 229 (**Bell**)  
*Burrabungba on behalf of the Wangan and Jagalingou People v State of Queensland* [2017] FCA 373 (**Burrabungba**)  
*Commonwealth v Yarmirr* [2001] HCA 56 (**Yarmirr**)  
*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* [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] 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 No 9**)  
*Kanak v National Native Title Tribunal* [1995] FCA 1624 (**Kanak**)  
*Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land & Water Conservation for the State of New South Wales* [2002] FCA 1517 (**Lawson**)  
*Martin v Native Title Registrar* [2001] FCA 16 (**Martin**)  
*McLennan v State of Queensland* [2019] FCA 1969 (**McLennan**)  
*Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (**Yorta Yorta**)  
*Noble v Mundraby* [2005] FCAFC 212 (**Noble**)  
*Northern Territory of Australia v Doepel* [2003] FCA 1384 (**Doepel**)  
*Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28 (**Project Blue Sky**)  
*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**)  
*Weribone on behalf of the Mandandanji People v State of Queensland* [2013] FCA 255 (**Weribone**)  
*Western Australia v Native Title Registrar* [1999] FCA 1591 (**WA v NTR**)

### Background

- [1] The claim in this application is made on behalf of the Wakka Wakka People #3 native title claim group (**claim group**). It covers approximately 9,393 square kilometres in south east Queensland, north of Brisbane and west of Gympie (**application area**).
- [2] On 21 March 2016, the Federal Court of Australia (**Federal Court**) made orders to combine two existing applications: QUD621/2011 Wakka Wakka People #3 (QC2011/010) and QUD93/2012 Wakka Wakka People #5 (QC2012/004). The combined application was filed on 29 April 2016. On 2 June 2016, the claim was accepted for registration by a delegate of the Native Title Registrar (**Registrar**) and entered onto the Register of Native Title Claims (**Register**). The combined application is referred to as 'Wakka Wakka People #3'.

- [3] On 26 July 2019, an amended Wakka Wakka People #3 application was filed. The amended application was given a new reference number by the Federal Court, QUD276/2019, but retained its NNTT reference number, QC2016/003. On 6 September 2019, in my capacity as delegate of the Registrar, I decided the amended application met all the conditions in ss 190B–190C of the Native Title Act (**registration test**) and thus the claim remained on the Register.
- [4] On 3 February 2020, a further amended application was filed and on 28 February 2020, I decided that the claim in that amended application passed all the conditions of the registration test and so the claim remained on the Register.
- [5] On 15 December 2020, another further amended application was filed and on 29 January 2021, I decided that the claim in that amended application passed all the conditions of the registration test and so the claim remained on the Register.
- [6] On 20 July 2021, another further amended application was filed which was provided to the Registrar on 22 July 2021, pursuant to s 64(4). This is the application currently before me and the referral from the Federal Court has triggered the Registrar’s duty to consider the claim in the amended application. Because of the history of the combination and amendments, this application is described on the Form 1 as the ‘Seventh Further Amended Claimant Application’. For convenience, I will refer to it as **the application** in my reasons below.
- [7] 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 include changes to the information about the authorisation of the applicant. As that type of amendment is not contemplated under s 190A(6A), I consider 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 of the registration test.
- [8] As discussed in my reasons below, I consider that the claim in the application satisfies all the conditions of the registration test and therefore it must be accepted for registration pursuant to s 190A(6). Attachment A contains the information that will be included in the Register.

## Procedural fairness

- [9] On 3 August 2021, 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 17 August 2021. The same day, the State’s representative advised that the State would not be making submissions.
- [10] Also on 3 August 2021, the senior officer wrote to the applicant’s representative advising that if the applicant wished me to consider any further information when making the registration decision, it should be provided by 17 August 2021.
- [11] I considered the application and noted that a copy of the notice for the meeting at which the applicant was authorised (**meeting notice**) had not been included, but the material stated that the notice was publicly available on the website of Queensland South Native Title Services (**QSNTS**).<sup>3</sup> I accessed and considered the meeting notice, and decided it contained information

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<sup>3</sup> Attachment R [17].

relevant to the conditions of the registration test. In considering the application, I formed the view it was appropriate to take into account the information the applicant had provided directly to the Registrar in relation to earlier versions of the application, specifically:

(a) 'Wakka Wakka Native Title Application QUD6032/1999 QC99/33 Anthropologist's Report', Dr Kinsley Palmer, March 2010 (**anthropologist's report**).

[12] On 2 November 2021, the senior officer wrote to the State's representative and advised that I would be taking the meeting notice and anthropologist's report into account and should the State wish to provide any information or submissions, it should do so by 9 November 2021.

[13] No submissions or further information was received from the State or the applicant, and so this concluded the procedural fairness process.

### Information considered

[14] In accordance with s 190A(3)(a), I have considered the information in the application. There is no information before me from searches of State, Territory or Commonwealth interest registers obtained by the Registrar under s 190A(3)(b). There is no information before me from the State which I must consider in accordance with s 190A(3)(c). Section 190A(3) also provides that the Registrar may have regard to such other information considered appropriate. Pursuant to that provision, I have considered:

- (a) the meeting notice;
- (b) the anthropologist's report;
- (c) the geospatial assessment and overlap analysis of the application area prepared by the Tribunal's Geospatial Services, dated 28 July 2021 (**geospatial report**); and
- (d) information in the Tribunal's geospatial database and registers.

### Section 190C: conditions about procedural and other matters

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

#### What is required to meet s 190C(2)?

[15] 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.<sup>4</sup> I have not addressed s 61(5) as I consider the matters covered by that condition are matters for the Federal Court.

### Consideration

[16] In my view, 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(2), Schedule A, s 62 affidavits filed with	Met

<sup>4</sup> *Doepel* [16], [35]–[39].

		application (s 62 affidavits)	
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Schedule A	Met

[17] I also consider the application contains the information specified in s 62:

Section	Details	Information	Result
s 62(1)(a)	Affidavits in prescribed form	s 62 affidavits	Met – see reasons below
s 62(1)(d)	Section 47 agreements	Schedule L(2)	Met – see reasons below
s 62(2)(a)	Information about the external 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
s 62(2)(i)	Conditions on authority	Schedule IA, Attachment IA	Met

### **Section 62(1)(a)**

[18] Section 62(1)(a) provides that applications must be accompanied by affidavits sworn by the applicant stating the matters mentioned in s 62(1A). The application is accompanied by affidavits from all of the applicant members and each affidavit contains the statements set out in s 62(1A). However, the heading on each of the affidavits refers to the neighbouring application of QUD277/2019 Wakka Wakka People #4, which is brought by the same claim group. In my view, this is not an issue of non-compliance which renders the application invalid.<sup>5</sup> I have formed this view by considering that the information within each of the affidavits refers to this application, as well as the Wakka Wakka People #4 application, and the fact that the Federal Court has accepted filing of these affidavits with this application. I therefore consider that s 62(1)(a) is met.

### **Section 62(1)(d)**

[19] Section 62(1)(d) states that, if the operation of s 47C has been agreed to in writing in accordance with s 47C(1)(b) or s 47C(5) in relation to all or part of the application area, then the application must be accompanied by a copy of the relevant agreement. As no s 47 agreement accompanies the application, I understand that no such agreement has been agreed to.

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<sup>5</sup> *Project Blue Sky* [93].

## Conclusion

[20] As the application contains the details and information specified in ss 61–2, I am satisfied s 190C(2) is met.

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

### What is required to meet s 190C(3)?

[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.

## Consideration

[22] The geospatial report states and my own searches confirm there are no applications which overlap this application, as required by s 190C(3)(a). This means that there are no ‘previous applications’ which I must consider and so the issue of common claimants does not arise.

## Conclusion

[23] I am satisfied that no member of the claim group was a member of the native title claim group for any previous application, and so s 190C(3) is met.

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

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

[24] To meet s 190C(4), the Registrar must be satisfied:

- (a) the application has been certified under Part 11 by each representative body that could certify the application in performing its functions under that Part; or
- (b) the requirements of s 190C(4AA) are met.

[25] Schedule R indicates that the application has not been certified and so I must consider the application against the requirements of s 190C(4AA).

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

[26] The requirements of s 190C(4AA) are:

- (a) That the applicant is a member of the claim group and is authorised to make the application by all the other persons in the claim group; and
- (b) Either that there are no conditions under s 251BA on the authority of the applicant that relate to the making of the application, or that any such conditions have been satisfied.

[27] Following s 190C(4AA) there is a Note in the Native Title Act which refers to the definition of 'authorise' in s 251B. That provision stipulates that all the persons in a claim group authorise a person to make an application and to deal with matters arising in relation to it, where one of the following processes of decision making is utilised:

- (a) a process which, under the traditional laws and customs of the persons in the claim group, must be complied with; or
- (b) where there is no traditional process, a process agreed to and adopted by the claim group.

[28] 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) is met unless the application:

- (a) includes a statement to the effect that the requirement in s 190C(4AA) has been met; and
- (b) briefly sets out the grounds on which the Registrar should consider that the requirement in s 190C(4AA) has been met (other than in relation to s 190C(4AA)(b)(i), in cases where there are no conditions on the applicant's authority).

[29] I therefore understand that in order to be satisfied that the requirements s 190C(4AA) are met, one of the decision making processes outlined in s 251B must be identified and complied with in relation to the authorisation of the applicant. I must also be satisfied that if there are any conditions on the applicant's authority, those conditions are met, and that the requirements of s 190C(5) are met. If all these requirements are met, then I can be satisfied that s 190C(4) is met.

## Consideration

[30] Section 190C(4AA) and related amendments to s 190C(5) came into force on 25 March 2021.<sup>6</sup> Other than the addition of the new limb in s 190C(4AA) requiring consideration of conditions placed on the applicant's authority, the wording of s 190C(4AA) replicates the wording of the previous s 190C(4)(b). That is, the requirement to be satisfied about the applicant's membership of the claim group and authorisation to make the application remain unchanged. I therefore consider it is appropriate to apply the judicial guidance previously given in relation to s 190C(4)(b) in my consideration of s 190C(4AA). Similarly, given s 190C(5) has been amended only to reflect the additional requirement pertaining to conditions on the applicant's authority, I consider the case law on s 190C(5) has continued application.

### ***Is s 190C(5) met?***

[31] Attachment R states:

- (a) each member of the applicant is a member of the claim group and is authorised to make the application by all other members of the claim group;<sup>7</sup> and
- (b) all of the conditions on the authority of the applicant have been satisfied.<sup>8</sup>

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<sup>6</sup> *Native Title Amendment Act 2021* (Cth), s 24(2).

<sup>7</sup> Attachment R [1].

<sup>8</sup> *Ibid* [3].

[32] Attachment R also describes the notice and conduct of two meetings of the claim group held at Gayndah on 6 June 2021, at the second of which the applicant was authorised by the other members of the claim group, using an agreed to and adopted decision making process of majority vote through show of hands, by those attendees over the age of 18.<sup>9</sup> I understand 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 at this condition.<sup>10</sup> I therefore consider that the information in Attachment R is sufficient to satisfy both limbs of s 190C(5).

### **Conclusion – s 190C(5)**

[33] I am satisfied the requirements of s 190C(5) are met.

### ***Is 190C(4AA) met?***

*Is the applicant a member of the claim group?*

[34] Section 190C(4AA) requires that all the persons comprising the applicant must be members of the claim group. As set out above, Attachment R contains such a statement. The s 62 affidavits from the applicant members each state that they believe all of the statements made in the application are true.<sup>11</sup> 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 claim group?*

[35] Section 190C(4AA) also requires that the applicant be authorised to make the application, by all the other members of the claim group. This requires me to identify the decision making process used by the claim group and how it was applied to authorise the applicant to make the application.<sup>12</sup> I will first set out the information before me which I consider relevant to these enquiries and then consider whether these requirements are met.

### **Decision making process**

[36] As outlined above, Attachment R provides that a decision making process of majority vote through show of hands was agreed to and adopted by the claim group. The application therefore identifies the type of decision making process provided for in s 251B(b).

[37] Where an agreed and adopted decision making process has been utilised, I must be satisfied that all members of the claim group were given reasonable opportunity to participate in the decision to authorise the applicant.<sup>13</sup> In deciding whether all members of the claim group have been given a reasonable opportunity to participate, I understand I must consider the notice and conduct of the authorisation meeting at which the applicant was authorised, the information about which I will summarise below.<sup>14</sup>

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<sup>9</sup> Ibid [8]–[53].

<sup>10</sup> *Strickland* [57].

<sup>11</sup> Section 62 affidavits [5].

<sup>12</sup> *Noble* [16].

<sup>13</sup> *Lawson* [25].

<sup>14</sup> *Burrugubba* [29]–[30].



### Notice of authorisation meeting

[38] Attachment R explains that two consecutive meetings of the Wakka Wakka claim group were scheduled for 6 June 2021, in relation to both this application and the adjacent application of QUD277/2019 Wakka Wakka People #4:

- (a) **Authorisation Meeting #1**, to authorise amendments to the claim group description; and
- (b) **Authorisation Meeting #2**, to authorise the applicant to make this amended application and resolve other matters.<sup>15</sup>

[39] Attachment R states that on 30 April 2021, QSNTS provided personal notice of the authorisation meetings by mail to the members of the claim group for whom it held addresses.<sup>16</sup> Attachment R also states that the authorisation meetings were publicly advertised in the *Koori Mail* and the *Burnett Today* during May 2021.<sup>17</sup> The meeting notice was published on the QSNTS website from 6 May 2021 and was displayed on the notice boards of Cherbourg Aboriginal Shire Council from 20 May 2021.<sup>18</sup> In the two weeks prior to the authorisation meetings, further personal notice was given to claim group members via telephone.<sup>19</sup> On 3 June 2021, QSNTS sent reminder text messages to the claim group members.<sup>20</sup>

[40] The meeting notice sets out the previous description of the claim group and explains that all members of the claim group, so described, were invited to attend Authorisation Meeting #1.<sup>21</sup> The meeting notice explains that the purpose of Authorisation Meeting #1 was to consider amending the claim group description. The proposed amended claim group description is included in the notice.<sup>22</sup> The notice then explains that, subject to the outcome of Authorisation Meeting #1, all members of the newly described claim group are invited to attend Authorisation Meeting #2.<sup>23</sup> The agenda of Authorisation Meeting #2 is set out in the notice, including the authorisation of the applicant.<sup>24</sup> The meeting notice includes the date, time and venue for the authorisation meetings, a map of the application area for both this application and Wakka Wakka People #4, and a freecall number.<sup>25</sup> Details of an Information Session scheduled for the day prior to the authorisation meetings are also included.<sup>26</sup>

### Conduct of authorisation meeting

[41] Attachment R provides that meeting participants were required to register upon arrival and were issued a purple wrist band.<sup>27</sup> 101 members of the claim group registered their attendance and Authorisation Meeting #1 commenced at 9:45am, chaired by a QSNTS staff

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<sup>15</sup> Attachment R [9]–[10].

<sup>16</sup> Ibid [13].

<sup>17</sup> Ibid [11].

<sup>18</sup> Ibid [14], [17].

<sup>19</sup> Ibid [15]–[16].

<sup>20</sup> Ibid [16].

<sup>21</sup> Wakka Wakka People – Public Notice – 6 June 2021, [www.qsnts.com.au](http://www.qsnts.com.au).

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Attachment R [21].

member.<sup>28</sup> The attendees passed a resolution confirming that there was no traditional decision making process that must be used, and agreed to adopt a decision making process of majority vote through show of hands of those present over the age of 18.<sup>29</sup> The attendees at Authorisation Meeting #1 agreed by majority to amend the claim group description as proposed in the meeting notice.<sup>30</sup>

[42] Authorisation Meeting #2 commenced at approximately 12.30pm and was also chaired by a QSNTS staff member.<sup>31</sup> 110 members of the claim group attended.<sup>32</sup> The attendees passed a resolution confirming that there was no traditional decision making process which must be used in making decisions regarding the application, and agreed to and adopted the same decision making process which had been utilised at Authorisation Meeting #1.<sup>33</sup> The attendees agreed by majority to authorise the applicant to make the application.<sup>34</sup>

### Consideration

[43] When considering whether all members of a claim group have authorised an applicant to make an application pursuant to s 251B(b), I understand that the reference to 'all' is not to be interpreted literally and does not mean that every single member of the claim group must authorise the applicant.<sup>35</sup> Rather, it is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision making process, which can be ascertained by information about a well-attended meeting which was appropriately advertised.<sup>36</sup>

[44] In my view, the notice of the authorisation meetings was sufficiently detailed, so as to enable the members of the claim group to judge for themselves whether to attend and vote for or against the proposals set out in the meeting notice.<sup>37</sup> The meeting notice set out the relevant details of the two authorisation meetings and included a map of the application area. The invitation to Authorisation Meeting #1 invited the existing members of the claim group and the invitation to Authorisation Meeting #2 invited members of the proposed claim group, both with reference to a list of apical ancestors. In my view, if a person claimed to hold native title rights in the application area but was not a descendant of one of the listed ancestors, there was otherwise sufficient information in the notice, such as the map, meeting details and contact information, to enable them to decide whether to make enquiries about attending the meetings.

[45] I also consider the notice of the authorisation meetings was sufficiently broad, as both personal and public notification methods were employed. The meeting notice was published in a local newspaper and a special interest Aboriginal and Torres Strait Islander newspaper several weeks prior to the authorisation meeting. It was also posted on the notice boards of Cherbourg Aboriginal Shire Council, which I understand from the map in Schedule C and the

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<sup>28</sup> Ibid [18]–[19], [23].

<sup>29</sup> Ibid [27]–[28].

<sup>30</sup> Ibid [32].

<sup>31</sup> Ibid [18], [37].

<sup>32</sup> Ibid [19].

<sup>33</sup> Ibid [41]–[42].

<sup>34</sup> Ibid [53].

<sup>35</sup> *Lawson* [25].

<sup>36</sup> Ibid [27].

<sup>37</sup> *Weribone* [40]–[41], followed in *Burrugubba* [30].

geospatial report, is the local government authority for the central part of the application area. Personal notice was given to the existing claim group members by letter, phone call and text message. In my view, the content, publication and distribution of the meeting notice was such that 'fair notice' was given of the business to be dealt with at the authorisation meetings, to all the members of the claim group.<sup>38</sup>

[46] With regard to the conduct of the authorisation meetings, I understand the substance of the following questions 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? <sup>39</sup>

[47] In my view, the material before me addresses the substance of those questions. As discussed above, Attachment R and the meeting notice show how and to whom notice was given. The meeting notice included the agenda for the two meetings. Attachment R describes the process by which attendees were registered and how the proceedings were controlled through the issuing of wrist bands. Information about the resolutions which were passed have been provided, along with information about who chaired the meetings. The material provides that the attendees authorised the applicant using the agreed to and adopted decision making process. In light of the information before me, I consider that the notice and conduct of the authorisation meetings was such that all members of the claim group were afforded a reasonable opportunity to participate in the decision to authorise the applicant.<sup>40</sup> I therefore consider that the applicant has been authorised to make the application, by all the other members of the claim group.

*Have the conditions on the authority of the applicant been satisfied?*

[48] Attachment R provides that the attendees at Authorisation Meeting #2 resolved to impose the conditions on the authority of the applicant set out in Attachment IA, using the agreed to and adopted decision making process.<sup>41</sup> In relation to the imposition of conditions on the authority of an applicant, s 251BA(b) permits the use of an agreed to and adopted decision making process, where there is no decision making process mandated under a claim group's traditional laws and customs. Attachment R states that the members of the applicant were aware of and understood the terms and conditions of their appointment, and continue to abide by those terms and conditions.<sup>42</sup> In their s 62 affidavits, each member of the applicant deposes that they are subject to, and abide by, the conditions placed on their authority under s 251BA.<sup>43</sup>

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<sup>38</sup> Ibid.

<sup>39</sup> *Ward v Northern Territory* [25]–[26].

<sup>40</sup> *Burragebba* [29]–[30].

<sup>41</sup> Attachment R [53].

<sup>42</sup> Ibid [55]–[56].

<sup>43</sup> Section 62 affidavits [8]–[10].

[49] In light of the information before me, and in the absence of any information to the contrary, I consider the conditions on the applicant's authority which relate to the making of the application have been satisfied.

### **Conclusion – s 190C(4AA)**

[50] I am satisfied that the applicant members are members of the claim group and are authorised to make the application by all the other members of the claim group, using an agreed to and adopted decision making process pursuant to s 251B(b). I also consider that the conditions imposed under s 251BA on the authority of the applicant have been satisfied. This means the requirements of s 190C(4AA) are met.

### **Conclusion**

[51] As the requirements of s 190C(5) and s 190C(4AA) are met, I am satisfied that s 190C(4)(b) is met.

### **Section 190B: conditions about merits of the claim**

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

#### **What is required to meet s 190B(2)?**

[52] 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. I understand the questions for this condition are whether:

- (a) the information and map provide certainty about the external boundary of the application area; and
- (b) the information enables identification of any areas within the external boundary over which no claim is made.<sup>44</sup>

### **Consideration**

#### ***Does the information and map of the external boundary meet this condition?***

[53] Attachment B contains a written description of the external boundary, dated 22 January 2016. The external boundary is described with reference to a commencement point on the Boyne River, the Auburn River, various local government areas, and longitude and latitude geographical coordinate points. The notes to the description provide that the geographical coordinate points are referenced to the Geocentric Datum of Australia 1994 (**GDA94**).

[54] Attachment C contains a map titled 'QUD621/2011 Wakka Wakka People #3 (Combined)', dated 12 January 2016. The map shows the external boundary of the application area with a blue outline and the 'Commencement Point' is marked with a bright pink star. Geographical features are labelled, including the Boyne River, and the notes to the map state that the coordinate points are referenced to GDA94.

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<sup>44</sup> Section 62(2)(a)–(b); *Doepel* [122].

[55] The assessment in the geospatial report is that the map and description are consistent and identify the application area with reasonable certainty, notwithstanding the inclusion of the previous Federal Court reference number for the application. I have considered the map and written description and in my view they provide certainty about the external boundary of the application area. I do not consider that the inclusion of the previous Federal Court reference number affects the ability to ascertain the external boundary.

***Does the information about excluded areas meet this condition?***

[56] Schedule B describes the excluded areas from the application in general terms, including areas covered by freehold estates, public works and areas where native title rights have been extinguished. With regard to general exclusion clauses of this nature, *Strickland* provides that it is unrealistic to expect a concluded definition of the areas subject to these provisions to be given in the application, as their applicability will require findings of fact and law to be made as part of the hearing of the application.<sup>45</sup> Following this guidance, I am satisfied the areas affected by the general exclusion clauses in Schedule B can be ascertained at the appropriate time.

[57] Attachment B states that the application area does not include any land and waters subject to:

- (a) QUD311/2011 Wulli Wulli and Wakka Wakka Peoples, accepted for registration 3 October 2014; and
- (b) QUD280/2013 Kabi Kabi First Nation, as accepted for registration 7 August 2013.

[58] In my view, the specific exclusions are clear from the information in Attachment B.

## Conclusion

[59] As I consider that the information and map provide certainty about the external boundary of the application area; and the information enables identification of any areas within the external boundary over which no claim is made, I am satisfied that s 190B(2) is met.

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

### What is required to meet s 190B(3)?

[60] 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.

[61] Schedule A states:

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

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<sup>45</sup> *Strickland* [55].

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

[62] It follows from this description that s 190B(3)(b) is applicable. *Wakaman* provides that where a description is used, the task is limited to making an assessment of the sufficiency of the description for the purpose of facilitating the identification of any person as part of the group.<sup>46</sup> I understand that my consideration of this condition is confined to information found in the application.<sup>47</sup>

## Consideration

[63] *WA v NTR* provides that describing a claim group with reference to descent from named ancestors satisfies the requirements of s 190B(3)(b).<sup>48</sup> I consider the list of ancestors in the second paragraph of the description provides a clear objective starting point from which to commence an enquiry into whether any particular person is a member of the claim group. In my view, factual enquiries and genealogical research would enable the descendants of the listed apical ancestors to be ascertained using the description in Schedule A.

[64] *Aplin* provides that self-identification can be ascertained either by assertion or by virtue of the way in which an individual conducts themselves.<sup>49</sup> I also note the reference to the claim group's traditional laws and customs in the description, and I understand that, as to substantive membership matters, a claim group must act in accordance with their traditional laws and customs.<sup>50</sup> I therefore consider, that while the opening paragraph introduces a subjective element to the description, enquiries to the individual in question and the other members of the claim group would enable the members of the claim group to be ascertained.

## Conclusion

[65] 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

### What is required to meet s 190B(4)?

[66] To meet s 190B(4), the Registrar must be satisfied the description contained in the application is sufficient to allow the claimed native title rights and interests to be identified. I have not considered whether the rights and interests claimed can be considered 'native title rights and interests' in accordance with s 223 as I consider that is part of the task at s 190B(6), where I must decide whether each of the claimed rights is established as a native title right on a prima facie basis. My consideration of this condition is confined to information found in the application.<sup>51</sup>

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<sup>46</sup> *Wakaman* [34].

<sup>47</sup> *Doepel* [16].

<sup>48</sup> *WA v NTR* [67].

<sup>49</sup> *Aplin* [226].

<sup>50</sup> *Ibid* [256].

<sup>51</sup> *Doepel* [16].

## Consideration

- [67] 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. From the description in paragraph 1(b) of Schedule E, I understand that within the areas where exclusive possession can be recognised, three non-exclusive rights are claimed in relation to the water in those areas, specifically the right to hunt, fish and gather, to take the natural resources of the water, and to take water for personal, domestic and non-commercial communal purposes. From paragraph 2 of Schedule E, I understand that the 12 listed non-exclusive rights are claimed in areas where exclusive possession cannot be recognised.
- [68] Schedule E also provides definitions of the terms 'natural resource' and 'water', and states that rights are subject to the laws of the State and the Commonwealth, and to the traditional laws and customs of the claim group.
- [69] In my view, Schedule E forms an exhaustive list of the claimed rights and interests, and the description and limitations on the rights claimed is clear and understandable.<sup>52</sup>

## Conclusion

- [70] I am satisfied the description is sufficient to understand and identify all the claimed rights and interests, which means s 190B(4) is met.

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

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

- [71] To meet s 190B(5), the Registrar must be satisfied there is sufficient factual basis to support the assertion that the claimed native title rights and interests exist. In particular, the factual basis must support the following assertions:
- (a) that the claim group have, and their predecessors had, an association with the area; and
  - (b) that there exist traditional laws acknowledged 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.
- [72] I understand my task is limited to assessing whether the asserted facts can support the existence of the claimed native title rights and interests, rather than determining whether there is evidence that proves directly or by inference the facts necessary to establish the claim.<sup>53</sup> I am not required by s 190B(5) to determine whether the asserted facts will or may be proved at a hearing.<sup>54</sup>

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<sup>52</sup> Ibid [16], [123].

<sup>53</sup> Ibid [16]–[17]; *Gudjala 2008* [83], [92].

<sup>54</sup> *Bell* [98].

## Consideration

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

[73] As discussed above, Schedule E describes the native title rights and interests which are claimed in the application area. Schedules F, G and M all refer to Attachment F&M, which I will refer to as **Attachment F** in my reasons below. The anthropologist's report also contains information which I consider supports the factual basis of the claim.

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

[74] As confirmed in *McLennan*, in order to satisfy the condition in s 190B(5)(a), it will be sufficient if the applicant demonstrates that:<sup>55</sup>

- (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 at least since European settlement;<sup>56</sup>
- (b) 'there is an association between the whole group and the area, although not all members must have such association at all times';<sup>57</sup> and
- (c) there is an association with the whole area claimed, rather than an association with only part of it or 'very broad statements', which have no 'geographical particularity'.<sup>58</sup>

### ***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*

[75] The anthropologist's report provides:

- (a) The application area was associated with the Wakka Wakka language group at the time of British sovereignty and when European settlement occurred in the region around the 1840s;<sup>59</sup>
- (b) Regional festivals in the Bunya Mountains, near the southern boundary of the application area have occurred since before sovereignty and were observed in the early years of settlement;<sup>60</sup>
- (c) Early observers described the spiritual significance of particular waterholes to the Wakka Wakka people in and around the application area;<sup>61</sup>
- (d) In the early 1900s, predecessors of the claim group were observed around the Cherbourg region, in the centre of the application area, collecting seeds and fruits and hunting porcupine and lizards;<sup>62</sup>

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<sup>55</sup> *McLennan* [28].

<sup>56</sup> *Gudjala 2007* [52].

<sup>57</sup> *Ibid.*

<sup>58</sup> *Martin* [26]; *Corunna* [39], [45].

<sup>59</sup> Anthropologist's report [41], [164], [168]–[169].

<sup>60</sup> *Ibid* [49], [107].

<sup>61</sup> *Ibid* [220]–[221].

<sup>62</sup> *Ibid* [824].



- (e) The Cherbourg mission, where many predecessors and current claim group members were removed to, was established on a pre-existing Wakka Wakka camping ground in 1901.<sup>63</sup>

[76] Attachment F and the anthropologist's report contain information about the apical ancestors of the claim group, for example:

- (a) Jenny Lind was born about 1837 at Mondure Station, in the central part of the application area, and was recorded as being associated with the Burnett River which forms part of the northern boundary;<sup>64</sup>
- (b) Minnie Bly, born in 1866, is associated with areas in the south east of the application area including Barambah;
- (c) Stockman and Aggie Bligh, both born in the 1860s, are associated with the Cherbourg area; and
- (d) MiMi, born in the 1840s, is associated with Gayndah in the north west of the application area.<sup>65</sup>

[77] The anthropologist's report also provides information about the intervening generations of the claim group, for example:

- (a) The sons of apical ancestor MiMi are remembered as being clever men, the youngest of whom died at Hawkwood station, in the far north west of the application area, in 1939;<sup>66</sup>
- (b) Princess Carlo, daughter of apical ancestors Jenny and David Carlo was born around 1870 in Eidsvold, in the Wakka Wakka People #4 application area to the north west, and was removed to Cherbourg mission in 1910 with her nine children, where she died in 1946;<sup>67</sup>
- (c) Tommy Dodd, the son of apical ancestors King Billy and Maria of Boondooma was born in 1870 and is associated with the Hawkwood and Rocky Springs stations to the north west of the application area, where he married and had children.<sup>68</sup>

[78] The current claimants, many of whom are the great-grandchildren of the apical ancestors, describe their predecessors' association with places in the application area, including, for example:

- (a) A waterhole on Auburn station, in the west of the application area, which one claimant was told by his father is associated with his ancestors;<sup>69</sup>
- (b) The burial site of apical ancestor Maggie Hart on Perlinga station to the north west;<sup>70</sup>
- (c) Hawkwood station, which one claimant describes as his grandmother's country;

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<sup>63</sup> Ibid [265].

<sup>64</sup> Anthropologist's report [701]–[706].

<sup>65</sup> Attachment F, Table 1; Anthropologist's report [784]–[785].

<sup>66</sup> Ibid [552].

<sup>67</sup> Ibid [621].

<sup>68</sup> Ibid [652]–[659].

<sup>69</sup> Ibid [553].

<sup>70</sup> Anthropologist's report [637].

- (d) Cherbourg, described by a claimant as ‘always Wakka Wakka for a long time’; and
- (e) Gayndah, Mingo Crossing and Blandy Mountains in the north west of the application area, which are described as location markers within ‘MiMi country’, within which the descendants of apical ancestor MiMi claim rights.<sup>71</sup>

*Association of the current claim group with the application area*

[79] Claimants describe the boundaries of Wakka Wakka country, as they were taught by their predecessors, as follows:

- (a) Mary River in the east;
- (b) The Auburn Range in the west;
- (c) Cooyar in the south;
- (d) Bunya Mountains in the south west; and
- (e) The Burnett River and Ban Ban Springs and in the north.<sup>72</sup>

[80] The anthropologist’s report also provides:

- (a) Claim group members have a spiritual association with certain sites and water sources in the application area which are linked to particular spiritual narratives passed down by their predecessors, including sites at Mundubbera and Gayndah, and water sources entering the application area from the north, including Barambah Creek and Ban Ban Springs;<sup>73</sup>
- (b) Claimants know the locations of particular traditional resources in the application area, such as ochre, which were taught to them by their predecessors;<sup>74</sup>
- (c) Claimants also describe the hunting and food preparation methods which they were taught by their predecessors and continue to practice on Wakka Wakka country, including a particular preparation of porcupine which is also reflected in the historical record;<sup>75</sup>
- (d) Current claim group members assert they are associated with particular places as a result of the association of their ancestors, including at locations on Mt Debateable and Mt Gayndah.<sup>76</sup> By way of further example, Maggie Hart’s descendants claim a strong spiritual connection to the Perlinga Station area and know the location of Maggie Hart’s gravesite there.<sup>77</sup>

[81] Attachment F provides that claimants participate in heritage surveys on the application area and consider this is their responsibility as the area’s owners, as negative spiritual

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<sup>71</sup> Ibid [302]–[314].

<sup>72</sup> Ibid [302]–[314].

<sup>73</sup> Ibid [492], Table 12.2; Appendix B.

<sup>74</sup> Ibid Appendix B.

<sup>75</sup> Ibid [795]–[824].

<sup>76</sup> Ibid [390], [392].

<sup>77</sup> Ibid [453], [482], [637].

consequences are believed to result from inappropriate access to country when such access is not mediated by the appropriate people.<sup>78</sup>

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

[82] 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.<sup>79</sup> I do not consider this application is of that nature. In my view, the information before me describes in sufficient detail the association of the claim group with the application area, both at the time of sovereignty and since that time. I have considered whether there is information sufficient to support the specific requirements of s 190B(5)(a) below.

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

[83] Using information available from the Tribunal's geospatial database, I can see that locations mentioned in the anthropologist's report are spread across and around the application area and the area covered by the Wakka Wakka People #4 application, which is adjacent to the north. I can see that the description of the extent of Wakka Wakka country provided in the anthropologist's report broadly accords with the external boundaries of the two Wakka Wakka People applications.

[84] I understand from the anthropologist's report that settlement in the application area occurred in the 1840s. Several of the apical ancestors are estimated to have been born before or in the very early years of settlement. The apical ancestors are recorded as being from different parts of Wakka Wakka country, including Eidsvold, Cherbourg, Gayndah and Hawkwood.<sup>80</sup> In my view, the apical ancestors who were born around the time of settlement likely had the same association with the application area as their own predecessors, who would have been alive at the time of sovereignty. I understand that it is appropriate to make this particular retrospective inference and to construe the Native Title Act beneficially.<sup>81</sup>

[85] I also consider there is sufficient information to show that the intervening generations of the claim group maintained an association with the application area. There is information in the anthropologist's report about members of the intervening generations living at various places in the application area, being removed to Cherbourg mission and working on the pastoral stations which were developed over and around the application area, including Mondure and Hawkwood. In my view, the information before me addresses the relationship between the predecessors of the claim group and the application area, both at the time of sovereignty and since that time.<sup>82</sup>

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

[86] From the anthropologist's report, I understand that the current members of the claim group continue to be present on the application area, to hunt and collect food and other resources

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<sup>78</sup> Attachment F [35]–[37].

<sup>79</sup> *Martin* [25].

<sup>80</sup> *Ibid* [783], Table 16.2.

<sup>81</sup> *Harrington-Smith No 9* [294]–[296]; *Kanak* [73].

<sup>82</sup> *Gudjala 2007* [40].

from locations in the application area, as they were taught by their predecessors. They also participate in heritage clearance surveys on the application area to ensure safe access to their country by others. The current claim group assert an association with the application area based on the association of their predecessors and were taught the boundaries of the areas associated with each apical ancestor (such as 'MiMi country', for example), as well as the external boundaries of Wakka Wakka country. In my view, there is sufficient information to support an association between the claim group and the application area currently.

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

[87] 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 with the application area as a whole.<sup>83</sup> It is not a requirement that every member of the claim group have an association with the entire application area at all times.

[88] I note the references, both historical and recent, to the communities and townships which are spread across the application area in all directions, including Murgon, Cherbourg, Ban Ban, Bunya, Gayndah and Eidsvold. There is information about the places of birth, death and marriage of various claim group members in and around the application area and descriptions of how the claim group members continue to use the application area for hunting and the collection of ochre. In my view, there is sufficient information to support a physical association between the claim group and the whole application area.

[89] I also note that there is information in the historical record about the spiritual association that the predecessors of the application area had with certain places in the application area, including various water sources. The current claimants describe having a spiritual association with these places, for example with Barambah Creek, which I can see in the geospatial database forms part of the northern boundary and extends south through the whole application area. In my view, such information supports a spiritual association between the claim group and the whole application area.

### ***Conclusion - s 190B(5)(a)***

[90] 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, had children 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)?***

[91] 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

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<sup>83</sup> *Corunna* [31].

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.

[92] In *Yorta Yorta*, the High Court of Australia (**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*;

[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.<sup>84</sup>

[93] *Warrie* 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.<sup>85</sup>

[94] *Gudjala 2009* 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.<sup>86</sup>

[95] 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)?***

[96] Attachment F and the anthropologist’s report provide the following information:

(a) Pre-sovereignty society

1. The pre-sovereignty society in the application area was comprised of people who spoke the Wakka Wakka language and who observed common laws and

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<sup>84</sup> *Yorta Yorta* [46]–[47], emphasis added.

<sup>85</sup> *Warrie* [105], [107], emphasis added.

<sup>86</sup> *Gudjala 2009* [40].

customs, including the observation of laws pertaining to rights over defined areas of land;<sup>87</sup>

2. The apical ancestors of the claim group were described by the early observers as belonging to the Wakka Wakka language group.<sup>88</sup>

(b) Rights and interests in land

1. Prior to sovereignty, rights to country were inherited through the principle of descent, and these rights included the right to enter and use all the resources of the land, as well as control its use by others;<sup>89</sup>
2. Claimants continue to observe the laws pertaining to inheritance of country and one claimant explains that being Wakka Wakka is determined by descent, stating ‘that’s my birth rights; traced back in the bloodline. That’s how you get to be Wakka Wakka’;<sup>90</sup>
3. Another claimant describes how distinct groups have authority over and can ‘speak for’ different areas of Wakka Wakka country, which are marked by indicative boundaries.<sup>91</sup>

(c) Kinship rules

1. The predecessors of the claim group observed particular rules of social organisation which included strict marriage rules;<sup>92</sup>
2. Claimants explain that today, marriage with those ‘close up’ is not permitted and that they ensure that the next generation understand the importance of this ‘very strong rule’;<sup>93</sup>
3. The predecessors recognised the decision making authority of senior people, based on their ritual experience and age;<sup>94</sup>
4. Current claimants explain that it is senior members of each family who have authority to make decisions.<sup>95</sup>

(d) Totem affiliation

1. From as early as 1897, various observers recorded the adherence of totem affiliation and associated food taboos by the predecessors of the claim group.<sup>96</sup> For example, Winterbotham’s informant’s totem was the bee and so he could give permission for others to take honey, although he could not eat it himself;<sup>97</sup>

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<sup>87</sup> Attachment F [2]–[4]; Anthropologist’s report [299].

<sup>88</sup> Anthropologist’s report [610]–[756].

<sup>89</sup> Ibid [199]–[201].

<sup>90</sup> Ibid [291].

<sup>91</sup> Ibid [289].

<sup>92</sup> Ibid [241]–[243].

<sup>93</sup> Ibid [581]–[585].

<sup>94</sup> Ibid [277].

<sup>95</sup> Ibid [594]–[596].

<sup>96</sup> Ibid [219], [262].

<sup>97</sup> Ibid [266].

2. A claim group member explains that the grave of her apical ancestor Maggie Hart has the scrub turkey and the crow engraved on the plaque, as they are the totems associated with Maggie Hart's family;<sup>98</sup>
3. Another claimant explains that there is a prohibition on eating one's totem, and '[i]f I hunted one I'd say I was sorry to him. If I don't do this I won't be sleeping properly either'.<sup>99</sup>

(e) Spiritual beliefs connected to country

1. Observers throughout the late 1800s and 1900s recorded spiritual beliefs about certain spirits which were associated with particular waterholes in and around the application area.<sup>100</sup> For example, in 1904, Cameron recorded beliefs about a spirit 'who lives in a spring near Ban Ban, [the people] go to the water and cry out and if then he shows his hand, they will not bathe or drink lest he should drag them in';<sup>101</sup>
2. A claimant describes that when she was growing up she was instructed by the old people to stay well away from particular areas for fear of becoming sick. One such place is known as 'nest of snake';<sup>102</sup>
3. Another claimant explains that when in country you should 'sing out' in the Wakka Wakka language, so as not to be tormented by the spirits;<sup>103</sup>
4. Another claimant describes how he was taught to avoid particular waterholes by his father and uncles, and he has taught all of his children and grandchildren the same avoidance rules.<sup>104</sup>

(f) Ceremonial practices

1. Initiation ceremonies and corroborees in and around the application area were held in the early decades of settlement and throughout the 1900s at particular bora grounds;<sup>105</sup>
2. The locations of bora grounds are known to claimants and are considered spiritually and culturally significant;<sup>106</sup>
3. Claim group members describe their participation in corroborees which they were taught by their predecessors and continue to practice today, and which they teach to their children;<sup>107</sup>
4. The anthropologist states that the practice of corroborees 'appears to have been unbroken since European observers made mention of them at the end of the 19<sup>th</sup> century'.<sup>108</sup>

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<sup>98</sup> Ibid [494].

<sup>99</sup> Ibid [496].

<sup>100</sup> Ibid [207], [214], [220].

<sup>101</sup> Ibid [209].

<sup>102</sup> Ibid [440].

<sup>103</sup> Ibid [452].

<sup>104</sup> Ibid [478].

<sup>105</sup> Ibid [226]–[229].

<sup>106</sup> Ibid [527].

<sup>107</sup> Ibid [528]–[533].

(g) Use and knowledge of resources

1. As discussed above, early observers recorded the predecessors of the claim group using the resources of the application area, including hunting porcupine, lizards and tortoises.<sup>109</sup> The extraction of witchetty grubs and honey was also recorded, as were rules and prohibitions which governed these and other resources;<sup>110</sup>
2. Current claimants describe how they were taught to hunt and gather food in the application area by their predecessors, and the associated rules, for example, the correct way to prepare porcupine and goanna;<sup>111</sup>
3. Claimants also describe the collection of witchetty grubs and their use in traditional bush medicine, which they were taught by their predecessors and continue to use today;<sup>112</sup>
4. The anthropologist concludes that the use of resources from the application area and knowledge about the medicinal application of these resources have been passed down through the generations of the claim group, since prior to sovereignty;<sup>113</sup>
5. Claimants continue to teach the younger generations about how to exploit the resources of the application area in accordance with their laws and customs, for example, one claimant explains that she takes her children out most weekends to hunt for wallaby and porcupine.<sup>114</sup>

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

*Does the factual basis support a link between the pre-sovereignty society, the predecessors and the claim group?*

[97] The material identifies a society that existed prior to British sovereignty in the application area and describes the claim group's predecessors' participation in that society through their observance of laws and customs such as the inheritance of rights to land by descent, kinship rules, spiritual beliefs and ceremonies. The material provides that the apical ancestors were alive around the time of settlement in the application area and I consider it is appropriate to infer they would have lived with predecessors who were alive when sovereignty occurred. I understand the current claim group members are descended from the apical ancestors and as such, have inherited rights and interests in the application area. 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 sovereignty.

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<sup>108</sup> Ibid [567].

<sup>109</sup> Ibid [824].

<sup>110</sup> Ibid.

<sup>111</sup> Ibid [797]–[798], [802].

<sup>112</sup> Ibid [803]–[804].

<sup>113</sup> Ibid [829].

<sup>114</sup> Ibid [799].



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

[98] As summarised above, the anthropologist's report provides descriptions of laws and customs observed in and around the application area around the time of settlement. The anthropologist's report also demonstrates how the laws and customs have been passed down to and observed by the successive generations of the claim group, with specific examples provided from the historical record and from current claim group members. For example, the information about how rights and interests in land were inherited by the predecessors reflects the current claimants' understanding that rights are gained through descent. The emphasis the current claim group members give to their totems and the kinship rules reflects the rules observed by the predecessors, such as the prohibition on eating one's totem. Similarly the belief in the spiritual beings which manifest in particular water sources, and the prescription to avoid those places, is reflected throughout the historical record and in the information from the current claimants. Overall, I consider the accounts from claimants about their totemic associations, the acquisition of rights to country through one's predecessors and rules relating to marriage and kinship, reflect those ascribed to the predecessors of the claim group by contemporary observers at the time of settlement and in the subsequent decades.

[99] In my view, there is sufficient information in the application about how the laws and customs were acknowledged and observed by the apical ancestors, the intervening generations and the current members of the claim group, to support the assertion that the laws and customs are 'traditional' in the *Yorta Yorta* sense.<sup>115</sup> This is because there are examples provided about the observation of the various laws and customs by successive generations of the claim group in the application area. In my view, there is also sufficient information about how the laws and customs have been passed down to the members of the current claim group by their predecessors, through teaching, oral transmission and common practice. For example, the claimants describe how they were taught by their predecessors to hunt and prepare animals such as porcupine, and to collect witchetty grubs and use them for medicinal purposes, and that they are teaching these skills to their descendants. In my view the material supports an inference 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, thus supporting the assertion that the laws and customs are 'traditional'.

### ***Conclusion – s 190B(5)(b)***

[100] 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)?***

[101] 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

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<sup>115</sup> *Yorta Yorta* [46]–[47].

give rise to the claimed native title rights and interests.<sup>116</sup> 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.<sup>117</sup>

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

[102] As set out above at ss 190B(5)(a)–(b), I am satisfied 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. Given the relatively recent date of settlement in the application area, it appears that only a few generations separate the senior members of the claim group from their apical ancestors. In my view, these circumstances means that an inference of continuity can more easily be made. The continuing observance of the rules relating to descent-based rights to land, kinship and totemic affiliations provide examples which I consider are relevant to s 190B(5)(c). In my view, there is sufficient information in the material to show how laws and customs have been continuously observed by the claim group, since at least the time of European settlement in the application area.

***Conclusion – s 190B(5)(c)***

[103] I am satisfied the factual basis is sufficient to support an assertion of continuity in the observance of traditional laws and customs, which means s 190B(5)(c) is met.

**Conclusion**

[104] 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**

**What is required to meet s 190B(6)?**

[105] 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 claim group.

[106] I understand the condition of s 190B(6) imposes a more onerous test to be applied to the individual rights and interests claimed.<sup>118</sup> I also understand that the words ‘prima facie’ mean that if a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis.<sup>119</sup> It is therefore my task to consider whether there is 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

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<sup>116</sup> *Gudjala 2009* [29].

<sup>117</sup> *Gudjala 2007* [82].

<sup>118</sup> *Doepel* [126].

<sup>119</sup> *Ibid* [135].

established prima facie will be entered on the Register.<sup>120</sup> In my consideration below I have grouped rights together where it is appropriate and convenient to do so.

## Consideration

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

1. *Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s238, ss47, 47A or 47B apply):*

*(a) other than in relation to Water, the right to possession, occupation, use and enjoyment of the area to the exclusion of all others;*

[107] *Yarmirr* provides that a claimed right of exclusive possession is not required to be supported by ‘some enforceable means of excluding from its enjoyment those who are not its holders’ and that an inquiry into how a right is observed ‘seems directed more to identifying practices that are regarded as socially acceptable’.<sup>121</sup> *Griffiths FC* held that demonstrating the existence of exclusive rights depends on the consideration of what the evidence discloses about the right’s content under the traditional laws and customs, and that the relationship to country is essentially a ‘spiritual affair’.<sup>122</sup> I therefore understand that I must consider what the material discloses about how a right of exclusive possession operates in relation to the application area, pursuant to the claim group’s traditional laws and customs.

[108] According to the anthropologist’s report, the claim group continue to observe their ancestral landholding systems where ‘[r]ights to country were exercised by members of country groups recruited by reference to descent’.<sup>123</sup> These rights are described as ‘exercisable and defensible’.<sup>124</sup> Further, those ‘who were not members of the relevant country group were required to seek permission prior to entering, gathering or hunting on the country of the group’ and ‘[t]respass was considered a breach of customary law and sanctions applied to those who transgressed that law’.<sup>125</sup> The anthropologist’s report provides that ‘country-specific knowledge’ is a ‘determining factor’ in one’s ability to assert rights to Wakka Wakka country, and to have the authority to ‘speak for country’ is a function of the possession of the relevant knowledge.<sup>126</sup>

[109] The anthropologist’s report also describes the spiritual aspect of this right, explaining that outsiders seek permission to enter country in part to ‘gain some certainty in an otherwise uncertain spiritual environment’.<sup>127</sup> Claimants describe the importance of seeking permission to enter country, and of the consequences that can result from trespass and taking things from country without permission, including sickness and ‘trouble’.<sup>128</sup>

[110] From the information in the anthropologist’s report, I understand that through observance of certain protocols, the claim group can access the application area and avoid negative spiritual

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<sup>120</sup> Section 186(1)(g).

<sup>121</sup> *Yarmirr* [16].

<sup>122</sup> *Griffiths FC* [127].

<sup>123</sup> Anthropologist’s report [199].

<sup>124</sup> *Ibid* [200].

<sup>125</sup> *Ibid*.

<sup>126</sup> *Ibid* [406]–[411].

<sup>127</sup> *Ibid* [463].

<sup>128</sup> *Ibid* [444]–[449].

consequences. It is the members of the claim group, who have inherited rights in the application area pursuant to their traditional laws and customs, who are able to safely mediate access to their country. The claimants are therefore the 'gatekeepers for the purpose of preventing harm'.<sup>129</sup> In my view, the material explains how a right of exclusive possession operates in relation to the application area, pursuant to the claim group's traditional laws and customs. I therefore consider this right is prima facie established.

*1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s238, ss47, 47A or 47B apply):*

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

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

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

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

[111] I have grouped the above rights together as they all relate to taking resources from the application area. The anthropologist's report contains descriptions of claim group members, past and present, hunting, fishing and gathering other natural products such as ochre, in and around the application area.<sup>130</sup> One claimant describes the Wakka Wakka method of preparing porcupine, and describes a good location to find it near Cherbourg.<sup>131</sup> There are references to plants used for medicinal purposes and to sites where claimants collect ochre.<sup>132</sup> Besides fish and other water-based resources, I infer that water is taken for personal and domestic purposes such as drinking and cooking. The anthropologist's report states that the knowledge and rules pertaining to the use of natural resources are rooted in practices which may reasonably be supposed to be evident since before sovereignty.<sup>133</sup> I consider these rights are prima facie established.

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

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

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

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<sup>129</sup> *Griffiths FC* [127].

<sup>130</sup> Anthropologist's report [183], [187], Table 11.2.

<sup>131</sup> *Ibid* [795].

<sup>132</sup> *Ibid* [815], [819].

<sup>133</sup> *Ibid* [827].

*(f) conduct ceremonies on the area;*

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

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

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

*(j) hold meetings on the area;*

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

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

[112] I have grouped the above rights together as they all relate to accessing the application area for purposes other than using its resources. The anthropologist's report details information from the historic record about the apical ancestors of the claim group living in and around the application area in the early years of settlement.<sup>134</sup> There is also information about the claimants and their predecessors camping on the application area, at locations including St John Creek and McRitchie Creek.<sup>135</sup> I consider it reasonable to infer that camping includes erecting shelters.

[113] As discussed above at s 190B(5)(b), there is information in the anthropologist's report about claim group members, past and present, participating in ceremonies and cultural activities, such as corroborees, in the application area.<sup>136</sup> Meetings continue to be held on the application area, including the authorisation meetings described in Attachment R. From the descriptions of these ceremonies and meetings, I understand that non-claim group members, including people from neighbouring groups and the early ethnographers, have been permitted to be accompanied onto the application area.

[114] Many claimants described how they were taught about attributes of the application area from their predecessors, and have passed this knowledge onto the younger generations, for example the narratives attached to significant waterholes,<sup>137</sup> and information about totemic animals.<sup>138</sup>

[115] With regard to maintaining and protecting places from harm, the anthropologist's report describes significant sites in the application area such as graves,<sup>139</sup> waterholes,<sup>140</sup> and bora grounds.<sup>141</sup> According to the anthropologist, possessing knowledge of the spiritual dimension of places 'remains central to the management of country, as I think it was in times past'.<sup>142</sup>

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<sup>134</sup> Ibid [613]–[766].

<sup>135</sup> Ibid Appendix B.

<sup>136</sup> Ibid [528]–[533].

<sup>137</sup> Ibid [553]–[554].

<sup>138</sup> Ibid [287], [494]–[498].

<sup>139</sup> Ibid Table 12.1.

<sup>140</sup> Ibid [476].

<sup>141</sup> Ibid [525].

<sup>142</sup> Ibid [429].

One claimant explains that 'knowing where things are is essential so we can protect it and so we tell our kids about it'.<sup>143</sup>

[116] One claimant describes the Wakka Wakka method of preparing and cooking a porcupine learnt from his predecessors, which included the use of fire.<sup>144</sup> Another claimant describes hearing stories from the old people 'round the camp fire'.<sup>145</sup>

[117] The anthropologist's report describes the funereal rites observed by the predecessors of the claim group, including burial in the trees and in the land of the application area.<sup>146</sup> Claimants know the burial sites of their ancestors on the application area and consider these places are spiritually significant.<sup>147</sup>

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

## Conclusion

[119] I am satisfied the application contains sufficient information about all of the rights claimed, such that they can be said to be established on a prima facie basis. I am also satisfied the claimed rights can be considered 'native title rights and interests'. This is because, according to the definition in s 223(1), a native title right or interest is one held under traditional laws and customs, and I am satisfied there is sufficient factual basis to support the assertion of the existence of traditional laws and customs, as discussed above at s 190B(5)(b). This means s 190B(6) is met.

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

### What is required to meet s 190B(7)?

[120] 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 application area; or
- (b) previously had and would reasonably have been expected currently to have such a connection, but for certain things done.

[121] 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.<sup>148</sup>

## Consideration

[122] Based on the information before me, I consider at least one claim group member currently has or had a traditional physical connection to the land and waters covered by the application. As summarised above at ss 190B(5)–(6), there is information in the application and anthropologist's report about claim group members living in the application area and using its

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<sup>143</sup> Ibid [443].

<sup>144</sup> Ibid [795]–[824].

<sup>145</sup> Ibid [488].

<sup>146</sup> Ibid [234], [569].

<sup>147</sup> Ibid Table 12.1.

<sup>148</sup> *Doepel* [18]; *Gudjala 2009* [84].

natural resources such as animals, fish and plants. In my view, this demonstrates there is a physical connection to the application area.

[123] 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

[124] I am satisfied at least one member of the native title claim group currently has or had a traditional physical connection with a part of the application area as required by s 190B(7)(a), and so s 190B(7) is met.

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

What is required to meet s 190B(8)?

[125] Section 190B(8) requires the application comply with ss 61A(1)–(3).

## Consideration

[126] In my view, the application complies with each of the requirements of ss 61A(1)–(3):

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 paragraphs 1 and 2 provide 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

## Conclusion

[127] I am satisfied the requirements of s 190B(8) are met.

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

What is required to meet s 190B(9)?

[128] Section 190B(9) states that the application must not disclose, and the Registrar must not otherwise be aware that the claimed native title extends to cover the situations described in ss 190B(9)(a)–(c).

### Consideration

[129] In my view, the application does not contravene any of the restrictions found in 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 the claim group does not claim 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 the claim group does not include a claim to exclusive possession of an offshore place	Met
s 190B(9)(c)	Native title rights and/or interests in the application area have otherwise been extinguished	Schedule B paragraph 6 states that the application excludes areas where native title has been otherwise extinguished	Met

### Conclusion

[130] I am satisfied the requirements of s 190B(9) are met.

*End of reasons*



## Attachment A

### Information to be included on the Register of Native Title Claims

Application name	Wakka Wakka People #3
NNTT No.	QC2016/003
Federal Court of Australia No.	QUD276/2019
Date of Registration Decision	19 November 2021

#### **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:** 29 April 2016

**Date application entered on Register:** 2 June 2016

**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

**Conditions on authority of applicant:** Add: See Attachment IA [*Label and upload Attachment IA*]

**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 19 May 2021 and made pursuant to s 99 of the Native Title Act.