

Registration Decision



Application name	Virginia Wyles and Ors on behalf of the Gurambilbarra Wulgurukaba People for the GW Mada claim (GW Mada)
Name of applicant	Ms Virginia Wyles, Ms Christina George, Mr Brenton Creed, Ms Florence Watson, Ms Petrina Pam Hegarty, Ms Iris Glenbar, Ms Gail Ambrym, Ms Esalyn Ambrym
Federal Court of Australia No.	QUD176/2020
NNTT No.	QC2020/002
Date of Decision	14 August 2020

Claim accepted for registration

I have decided the claim in the GW Mada 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 entered on the Register of Native Title Claims.

Katy Woods²

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

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

Reasons for Decision

Cases Cited

Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia [2013] HCA 33 (**Akiba HCA**)

BP (Deceased) on behalf of the Birriliburu People v State of Western Australia [2014] FCA 715 (**Birriliburu People**)

Corunna v Native Title Registrar [2013] FCA 372 (**Corunna**)

Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People [2019] FCAFC 177 (**Warrie**)

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 v Western Australia (No 5) (2003) 197ALR 138; [2003] FCA 218 (**Harrington-Smith No 5**)

Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9) [2007] FCA 31 (**Harrington-Smith No 9**)

Kanak v National Native Title Tribunal (1995) 61 FCR 103; [1995] FCA 1624 (**Kanak**)

Martin v Native Title Registrar [2001] FCA 16 (**Martin**)

McGlade v South West Aboriginal Land & Sea Aboriginal Corporation (No 2) [2019] FCAFC 238 (**McGlade No 2**)

Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422; [2002] HCA 58 (**Yorta Yorta**)

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

Strickland v Native Title Registrar [1999] FCA 1530 (**Strickland**)

Wakaman People 2 v Native Title Registrar and Authorised Delegate [2006] FCA 1198 (**Wakaman**)

Ward v Registrar, National Native Title Tribunal (1999) 168 ALR 242; [1999] FCA 1732 (**Ward v Registrar**)

Western Australia and Northern Territory v Lane (1995) 59 FCR 332; [1995] FCA 1484 (**Lane**)

Western Australia v Native Title Registrar (1999) 95 FCR 93; [1999] FCA 1591 (**WA v NTR**)

Background

- [1] The claim in this application is made on behalf of the Gurambilbarra Wulgurukaba native title claim group (**claim group**). I understand from the application that ‘Wulgurukaba’ means ‘canoe people’.³ The application covers approximately 4,316 square kilometres of land and sea off the coast of Townsville in Queensland, including Magnetic Island (**application area**). Immediately inland of the application area, and including much of the city of Townsville, the claim group has a registered native title claim which covers approximately 1,358 square kilometres (QUD623/2016 Gurambilbarra Wulgurukaba People (QC2016/007)).
- [2] This application was filed on 5 June 2020 and the Registrar of the Federal Court (**Court**) gave a copy of the application to the Native Title Registrar (**Registrar**) on 15 June 2020, pursuant to s 63. This referral has triggered the Registrar’s duty to consider the claim made in the

³ Attachment F [27].

application in accordance with s 190A.⁴ In accordance with s 190A(6), I must accept the claim for registration if it satisfies all the conditions in ss 190B–190C (**registration test**).

- [3] As discussed in my reasons below, I consider that the claim in the application satisfies all of the conditions in ss 190B–190C and therefore it must be accepted for registration.⁵ Attachment A contains information that will be included in the Register of Native Title Claims (**Register**).

Procedural fairness

- [4] On 16 June 2020, a senior officer of the National Native Title Tribunal (**Tribunal**) wrote to the representative of the State of Queensland (**State**) advising that any submissions on the application's ability to pass the registration test should be made by 23 June 2020.
- [5] Also on 16 June 2020, the senior officer wrote to the representative of the applicant and advised that any additional material which the applicant wished the delegate to consider should be provided by 23 June 2020.
- [6] No submissions were received from either the State or the applicant, and so this concluded the procedural fairness process.

Information considered

- [7] I have considered the information in the application.⁶ I have considered information contained in the geospatial assessment and overlap analysis of the application area prepared by the Tribunal's Geospatial Services dated 18 June 2020 (**geospatial report**) and information available in the Tribunal's geospatial database in relation to locations mentioned in the application.⁷ I have also considered information in the Register.⁸
- [8] There is no information before me from searches of State or Commonwealth interest registers,⁹ 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.¹⁰

Section 190C: conditions about procedures and other matters

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

- [9] 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.¹¹ I have not addressed s 61(5) as I consider the matters covered by that condition are matters for the Court.
- [10] The application contains the details specified in s 61:

⁴ Section 190A(1).

⁵ Section 190A(6).

⁶ Section 190A(3)(a).

⁷ Section 190A(3)(c).

⁸ *Ibid.*

⁹ Section 190A(3)(b).

¹⁰ Section 190A(3)(c).

¹¹ *Doepel* [16], [35]–[39].

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

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

Section	Details	Information	Result
s 62(1)(a)	Affidavits in prescribed form	Section 62 affidavits	Met
s 62(2)(a)	Information about the boundaries of the area	Schedule B, Attachment B	Met
s 62(2)(b)	Map of external boundaries of the area	Attachment C	Met
s 62(2)(c)	Searches	Schedule D	Met
s 62(2)(d)	Description of native title rights and interests	Schedule E	Met
s 62(2)(e)	Description of factual basis	Schedule F, Attachment F	Met
s 62(2)(f)	Activities	Schedule G	Met
s 62(2)(g)	Other applications	Schedule H	Met
s 62(2)(ga)	Notices under s 24MD(6B)(c)	Schedule HA	Met
s 62(2)(h)	Notices under s 29	Schedule I, Attachment I	Met

Conclusion

[12] As the application contains all of the prescribed details and other information, as required by ss 61–2, I am satisfied s 190C(2) is met.

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

[13] 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.

[14] The geospatial report states and my own searches of the geospatial database and the Register confirm there are no applications which overlap the current application, as required by s 190C(3)(a). Therefore, there are no applications which meet the definition of a ‘previous application’ under s 190C(3). This means that the issue of common claimants does not arise.

Conclusion

[15] I am satisfied that no person included in the claim group was a member of a 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

[16] 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.

[17] Schedule R states that the application has been certified and refers to Attachment R1. I therefore understand I must assess the application against the requirements of s 190C(4)(a), and in particular that:

- (a) the certificate identifies the relevant representative body;
- (b) the representative body has the power under Part 11 to issue the certification; and
- (c) the certificate meets the requirements of s 203BE(4).¹²

Is the relevant representative body identified?

[18] North Queensland Land Council Native Title Representative Body Aboriginal Corporation (**NQLC**) has provided the certificate, which is dated 11 December 2019 and signed by the Chairperson. The geospatial report states, and I have verified, that NQLC is the only representative body for the whole of the application area. I am therefore satisfied the certificate identifies the relevant representative body. I have addressed the issue of the Chairperson signing the certification separately below.

Does the representative body have the power to issue the certification?

[19] As a recognised representative body, NQLC can perform all the functions listed in Part 11 of the Native Title Act, including the certification functions in s 203BE. I am satisfied NQLC has the power under Part 11 to issue the certification.

Does the certificate meet the requirements of s 203BE(4)?

[20] I have considered each of the requirements of s 203BE(4) in turn below.

Section 203BE(4)(a) – statements

[21] Section 203BE(4)(a) requires a representative body to state that it is of the opinion that the requirements of ss 203BE(2)(a)–(b) have been met.

[22] Section 203BE(2)(a)–(b) prohibits a representative body from certifying an application unless it is of the opinion that:

¹² *Doepel* [80]–[81].

- (a) all persons in the claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and
- (b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the claim group.

[23] As the certificate contains these required statements, I am satisfied s 203BE(4)(a) is met.

Section 203BE(4)(b) – reasons

[24] Section 203BE(4)(b) requires a representative body to briefly set out its reasons for being of the opinion that the requirements of ss 203BE(2)(a)–(b) have been met.

[25] Under the heading ‘Brief reasons’, the certificate sets out NQLC’s reasons for its opinion that ss 203BE(2)(a)–(b) are met, which includes the following information:

- (a) Authorisation of the applicant by all the persons in the claim group:
 - 1. An authorisation meeting took place in Townsville on 7 December 2019 (**authorisation meeting**), at which the members of the claim group authorised the applicant to make the application using an agreed to and adopted decision making process;
 - 2. Prior to the authorisation meeting, the NQLC legal and anthropological team consulted with members of the claim group to introduce a Consultant Anthropologist for the purpose of undertaking research to identify the sea country of the claim group;
 - 3. Meetings of the claim group occurred in February and August 2018, as well as an information session on 6 December 2019 about the proposed claim, prior to the authorisation meeting.
- (b) Efforts made to ensure the application describes or identifies all the other persons in the claim group:
 - 1. The Consultant Anthropologist undertook extensive research in the region, including interviews with knowledgeable elders and secondary resources;
 - 2. The authorisation meeting was advertised in the Townsville Bulletin on 16 November 2019;
 - 3. The description of the claim group and the expert Anthropological Report has been considered by the members of the claim group and internally reviewed at NQLC.

[26] As the certificate sets out the reasons for NQLC’s opinion that ss 203BE(2)(a)–(b) are met, I am satisfied s 203BE(4)(b) is met.

Section 203BE(4)(c) – overlapping applications

[27] Section 203BE(4)(c) requires a representative body to set out, where applicable, what it has done to meet the requirements of s 203BE(3).

[28] Section 203BE(3) states that if the land or waters covered by the application are wholly or partly covered by one or more applications (including proposed applications) of which the representative body is aware, the representative body must make all reasonable efforts to:

(a) achieve agreement, relating to native title over the land or waters, between the persons in respect of whom the applications are, or would be, made; and

(b) minimise the number of applications covering the land or waters.

However, a failure by the representative body to comply with this subsection does not invalidate any certification of the application by the representative body.

[29] The certificate provides that NQLC checked the Tribunal's registers to confirm the application area is not covered by any other application.

[30] As the certificate sets out what NQLC has done to meet the requirements of s 203BE(3), I am satisfied s 203BE(4)(c) is met.

Certification by the Chairperson

[31] The Full Court in *McGlade No 2* confirmed that a representative body incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**) can perform its functions through its directors and/or its authorised employees and agents, and that '[a] function so performed is properly characterised as the performance of the function by the ATSI corporation itself, not a CEO or anyone else'.¹³ I understand that NQLC is incorporated under the CATSI Act. Therefore, applying *McGlade No 2*, I understand that the certification of this application by the Chairperson, as an agent of NQLC, is properly characterised as certification by NQLC itself.

[32] Finally, I note the earlier judicial guidance that s 190C(4)(a) requires the Registrar to be 'satisfied about the fact of certification by an appropriate representative body', but is not to 'go beyond that point' and 'revisit' or 'consider the correctness of the certification by the representative body'.¹⁴ In my view, the information in the certificate is such that I can be satisfied of the fact of certification, and can therefore proceed to decide whether the application meets the requirements of s 190C(4).

Conclusion

[33] As the certificate identifies the relevant representative body, the representative body has the power under Part 11 to issue the certification, and the certificate meets the requirements of s 203BE(4), the requirements of s 190C(4)(a) are satisfied. This means s 190C(4) is met.

Section 190B: conditions about merits of the claim

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

[34] 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.

¹³ *McGlade No 2* [329].

¹⁴ *Doepel* [78], [80]–[82].

[35] 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.¹⁵

Does the information about the external boundary meet this condition?

[36] Schedule B refers to Attachment B, which describes the application area as all the land and water within an external boundary defined with reference to various features including the centreline of Ross River, Cape Cleveland, Magnetic Island, and the Myrmidon, Arab and Needle Reefs. The description also includes references to the High Water Mark, the 200 metre depth contour, and geographical coordinate points to six decimal places.

[37] Schedule C refers to Attachment C, which contains a map titled 'Gurambilbarra Wulgurukaba Sea Claim'. The map is dated 26 November 2019 and includes:

- (a) The application area depicted by a bold dark blue outline;
- (b) The 200 metre depth contour depicted by a dashed yellow line;
- (c) Selected reef localities depicted by a hollow black point marker;
- (d) Commencement Point labelled;
- (e) Topographic background showing roads, islands, towns, place names and water features;
- (f) Scalebar, coordinate grid and locality diagram; and
- (g) Notes relating to the source, currency and datum of data used to prepare the map.

[38] The assessment in the geospatial report is that the map and description are consistent and identify the application area with reasonable certainty. I have considered the map and description and I agree with that assessment.

Does the information about excluded areas meet this condition?

[39] Schedule B states that the application does not cover areas where Category A and B past and intermediate period acts were done, where previous exclusive possession acts were done, or any other area where native title has been extinguished, except where any extinguishment is required to be disregarded by force of ss 47–47B.

[40] 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'.¹⁶ Following this reasoning, I am satisfied the areas affected by the general exclusion clauses in Schedule B can be ascertained at the appropriate time.

¹⁵ *Doepel* [122].

¹⁶ *Strickland* [55].

[41] Attachment B specifically excludes all lands or waters subject to the native title determination of QUD623/2016 Gurambilbarra Wulgurukaba People (QC2016/007) as accepted for registration on 4 October 2016, which included Rattlesnake Island and Herald Island. In my view, the specific exclusions are clear from the description in Attachment B.

Conclusion

[42] 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

[43] 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.

[44] 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 that group’ at this condition.¹⁷

[45] Schedule A states:

Membership of the Gurambilbarra Wulgurukaba People’s group is in accordance with the traditional laws acknowledged and the traditional customs observed by them and is based upon descent from an acknowledged Gurambilbarra Wulgurukaba antecedent.

The GW Mada Claim Native Title Claim Group is comprised of the biological and adoptive descendants (in accordance with traditional laws and customs) of the following apical ancestors: [list of four people, one with reference to an immediate descendant].

[46] 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?

[47] The Court has held that describing a claim group with reference to descent from named ancestors, including by adoption, satisfies the requirements of s 190B(3)(b).¹⁸ I note that the description references the traditional laws and customs of the claim group. Attachment F states that the claim group continue to acknowledge and observe their laws and customs regarding kinship, including customary adoption practices, and that their connection to country is maintained and expressed through their connections to other claim group members and their predecessors.¹⁹ I therefore consider that, in addition to factual enquiries and genealogical research, the traditional laws and customs would provide the ‘set of rules or principles’ to enable the identification of the people who meet this criterion.²⁰

¹⁷ *Wakaman* [34].

¹⁸ *WA v NTR* [67].

¹⁹ Attachment F [30]–[33].

²⁰ *Ward v Registrar* [25].

Conclusion

- [48] 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

- [49] 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.²¹

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

- [50] From the description in Schedule E, I understand that three non-exclusive rights are claimed, and in my view there is no inherent or explicit contradiction within the description.²²
- [51] There is also information in Schedule E which qualifies that the claimed rights and interests are subject to the valid laws of the State and the Commonwealth and rights conferred under those laws, and do not include a claim to resources wholly owned by the Crown.

Conclusion

- [52] 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

- [53] 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.
- [54] 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’.²³

²¹ *Doepel* [16].

²² *Ibid* [123].

²³ *Ibid* [16]–[17]; *Gudjala 2008* [83], [92].

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

[55] Schedule F and Schedule M both refer to Attachment F, which is a document outlining the factual basis of the claim. Schedule G states that members of the claim group currently carry out activities consistent with the rights and interests claimed in Schedule E, which as discussed above, lists three non-exclusive rights that are claimed in relation to the application area. I consider this is the extent of the information which has been provided in support of the assertions at s 190B(5) and so my reasoning below will focus on the information in Attachment F.

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

[56] 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;²⁴
- (b) there is 'an association between the whole group and the area', although not 'all members must have such association at all times';²⁵ 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'.²⁶

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

[57] Attachment F provides:

- (a) The northern boundary of the application area, demarcated by the Lodestone, Arab and Needle Reefs, traces the edge of a mythological stingray being which delineates the claim group's sea country from that of its northern neighbours;²⁷
- (b) The eastern boundary is based on the shoreline before the land was 'drowned' in the Great Flood, an ecological event dated to approximately 18,000 years ago which also forms part of the claim group's mythological creation story;²⁸
- (c) Connection to 'sea country' is underpinned by the claim group's spiritual beliefs, which describe a mythological carpet snake creating islands and other features as it travelled, as well as creating the law for the land and for the 'drowned land' of the application area;²⁹
- (d) Observations of people living in the area were documented as early as 1770 by Captain James Cook and other explorers, including the use of 'eight foot bark canoes' and fishing

²⁴ *Gudjala* 2007 [52].

²⁵ *Ibid.*

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

²⁷ Attachment F [4].

²⁸ *Ibid* [6], [23]–[29].

²⁹ *Ibid* [27]–[29].

nets in the application area, and of people crossing the application area from the mainland to Magnetic Island at low tide;³⁰

- (e) European settlement in the Townsville area occurred around 1861 and mythological beliefs about parts of the application area were recorded by early settlers, including the story of the Great Flood;³¹
- (f) Early records about the application area and surrounds describe a corroboree in 1884 at Kissing Point and the presence of people on Magazine Island, Ross Island, Rowes Bay, the Town Common, Cape Bowling Green, and on Magnetic Island at Picnic Bay and Cockle Bay;³²
- (g) The claim group's apical ancestors were all born in and around the application area in the early decades of European settlement, and in the case of Emily Underwood, 12 years prior to settlement in circa 1852;³³
- (h) Despite the period of forced removals to Aboriginal settlements, some members of the intervening generations maintained their association with the application area through their involvement in the commercial seafood industry, with other members returning to country when they were no longer prevented from doing so by the authorities.³⁴

Association of the current claim group with the application area

[58] With regard to the association of the current claim group, Attachment F provides the following information:

- (a) Members of the current claim group reside in and around the application area, including in Townsville and on Magnetic Island, and continue to access the application area for fishing and collecting shellfish by boat and by wading through the intertidal zone;³⁵
- (b) Some claim group members are involved in land and sea management through employment as rangers and in cultural heritage in the application area, including on Magnetic Island and for the Great Barrier Marine Park Authority;³⁶
- (c) Claim group members continue to interact with the application area spiritually, through their beliefs in the ancestral beings which inhabit the land and seascape, including the creation being, and through their observance of the associated laws and customs.³⁷

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

[59] 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.³⁸ 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 land and waters of the application

³⁰ Ibid [9]–[15].

³¹ Ibid [14].

³² Ibid [16].

³³ Ibid [34]–[56].

³⁴ Ibid [23], [45]–[47].

³⁵ Ibid [55], [67], [76].

³⁶ Ibid [91]–[92].

³⁷ Ibid [57]–[65].

³⁸ *Martin* [25].

area, in a sufficient level of detail, both at the time of settlement and since that time.³⁹ I have considered whether there is information sufficient to support the requirements of s 190B(5)(a) below.

- [60] In considering the factual basis of this application I have observed two salient features. The first is the information about the period of forced removal of people from the application area to reserves and settlements. The second is that the majority of the application area is covered by the Coral Sea. In my view, the combination of these features means that demonstrating an ongoing association raises particular challenges. I note the comments in *Strickland*, that '[t]he requirements of the registration test are stringent. It is not necessary to elevate them to the impossible'.⁴⁰ I also note the comments in *Lane*, that the Registrar's statutory obligations should be performed with a degree of flexibility consistent with the beneficial nature of the legislation.⁴¹ I have therefore assessed the sufficiency of the factual basis by taking into account the particular features of this application, and applying this judicial guidance.

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

- [61] Attachment F describes locations which lie in and around the application area. I have identified many of these locations in the Tribunal's geospatial database to enable me to be satisfied that the factual basis is sufficient to support an assertion of an association of the ancestors of the claim group with the application area. Magnetic Island is the largest island in the application area and there is information about claim members, both past and present, living on Magnetic Island and using its resources. There is also information about the predecessors accessing different named parts of the application area and surrounds, including Kissing Point on the south west edge and Cape Bowling Green to the south. I understand that the northern and eastern boundaries of the application area reflect aspects of the creation story of the claim group, which manifest in the features of the seascape including the Lodestone, Arab and Needle Reefs which line the application area's northern edge. These creation stories were recorded by early settlers to the area, which in my view supports the assertion that the claim group has had a spiritual association with the application area since at least that time.
- [62] Settlement on the lands adjacent to the application area is asserted to have occurred in the 1860s, much later than the acquisition of British sovereignty in 1788. The apical ancestors are all estimated to have been born around the time of settlement in or near to the application area. 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 No 9*.⁴² I therefore consider that the factual basis is sufficient to support an association between the claim group at the time of sovereignty and since that time.

³⁹ *Gudjala 2007* [40].

⁴⁰ *Strickland* [55].

⁴¹ *Lane* [9], see also *Kanak* [73].

⁴² *Harrington-Smith No 9* [294]–[296].

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

[63] In my view, 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 maintain. This is demonstrated by members of the claim group continuing to live and work on and nearby to the application area, and their ongoing use of its resources, such as fish and shellfish. The current claimants also know the creation stories relevant to the application area, which in my view demonstrates their ongoing spiritual association.

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

[64] 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.⁴³ It is not a requirement that the every member of the claim group have an association with the entire application area at all times.

[65] In my view, there is sufficient information about claim group members, past and present, living on the lands of the application area, and accessing the waters of the application area in order to utilise its resources. I also consider there is information to support a spiritual association with the whole area claimed, based on the assertion that the application area comprises the 'drowned lands' which feature in the claim group's creation story. Considering all the information before me, I am of the view that there is sufficient information to support both a physical and spiritual association with the whole area claimed.

Conclusion - s 190B(5)(a)

[66] 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 means s 190B(5)(a) is met.

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

[67] 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.

[68] 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:

⁴³ *Corunna* [31].

[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.⁴⁴

[69] 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.⁴⁵

[70] 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.⁴⁶

[71] 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)?

[72] Attachment F provides information about different aspects of the claim group’s society and its laws and customs, including:

(a) Land system:

1. At sovereignty, the predecessors of the claim group belonged to the ‘Southern Rainforest (Girringun) Regional Society’, the members of which observed a system of land tenure based on descent from ancestors who were connected to particular lands and waters.⁴⁷

⁴⁴ *Yorta Yorta* [46]–[47], emphasis added.

⁴⁵ *Warrie* [105], [107], emphasis added.

⁴⁶ *Gudjala 2009* [40].

⁴⁷ Attachment F [1]–[2], [26].

2. At the time of settlement, the existence of different groups that inhabited 'distinct tracts of land' were described by early settlers of the Townsville area;⁴⁸
3. Current claimants continue to observe this tenure system, and their descent from ancestors connected to the application area gives rise to their claim to native title rights and interests.⁴⁹

(b) Spiritual beliefs:

1. The laws and customs of the claim group are rooted in beliefs about creation beings which formed the landscape and set rules which govern traditional life, including the carpet snake creation being discussed at s 190B(5)(a) above;⁵⁰
2. These beliefs have been passed down to the current claimants by their predecessors, who continue to tell the stories and observe the rules set in the creation period, including the observance of particular practices to avoid supernatural punishment and sickness, such as introducing oneself to resident spirits and burning entrails after cleaning and gutting fish;⁵¹
3. Relevant to the application area, the story of the Great Flood tells how the transgressions of a group of young people who ignored the instructions of their Elders which caused the area between the current and former coastlines to be flooded. This story about the physical and spiritual aspects of the application area, and its inherent lesson for young people, was recorded in the early decades of settlement and has been taught to the members of the claim group by their parents and grandparents.⁵²

(c) Trade and ceremony:

1. Early accounts describe the use of the application area and the surrounding region by the predecessors of the claim group for ceremonies, including an initiation ceremony in 1881 near Bluewater and a corroboree in 1884 at Kissing Point;⁵³
2. Current claimants use the waters of the application area for ceremonial and ritual activities, which include immersion in the salt water.⁵⁴
3. The Gurambilbarra language, first recorded in the 1880s, contains words and phrases associated with the beche-de-mer (sea cucumber) trade, in which the claim group's predecessors participated before settlement and throughout the 20th century as the commercial seafood industry developed;⁵⁵

⁴⁸ Ibid [14].

⁴⁹ Ibid [3].

⁵⁰ Ibid [27]–[29].

⁵¹ Ibid [57]–[59], [62], [69].

⁵² Ibid [14], [63]–[64].

⁵³ Ibid [16], [20].

⁵⁴ Ibid [77].

⁵⁵ Ibid [82]–[83].

4. Today, claim group members trade the resources of the application area, including fish, crabs, art and crafts made from sea shells 'with family, friends and strangers', as well as commercially.⁵⁶

(d) Traditional practices:

1. The early records describe the predecessors of the claim group utilising the resources of the application area and using particular methods, including string fishing lines and turtle shell hooks,⁵⁷
2. The current claim group, which includes the great great grandchildren of some of the apical ancestors, continue to use the resources of the application area in the methods taught to them by their predecessors, including fishing for particular varieties for food, medicinal purposes and ceremonial use.⁵⁸

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?

[73] Attachment F identifies a regional pre-sovereignty society and describes the claim group's predecessors' place in that society. In *Harrington-Smith No 5*, Lindgren J observed that '[i]t is conceivable that the traditional laws and customs under which the rights and interests claimed are held might, in whole or in part, be also traditional laws and customs of a wider population, without that wider population being a part of the claim group'.⁵⁹ In my view, the factual basis of this application demonstrates that while the claim group's laws and customs were and are observed across a broader society, rights to land are held at localised levels under those laws, and in relation to the application area, they were and are held by this claim group.

[74] The material also describes how the claim group are linked to the apical ancestors and, as their descendants, have inherited rights and interests in their country, including the application area. I therefore consider the application 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'?

[75] 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 it appears that the great great grandchildren of some of the apical ancestors are now senior claim group members. Attachment F describes how the claimants were taught the laws and customs from their predecessors, including how rights to land are acquired.

⁵⁶ Ibid [89].

⁵⁷ Ibid [66].

⁵⁸ Ibid [35]–[56]; [84]–[86].

⁵⁹ *Harrington-Smith No 5* [53].

- [76] 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.⁶⁰ This is because there is information about the predecessors of the claim group passing down laws and customs with normative content to the current claim group. One example is the observance of rules to avoid spiritual misfortune on the application area through particular practices. The creation story of the Great Flood and the normative rule of obeying elders found in that story, is another example. There are also many examples provided of claimants learning from their predecessors the methods of fishing and gathering resources in particular ways on the application area.
- [77] 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)

- [78] 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)?

- [79] 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.⁶¹ 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.⁶²

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

- [80] 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.
- [81] As discussed above as s 190B(5)(b), Attachment F 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 and common practice. The continued observance of the traditional laws and customs is demonstrated in the information about spiritual beliefs about the application area and the rules arising from the creation stories, which the claimants have learned from their predecessors. Attachment F also provides that the members of the claim

⁶⁰ *Yorta Yorta* [46]–[47].

⁶¹ *Gudjala 2009* [29].

⁶² *Gudjala 2007* [82].

group continue to utilise the application area and teach their younger generations skills such as hunting, fishing and gathering the resources of the application area.⁶³

- [82] 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 the time of European settlement in the application area.

Conclusion – s 190B(5)(c)

- [83] 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, which means s 190B(5)(c) is met.

Conclusion

- [84] 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

- [85] 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.

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

- (a) it requires some measure of the material available in support of the claim;⁶⁴
- (b) it appears to impose a more onerous test to be applied to the individual rights and interests claimed;⁶⁵ 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’.⁶⁶

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

1. The claimed rights and interests are:

(a) the right to have access to, remain in and use that part;

(b) the right to access and take for any purpose the resources in that part; and

(c) the right to protect places, areas and things of traditional significance in that part.

- [87] I understand the phrase ‘that part’ in each of the claimed rights refers to the part or parts of the application area where those rights can be recognised. I do not understand that my task at

⁶³ Attachment F [67]–[68].

⁶⁴ *Doepel* [126].

⁶⁵ *Ibid* [132].

⁶⁶ *Ibid* [135].

this condition extends to determining those particular parts, my task is limited to considering whether there is any probative factual material which supports the existence of each individual right and interest. 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.⁶⁷

- [88] According to the information in Attachment F, the claim group have inherited and exercise the claimed rights pursuant to their traditional laws and customs, and as stated above at s 190B(5), I am satisfied that there is a sufficient factual basis to support the existence of traditional laws and customs.⁶⁸
- [89] There is a wealth of information in the application about members of the claim group, past and present, living on the lands of the application area and accessing and using both the lands and the waters of the application area. There is also specific information about claim group members wading across the waters of the application area at low tide, and traversing the waters by canoe and boat, which was recorded by the early explorers as well as at the time of European settlement, and is undertaken by claim group members currently.⁶⁹ There is also information about claim group members accessing the waters of the application area to perform particular immersion rituals.⁷⁰ I therefore consider the right claimed in paragraph 1(a) of Schedule E is prima facie established under traditional laws and customs.
- [90] With regard to the right claimed in (b) above, the High Court has held that in relation to a claimed right to take resources ‘for any purpose’, ‘[t]he purposes may be well defined or diffuse’ and that focussing upon particular activities rather than upon the relevant native title *right* is apt to lead to error.⁷¹ Following *Akiba HCA*, North J in *Birriliburu People* confirmed that resolution of this issue depends on an assessment of the evidence, and that the applicant needs to establish that the claim group has a right under traditional laws and customs to access and take for any purpose the resources of the application area.⁷²
- [91] The application contains information about the members of the claim group taking different resources for a range of different purposes currently as well as at the time of settlement, including for trade,⁷³ food,⁷⁴ decorations and jewellery,⁷⁵ and medicine.⁷⁶ There is also information to show how this right is exercised in accordance with traditional laws and customs. In addition to the inheritance of rights in the application area pursuant to their traditional laws and customs, Attachment F provides that the claim group observe rules which govern the taking of particular resources for ceremonial purposes, such as turtles and dugong.⁷⁷ Having assessed the information before me, I am satisfied that the right claimed in paragraph 1(b) of Schedule E is prima facie established under traditional laws and customs.

⁶⁷ Section 186(1)(g).

⁶⁸ Attachment F [31], [66]–[70].

⁶⁹ Ibid [10]–[13], [15], [74], [76].

⁷⁰ Ibid [77].

⁷¹ *Akiba HCA* [21], [67].

⁷² *Birriliburu People* [86].

⁷³ Attachment F [17], [80]–[83], [89].

⁷⁴ Ibid [14], [84].

⁷⁵ Ibid [25], [86], [89].

⁷⁶ Ibid [86].

⁷⁷ Ibid [65], [86].

[92] Attachment F provides that the right to protect places, areas and things of traditional significance has been exercised by the claim group through their systems of land and sea management since prior to sovereignty, and is further demonstrated today by current claimants' engagement in cultural heritage and ranger work.⁷⁸ I am satisfied that the right claimed in paragraph 1(c) of Schedule E is prima facie established under traditional laws and customs.

Conclusion

[93] I am satisfied that, prima facie, the native title rights and interests claimed in the application can be established. This means s 190B(6) is met.

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

[94] 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.

[95] 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.⁷⁹

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

[96] 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, 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 in the application which describes current claimants living on the application area and accessing and using its resources.

[97] 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

[98] 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 claim area as required by s 190B(7)(a), and so s 190B(7) is met.

⁷⁸ Ibid [90]–[92].

⁷⁹ *Doepel* [18], *Gudjala* 2009 [84].

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

[99] In my view the application complies with the provisions 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, paragraph 1(b) states that the application does not cover any area to which a previous exclusive possession act was done	Met
s 61A(3)	Claimant application not to claim possession to the exclusion of all others in previous non-exclusive possession act areas	Schedule E indicates that no claim of possession to the exclusion of all others is made	Met

Conclusion

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

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

[101] 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), as summarised in the table below.

Section	Requirement	Information	Result
s 190B(9)(a)	No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q states that no claim is made for the ownership of minerals, petroleum or gas wholly owned by the Crown	Met
s 190B(9)(b)	Exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P states that no claim is made for exclusive possession of all or part of an offshore place	Met
s 190B(9)(c)	Native title rights and/or interests in the claim area have not otherwise been extinguished	Schedule B paragraph 1(c) states that the application excludes land or waters where native title rights and interests have been extinguished	Met

Conclusion

[102] 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	GW Mada
NNTT No.	QC2020/002
Federal Court of Australia No.	QUD176/2020
Date of Registration Decision	14 August 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:

5 June 2020

Date application entered on Register:

14 August 2020

Applicant:

As per Schedule

Applicant's address for service:

As per Schedule

Area covered by application:

Please amend Schedule as follows:

Does the Area Include Sea: Yes

Persons claiming to hold native title:

As per Schedule

Registered native title rights and interests:

As per Schedule

Katy Woods

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