

Registration Decision

Application name	Ernest Michael Hoolihan & Ors on behalf of Gugu Badhun People #3 v State of Queensland (Gugu Badhun People #3)
Name of applicant	Mr Ernie Hoolihan; Mr Harry Gertz; Ms Narda Kennedy; Ms Hazel Illin; Ms Elsie Thompson
Federal Court of Australia No.	QUD777/2019
NNTT No.	QC2019/003
Date of Decision	6 March 2020

Claim accepted for registration

I have decided the claim in the Gugu Badhun People #3 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

Corunna v Native Title Registrar [2013] FCA 372 (**Corunna**)
Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People [2019] FCAFC 177 (**Warrie**)
Griffiths v Northern Territory of Australia [2007] FCAFC 178 (**Griffiths FC**)
Gudjala People #2 v Native Title Registrar [2007] FCA 1167 (**Gudjala 2007**)
Gudjala People #2 v Native Title Registrar (2008) 171 FCR 317; [2008] FCAFC 157 (**Gudjala 2008**)
Gudjala People #2 v Native Title Registrar [2009] FCA 1572 (**Gudjala 2009**)
Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9) [2007] FCA 31 (**Harrington-Smith**)
Hoolihan on behalf of the Gugu Badhun People #2 v State of Queensland [2012] FCA 800 (**Gugu Badhun People #2**)
Kanak v National Native Title Tribunal (1995) 61 FCR 103; [1995] FCA 1624 (**Kanak**)
Martin v Native Title Registrar [2001] FCA 16 (**Martin**)
Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422; [2002] HCA 58 (**Yorta Yorta**)
Northern Territory of Australia v Doepel [2003] FCA 1384 (**Doepel**)
Strickland v Native Title Registrar [1999] FCA 1530 (**Strickland**)
Wakaman People 2 v Native Title Registrar and Authorised Delegate [2006] FCA 1198 (**Wakaman**)
Ward v Registrar, National Native Title Tribunal (1999) 168 ALR 242; [1999] FCA 1732 (**Ward v Registrar**)
Western Australia v Native Title Registrar (1999) 95 FCR 93; [1999] FCA 1591 (**WA v NTR**)
Western Australia v Ward (2002) 213 CLR 1; [2002] HCA 28 (**Ward HC**)

Background

- [1] The claim in this application is made on behalf of the Gugu Badhun native title claim group (**claim group**). It covers an area of approximately 1800 square kilometres in north Queensland, approximately 145 kilometres west of Townsville (**application area**). To the north of the application area, the claim group holds native title rights which were determined in *Gugu Badhun People #2*.
- [2] The application was filed on 17 December 2019 and the Registrar of the Federal Court (**Court**) gave a copy of the application to the Native Title Registrar (**Registrar**) on 19 December 2019, pursuant to s 63. This referral has triggered the Registrar's duty to consider the claim made in the application in accordance with s 190A.³ In accordance with s 190A(6), I must accept the claim for registration if it satisfies all the conditions in ss 190B–190C (**the registration test**).
- [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.⁴ Attachment A contains information that will be included in the Register.

Procedural fairness

- [4] On 24 December 2019, a senior officer of the National Native Title Tribunal (**Tribunal**) wrote to the relevant minister of the state of Queensland (**State**) advising that any submissions on the application's ability to pass the registration test should be made by 13 January 2020.

³ Section 190A(1).

⁴ Section 190A(6).

[5] Also on 24 December 2019 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 13 January 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.⁵ I have also considered information contained in the geospatial assessment and overlap analysis of the application area prepared by the Tribunal's Geospatial Services dated 15 January 2020 (**geospatial report**) and information available in the Tribunal's geospatial database in relation to locations mentioned in the application.⁶

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

Section 190C: conditions about procedures and other matters

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

[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.⁹ 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:

Section	Details	Information	Result
s 61(1)	Native title claim group have authorised the applicant	Part A, Schedule A, s 62 affidavits filed with application	Met
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Schedule A, Attachment 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 filed with application	Met
s 62(2)(a)	Information about the boundaries of the area	Schedule B,	Met

⁵ Section 190A(3)(a).

⁶ Section 190A(3)(c).

⁷ Section 190A(3)(b).

⁸ Section 190A(3)(c).

⁹ *Doepel* [16], [35]–[39].

Section	Details	Information	Result
		Attachment B	
s 62(2)(b)	Map of external boundaries of the area	Attachment C	Met
s 62(2)(c)	Searches	Schedule D, Attachment 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, Attachment G	Met
s 62(2)(g)	Other applications	Schedule H	Met
s 62(2)(ga)	Notices under s 24MD(6B)(c)	Schedule HA	Met
s 62(2)(h)	Notices under s 29	Schedule I, Attachment I	Met

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

[12] 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.

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

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

[14] 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.

[15] 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).¹⁰

Is the relevant representative body identified?

[16] 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, 'under delegation from the Board of Directors'. 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.

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

[17] 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)?

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

Section 203BE(4)(a) – statements

[19] 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.

[20] Section 203BE(2)(a) prohibits a representative body from certifying an application unless it is of the opinion that all persons in the claim group have authorised the applicant to make the application and to deal with matters arising in relation to it.

[21] Section 203BE(2)(b) prohibits a representative body from certifying an application unless it is of the opinion that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the claim group.

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

Section 203BE(4)(b) – reasons

[23] 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.

[24] 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:

1. Anthropological research in the region commenced in 2018 and a community meeting in June 2019 of Gugu Badhun, Gudjala and Ewamian People passed a resolution acknowledging that the application area was Gugu Badhun;
2. On 30 November 2019, a meeting of the claim group was held at which the claim group agreed to and adopted a decision making process and then authorised the applicant to make the application.

(b) Identification of the claim group:

¹⁰ *Doepel* [80]–[81].

1. The anthropologist undertook extensive research in the region to identify the claim group for the application area;
2. The 30 November 2019 authorisation meeting was advertised on 9 November 2019 in the Townsville Bulletin and Cairns Post.

[25] 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

[26] 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).

[27] 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.

[28] The certificate provides that NQLC obtained an overlap analysis from the Tribunal's Geospatial Services which confirmed that the application area is not covered by any other claimant application.

[29] 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.

Conclusion

[30] 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), I am satisfied that s 190C(4)(a) is met.

Section 190B: conditions about merits of the claim

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

[31] 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.

[32] 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.¹¹

Does the information about the external boundary meet this condition?

- [33] Schedule B refers to Attachment B, which describes the application area by metes and bounds referring to land parcels, the Upper Burdekin River sub-catchment boundaries, the Gregory Developmental Road reserve boundaries, the centreline of the Clarke River, the boundaries of two native title determinations and geographic coordinates to six decimal places.
- [34] Schedule C refers to Attachment C, which contains a map prepared by the Tribunal's Geospatial Services titled 'Gugu Badhun'. The map is dated 14 October 2019 and includes:
- (a) The application area depicted with a bold dark blue outline with light blue semi-transparent fill;
 - (b) Background colour topographic raster image;
 - (c) Scalebar, legend, coordinate grid and locality diagram; and
 - (d) Notes relating to the source, currency and datum of data used to prepare the map.
- [35] 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?

- [36] 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.
- [37] 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'.¹² Following this reasoning, I am satisfied the areas affected by the general exclusion clauses in Schedule B can be ascertained at the appropriate time.
- [38] Attachment B specifically excludes all lands or waters subject to the native title determinations of:
- (a) QUD85/2005 Gugu Badhun People #2 (QCD2012/002); and
 - (b) QUD80/2005 Gudjala People (QCD2014/006).
- [39] In my view, the specific exclusions are clear from the description in Attachment B.

Conclusion

- [40] 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.

¹¹ *Doepel* [122].

¹² *Strickland* [55].

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

[41] 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.

[42] I understand I am not required to do more than make ‘an assessment of the sufficiency of the description of the group for the purpose of facilitating the identification of any person as part of the group’ at this condition.¹³

[43] Schedule A refers to Attachment A, which states:

The Gugu Badhun native title claim group is comprised of the descendants (including through adoption or raising up in accordance with traditional law and customs) of the following apical ancestors: [list of ten apical ancestors, some with reference to their immediate descendants and/or spouses].

[44] 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?

[45] The Court has previously held that describing a claim group with reference to descent from named ancestors, including by adoption, satisfies the requirements of s 190B(3)(b).¹⁴ I note also 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, and their connection to country is mediated and expressed through their connections to other claim group members.¹⁵ 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 to the identification of the people who meet this criterion.¹⁶

Conclusion

[46] 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

[47] 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

¹³ *Wakaman* [34].

¹⁴ *WA v NTR* [67].

¹⁵ Attachment F [31].

¹⁶ *Ward v Registrar* [25].

facie basis. I note that my consideration of this condition is confined to information found in the application.¹⁷

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

- [48] From the description in paragraphs 1–2 of Schedule E, I understand that exclusive possession is claimed in any areas covered by the application where there has been no extinguishment or where any extinguishment is to be disregarded. I understand that a broad claim to exclusive possession such as this one does not offend s 190B(4).¹⁸
- [49] From paragraph 3 of Schedule E, I understand that the non-exclusive rights described in paragraph 4 are claimed in areas where exclusive possession cannot be recognised. The non-exclusive rights form an exhaustive list, and in my view there is no inherent or explicit contradiction within the description.¹⁹
- [50] There is also information in Schedule E which qualifies that the claimed rights and interests are subject to the laws of the State and the Commonwealth and the non-exclusive claim to the resources of the application area do not include resources wholly owned by the Crown.

Conclusion

- [51] 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

- [52] 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.
- [53] 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’.²⁰

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

- [54] Schedule F refers to Attachment F, which is a document titled ‘General description of Native Title Rights and Interests claimed’. Schedule G refers to Attachment G, which contains a summary of the claim group’s activities on 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).

¹⁷ *Doepel* [16].

¹⁸ *Strickland* [60].

¹⁹ *Doepel* [123].

²⁰ *Doepel* [16]–[17]; *Gudjala 2008* [83], [92].

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

[55] 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;²¹
- (b) there is 'an association between the whole group and the area', although not 'all members must have such association at all times';²² 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'.²³

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

[56] Attachment F provides:

- (a) The first European to explore the region was Ludwig Leichhardt in 1847, who observed people living in the application area;²⁴
- (b) Settlement of the application area occurred around 1860;²⁵
- (c) Pastoral stations, including Valley of Lagoons, Blue Range, Fullstop, Christmas Creek and Kangaroo Hills were established over and around the application area, upon which many claim group members lived and worked;²⁶
- (d) Apical ancestor Bella gave birth to a son around 1890 at Kangaroo Hills station, who went on to marry apical ancestor Nancy Jordan in 1920 at Valley of Lagoons, where he spent the rest of his life and had many children;²⁷
- (e) Apical ancestor Lucy Shaw was born at a traditional birthing place in Valley of Lagoons and married apical ancestor King Lava. She had a son at Valley of Lagoons in 1870 and other children who went on to work on the application area, including as stockmen and trackers;²⁸
- (f) Apical ancestor Nellie Rankin was born around 1914 and lived at Blue Range Station until she and some of her children were removed by the station owner in 1955. She had had many children by that time, whose descendants continued to live and work on the stations in and around the application area;²⁹
- (g) Apical ancestor Charlie Burdekin had a son who was born in 1899 at Kangaroo Hills Station, and other children born in the early years of the 20th century. His wife, apical

²¹ *Gudjala 2007* [52].

²² *Ibid.*

²³ *Martin* [26]; *Corunna* [39], [45].

²⁴ Attachment F [4].

²⁵ *Ibid* [34].

²⁶ *Ibid* [13], [17].

²⁷ *Ibid* [17]–[18].

²⁸ *Ibid* [20]–[21].

²⁹ *Ibid* [24]–[25].

ancestor Nora Lee was also from the area covered by Kangaroo Hills Station and some of their children worked on the station for many years;³⁰

- (h) Apical ancestor Ceasar Murray lived all of his life in and around the application area, passing away in 1965 at age 70. While he did not have children, he is remembered by current claimants as being fluent in Gugu Badhun language and as a 'great bushman';³¹
- (i) Ancestors of the claim group are buried on the application area and these sites are known to current claimants, who have an obligation to both care for the physical site and to speak appropriately to the resident spirits when visiting.³²

Association of the current claim group with the claim area

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

- (a) Senior claimants recall the 'station days' when they would build shelters on the application area using leaves and bark;³³
- (b) The great grandson of apical ancestor Bella is now an elder of the claim group and resides in Greenvale with his family, just north of the application area;³⁴
- (c) Descendants of Lucy Shaw continue to live in Greenvale;³⁵
- (d) Youth camps are held on the application area each year through which claimants maintain their association and pass on traditional knowledge to the younger generations;³⁶
- (e) Claimants maintain a spiritual association with the application area through dreaming stories about particular features of the landscape, including a story of the rainbow serpent which manifests in the Burdekin river, and also at Pelican Lakes;³⁷
- (f) A story about two girls being turned to stone as punishment for cruelty to a turtle is represented by a large rock in the Burdekin River, and has been passed down through the generations to the current claimants, who in turn have taught it to their children;³⁸
- (g) Current claimants hold knowledge, passed onto them by their predecessors, about the location and use of particular resources of the application area, including different types of wood, particular medicinal plants, clay and ochre;³⁹
- (h) Current claimants participate in cultural heritage surveys as a way to protect important places in the application area.⁴⁰

³⁰ Ibid [26].

³¹ Ibid [28].

³² Ibid [65]–[67].

³³ Ibid [88].

³⁴ Ibid [19].

³⁵ Ibid [22].

³⁶ Ibid [39], [88].

³⁷ Ibid [41]–[42].

³⁸ Ibid [46].

³⁹ Ibid [68]–[70], [85].

⁴⁰ Ibid [[35].

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

[58] 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.⁴¹ 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 relevant land and waters, in a sufficient level of detail, both at the time of settlement and since that time.⁴² I have considered whether there is information sufficient to support the requirements of s 190B(5)(a) below.

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

[59] 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. I note the references to the pastoral stations which cover the application area and extend north into the area covered by the *Gugu Badhun #2* determination, as well as the references to the Burdekin River, which I can see forms part of the southern boundary of the application area.

[60] Settlement in 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 in the early decades of settlement. In my view, the apical ancestors would have had a similar association with the application area as their forebears who were alive at the time of sovereignty. In making this retrospective inference I have considered the judicial guidance of Lindgren J on making such inferences in *Harrington-Smith*, and of French J in *Kanak* on construing the Native Title Act beneficially.⁴³

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

[61] 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 describe. I note that the application area does not include any large permanent settlements, however the town of Greenvale lies just outside the northern border, where many claimants and their families continue to live. I understand that, since the end of the 'station days', the claim group has maintained its association with the application area through regular visits, including the annual Youth Camp. The claimants also hold knowledge of the dreaming stories related to the application area which was passed to them by their predecessors, thus demonstrating an ongoing spiritual association.

⁴¹ *Martin* [25].

⁴² *Gudjala 2007* [40].

⁴³ *Harrington-Smith* [294]–[296], *Kanak* [73].

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

[62] 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.⁴⁴ It is not a requirement that the every member of the claim group have an association with the entire application area at all times.

[63] In my view, there is sufficient information in the application to support an association by the claim group, past and present, with the application area as a whole. I note the references, both historical and recent, to the pastoral stations which overlay the application area, as well as to Burdekin River in the south east and the Clarke River which runs just to the north. I understand that this application covers the most southern part of Gugu Badhun country, the majority of which has already been determined in *Gugu Badhun #2*. In that determination the native title rights of the claim group were recognised in a large area which lies directly to the north of the application area, and extends beyond both the eastern and western boundaries. I can see that some locations mentioned in this application are within the *Gugu Badhun #2* determined area, such as Walters Plains Lake and Lake Lucy to the north east. In light of the references to the pastoral stations which cover the application, to locations within the *Gugu Badhun #2* determination and to the Burdekin River which forms part of the southern boundary, I am satisfied the factual basis is sufficient to support an association with the whole area claimed.

Conclusion - s 190B(5)(a)

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

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

[65] 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.

[66] 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:

⁴⁴ *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.⁴⁵

[67] 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.⁴⁶

[68] 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.⁴⁷

[69] 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)

[70] Attachment F provides:

- (a) Rights and interests in land:
 1. At sovereignty, the predecessors of the claim group observed a system of land tenure based on descent from ancestors who were connected to particular lands and waters. Current claimants continue to observe this system which gives rise to their claim to rights and interests in the application area;⁴⁸
 2. The spirits of the deceased ancestors inhabit the country and it is their descendants who can 'speak for country' in accordance with the claim group's laws and customs;⁴⁹

⁴⁵ *Yorta Yorta* [46]–[47], emphasis added.

⁴⁶ *Warrie* [105], [107], emphasis added.

⁴⁷ *Gudjala 2009* [40].

⁴⁸ Attachment F [16].

⁴⁹ *Ibid* [54], [59].

(b) Kinship system

1. The kinship system observed by the claim group is linked to the tenure system, in that connection to country is mediated and expressed through connections to other claim group members;⁵⁰
2. Kinship rules continue to be observed, including rules regarding 'proper marriage' which govern the marriage choices available to young people.⁵¹

(c) Trade and ceremony:

1. Senior claimants recall people gathering on the application area in the 1920s and 1930s for ceremonies and dances. Today, elders continue to perform ceremonial duties at claim group gatherings, including ceremonies to communicate with deceased ancestors and other spirits, and the 'welcome to country';⁵²
2. In 1847, Leichhardt recorded trade between people in the application area and their neighbours on the coast, including shells and various foods. Current claimants can identify particular places in Gugu Badhun country which were used as meeting places to conduct trade.⁵³

(d) Spiritual beliefs:

1. The laws and customs of the claim group are rooted in spiritual beliefs about creative beings who formed and populated the landscape and set rules which govern traditional life. These beliefs have been passed down to the current claimants by their predecessors.⁵⁴
2. The story of the girls turned to stone after acting cruelly to a turtle, summarised above at s 190B(5)(a), is an example of a spiritual story prescribing normative behaviour. Other such examples include the prohibition on children playing after dark because of the presence of a dangerous spirit who would take them away;⁵⁵
3. The belief that the spirits of the ancestors inhabit the country gives rise to normative behaviours to manage the risk of supernatural misfortune which may result from unauthorised entry, including calling out to the ancestors in 'lingo' and avoiding gender-restricted areas such as birthing and initiation sites.⁵⁶

⁵⁰ Ibid [31].

⁵¹ Ibid [33].

⁵² Ibid [61]–[64].

⁵³ Ibid [79]–[83].

⁵⁴ Ibid [29].

⁵⁵ Ibid [47].

⁵⁶ Ibid [54]–[56].

(e) Traditional practices:

1. Leichhardt recorded people in the application area harvesting seeds and yams, which current claimants continue to collect in the ways taught to them by their predecessors;⁵⁷
2. The claim group continue to observe particular rules which govern the collection and use of resources, such as set limits on the number of fish which can be caught, and prohibitions on eating particular animals based on age or one's totemic relationship;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?

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

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

[72] I consider the material before me demonstrates how the laws and customs have been observed by successive generations of the claim group in the application area. Settlement of the application area occurred relatively recently and the great grandchildren of some of the apical ancestors are now senior claim group members. These claimants describe how they were taught the laws and customs from their predecessors, including how rights to land are acquired, the kinship system, and the rules of normative conduct in relation to locations in the application area, based on the group's spiritual beliefs.

[73] 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.⁵⁹ This is because there are examples provided about the predecessors of the claim group handing down the laws and customs to members of the current claim group, and those claimants passing them on to their children and grandchildren. The belief in particular spiritual beings which continue to inhabit the landscape, and the observation of rules to manage spiritual misfortune through avoidance of particular places are salient examples. There are also many examples provided of claimants learning

⁵⁷ Ibid [71]–[72].

⁵⁸ Ibid [74]–[77].

⁵⁹ *Yorta Yorta* [46]–[47].

from their predecessors the rules of hunting, fishing and preparing food in particular ways, and taking their children onto the application area and teaching them these practices. I consider it is reasonable to infer that the predecessors of the current claim group acquired their knowledge of the laws and customs in much the same way as they passed it on to their descendants, through teaching, oral transmission and common practice, thus supporting the assertion that the laws and customs are ‘traditional’.

Conclusion – s 190B(5)(b)

[74] 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)?

[75] 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.⁶⁰ 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.⁶¹

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

[76] 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.

[77] I note that the current claim group includes the great grandchildren of some of the apical ancestors. In my view, an inference of continuity can more easily be made when only a few generations separate the current claim group from those who were alive at the time of settlement.

[78] 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 continuing observance of the kinship system, rules relating to access to country (such as avoidance rules) and the ongoing observation of rules governing appropriate quotas and distribution of resources such as fish are examples which I consider are relevant to s 190B(5)(c). The knowledge that claimants hold about protocols for entering particular sites and the mythological stories about such sites, both of which they have learned from their predecessors, also supports the continued observance of the traditional laws and customs.

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

⁶⁰ *Gudjala 2009* [29].

⁶¹ *Gudjala 2007* [82].

Conclusion – s 190B(5)(c)

[80] I am satisfied the factual basis is sufficient to support the assertion that the claim group have continued to hold their native title rights in accordance with traditional laws and customs since at least the time of European settlement in the application area. The application demonstrates that claimants possess knowledge about how the previous generations acknowledged and observed their laws and customs in relation to the application area. I consider the factual basis sufficient to support an assertion of continuity in the observance of traditional laws and customs, which means s 190B(5)(c) is met.

Conclusion

[81] 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

[82] 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.

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

- (a) it requires some measure of the material available in support of the claim;⁶²
- (b) it appears to impose a more onerous test to be applied to the individual rights and interests claimed;⁶³ 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’.⁶⁴

[84] It is not my role to resolve whether the asserted factual basis will be made out at trial. My task is to consider whether there is any probative factual material which supports the existence of each individual right and interest, noting that as long as some rights can be prima facie established, the requirements of s 190B(6) will be met. Only those rights and interests I consider can be established prima facie will be entered on the Register.⁶⁵

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

2. ... the right of possession, occupation, use and enjoyment of land and waters against all others

[85] I note the majority’s comment in *Ward HC* that ‘[t]he expression “possession, occupation, use and enjoyment ... to the exclusion of all others” is a composite expression directed to describing a particular measure of *control over access to land*’.⁶⁶

⁶² *Doepel* [126].

⁶³ *Ibid* [132].

⁶⁴ *Ibid* [135].

⁶⁵ Section 186(1)(g).

⁶⁶ *Ward HC* [93], emphasis added.

[86] I also note the Full Court’s observations in *Griffiths FC* that:

[i]f control of access to country flows from spiritual necessity because of the harm that “the country” will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive. The relationship to country is essentially a “spiritual affair”. It is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people. The question of exclusivity depends upon the ability of the [native title holders] effectively to exclude from their country people not of their community. If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have ... an exclusive right of possession, use and occupation.⁶⁷

[87] The Full Court held in *Griffiths FC* that demonstrating the existence of exclusive rights depends on the consideration of what the evidence discloses about the right’s content under traditional laws and customs.⁶⁸ I therefore understand that I must consider whether the material demonstrates that the traditional laws and customs of the claim group permit them to exercise control over others’ access to the land and waters of the application area.

[88] As discussed above at s 190B(5), spiritual beliefs about creative beings who inhabit the landscape and set rules which govern traditional life have been passed down to the current claimants by their predecessors.⁶⁹ These beliefs give rise to normative behaviours to manage the risk of supernatural misfortune which may result from unauthorised entry to country.⁷⁰ Attachment F explains:

[T]he spirits are aware of people who are not Gugu Badhun and if they come onto country alone or without permission of the traditional owners the spirits can cause supernatural misfortune to befall those people.⁷¹

[89] From the information in Attachment F, I understand that as the descendants of the deceased ancestors and the holders of the relevant spiritual knowledge, the claim group members can speak to the spirits of those ancestors and enable safe access to country. Through observance of these protocols, the claim group can exercise control over others’ access to the application area. I therefore consider the claimants are the ‘gatekeepers for the purpose of preventing harm’, as described in *Griffiths FC* above, and that the content of the traditional laws and customs shows how a right of exclusive possession operates in relation to the application area.

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

4. ...the (non-exclusive) rights to:

(a) have access to, remain on and use the land and waters;

(b) access and take for any purpose the resources of the land and waters; and

(c) protect places, areas and things of traditional significance on the land and waters.

⁶⁷ *Griffiths FC* [127].

⁶⁸ Attachment F [71].

⁶⁹ *Ibid* [29].

⁷⁰ *Ibid* [54]–[56].

⁷¹ *Ibid* [55].

- [91] Attachment F provides information about claim group members past and present accessing the application area, including in Leichhardt’s journal in 1847 and in the records of various ethnographers and anthropologists in throughout the 19th and 20th centuries.⁷² Those early records describe how predecessors of the claim group took the resources of the application area including fruit, yams and wood for weapons.⁷³ The claim group today access the application area regularly for camping and take and use resources in accordance with the traditional laws and customs passed down to them by their predecessors, such as kangaroo, goanna and fish.⁷⁴
- [92] Attachment F also explains how claimants are required to protect places of traditional significance such as burial sites.⁷⁵ As discussed above, I understand this obligation arises from the belief in the spiritual imbueement of the landscape, which informs the traditional laws and customs observed by the claim group.⁷⁶
- [93] I consider these rights are prima facie established.

Conclusion

- [94] 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 pursuant to traditional laws and customs of the claim group. I am also satisfied those rights can be considered ‘native title rights and interests’. This is because there is information in the application to show how those rights were observed in the early years of settlement as well as in recent times. Additionally, 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

- [95] 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.
- [96] 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.⁷⁷

⁷² Ibid [4]–[12].

⁷³ Ibid [79].

⁷⁴ Ibid 72]–[77].

⁷⁵ Ibid [66].

⁷⁶ Ibid [65]–[66].

⁷⁷ *Doepel* [18], *Gudjala 2009* [84].

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

[97] 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 visiting and camping on the application area, accessing and using its natural resources.

[98] 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

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

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

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

Section	Requirement	Information	Result
s 61A(1)	Claimant application not to be made covering areas of approved determination of native title	The geospatial report states and my own searches confirm that the application does not cover an area where there has been an approved determination of native title.	Met
s 61A(2)	Claimant application not to be made covering previous exclusive possession act areas	Schedule B, paragraph 3(b)–(c) state that the application does not cover any area covered by previous exclusive possession acts.	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 provides that exclusive possession is only claimed where there has been no extinguishment of native title, or where any extinguishment is to be disregarded.	Met

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

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

Section	Requirement	Information	Result
s 190B(9)(a)	No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q states that the applicant does not claim any minerals, petroleum or gas wholly owned by the Crown.	Met
s 190B(9)(b)	Exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P states that no claim of exclusive possession is made in relation to any offshore place.	Met
s 190B(9)(c)	Native title rights and/or interests in the claim area have otherwise been extinguished	Schedule B paragraph 3(d) states that the application excludes land or waters where native title rights and interests have been extinguished.	Met

End of reasons

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Gugu Badhun People #3
NNTT No.	QC2019/003
Federal Court of Australia No.	QUD777/2019
Date of Registration Decision	6 March 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:

17 December 2019

Date application entered on Register:

6 March 2020

Applicant:

As per Schedule

Applicant's address for service:

As per Schedule

Area covered by application:

As per Schedule

Persons claiming to hold native title:

As per Schedule

Registered native title rights and interests:

As per Schedule

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.