

## Registration Decision

<b>Application name</b>	Kabi Kabi First Nation Traditional Owners Native Title Claim Group
<b>Name of applicant</b>	Alex Davidson, Bianca Beetson, Norman Bond, Kerry Neill, Helena Gulash, Kerry Jones, Brian Warner
<b>Federal Court of Australia No.</b>	QUD20/2019
<b>NNTT No.</b>	QC2018/007
<b>Date of Decision</b>	8 February 2019

### Claim accepted for registration

I have decided that the claim in the Kabi Kabi First Nation Traditional Owners Native Title Claim Group application satisfies all of the conditions in ss 190B and 190C of the *Native Title Act 1993* (Cth).<sup>1</sup> Therefore the claim must be accepted for registration and entered on the Register of Native Title Claims.

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Lisa Jowett

*Delegate of the Native Title Registrar*<sup>2</sup>

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

<sup>2</sup> Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 27 July 2018 and made pursuant to s 99 of the Act.

# Reasons for Decision

## CASES CITED

*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 FC*)

*Northern Territory of Australia v Doepel* (2003) 133 FCR 112; [2003] FCA 1384 (*Doepel*)

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

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

## BACKGROUND

- [1] This is an amended application made by the Kabi Kabi People. The original Kabi Kabi First Nation application was made on 31 May 2013 and later amended in 2017. It has remained on the Register of Native Title Claims (Register) since it was first accepted for registration on 7 August 2013. On 29 November 2018, the Federal Court (the Court) granted the applicant leave to amend the application to combine it with another Kabi Kabi application - Kabi Kabi Undambi Area Claim (QUD908/2016). The Court has retained the Kabi Kabi First Nation application as the lead application with the file number QUD20/2019<sup>3</sup>. For the purposes of entries on the Schedule of Applications and the Register, the Tribunal attributes a fresh file number to the combined application but retains the lead application's Court file number.
- [2] The combined area covers approximately 12,422 sq km inland and along the coast of Queensland just north of Brisbane. The First Nation claim is the larger of the originating claims with the smaller 732 sq km Undambi Area claim forming the southern tip of the entire combined area. The northern portion of the claim area is inland from Maryborough and extends east to the western boundary of the Wakka Wakka People #3 claim. The town of Gympie lies in the centre of the claim area and the towns of Caboolture and Redcliffe lie in the southern reaches. The eastern boundary follows the coast, extending to the lowest astronomical tide, from Double Island Point in the north to Redcliffe in the south.
- [3] The Registrar of the Court gave a copy of the amended application and accompanying affidavits to the Native Title Registrar (Registrar) on 14 December 2018 pursuant to s 64 of the Act. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A.

### *Registration conditions*

- [4] Sections 190A(1A), (6), (6A) and (6B) set out the decisions available to the Registrar under s 190A. Subsection 190A(1A) provides for exemption from the registration test for certain amended applications and s 190A(6A) provides that the Registrar must accept a claim (in an amended application) when it meets certain conditions. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (which deals mainly with the merits of the claim) and s 190C (which deals with procedural and

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<sup>3</sup> On 10 January 2019 Court orders allocated the new file number QUD20/2019 in line with its electronic court file proceeding policy. The Court's file number since lodgement of the pre combination application has been QUD280/2013 and the documents relating to the First Nation application all reference the previous QUD280/2013 file number.

other matters).<sup>4</sup> Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B and 190C.<sup>5</sup>

- [5] I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to the claim made in this amended application. The granting of leave by the Court to amend the application was not made pursuant to s 87A, and thus the circumstance described in s 190A(1A) does not arise. The amendments to the application, namely, to combine the two Kabi Kabi native title determination applications are not of a type contemplated in subparagraphs 190A(6A)(d)(i) to (v) and do not therefore meet the requirements of that condition.
- [6] I have decided that the claim satisfies all of the registration test conditions and my reasons on each condition follow below.

### Information considered

- [7] Section 190A(3) sets out the information to which the Registrar must have regard in considering a claim under s 190A and provides that the Registrar ‘may have regard to such other information as he or she considers appropriate’.
- [8] I have had regard to information in the application and accompanying documents.<sup>6</sup>
- [9] I note there is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers.<sup>7</sup>
- [10] The State of Queensland (the state government) has not provided any submissions in relation to the application of the registration test.<sup>8</sup>
- [11] I may also have regard to such other information as I consider appropriate<sup>9</sup>. As such, I consider it appropriate to have regard to the previous delegate’s statement of reasons for her registration decisions in relation to the pre combination applications:
1. [Kabi Kabi First Nation, Registration Decision 20 March 2017](#)
  2. [Kabi Kabi Undambi Area Claim, Registration Decision 30 March 2017](#)
- [12] I have also considered information contained in a geospatial assessment and overlap analysis prepared by the Tribunal’s Geospatial Services in relation to the area covered by the application, dated 8 January 2019 (the geospatial report).

### Procedural fairness

- [13] On 18 December 2018 the Tribunal’s senior officer for the matter wrote to the relevant minister of the state government advising I would be considering the application for registration, providing it with an opportunity to make submissions. No information or submissions were received from the state government and this concluded the procedural fairness process.

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<sup>4</sup> See 190A(6).

<sup>5</sup> See 190A(6B).

<sup>6</sup> See s 190A(3)(a).

<sup>7</sup> See s 190A(3)(b).

<sup>8</sup> See s 190A(3)(c).

<sup>9</sup> See s 190A(3).

## Merits of the claim (s 190B) – Conditions met

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

[14] For the application to meet the requirements of s 190B(2), the Registrar must be satisfied that the information and map contained in the application identify with reasonable certainty the ‘particular land and waters’ where native title rights and interests are claimed. The two questions for this condition are whether the information and map provides certainty about:

- the external boundary of the area where native title rights and interests are claimed; and
- any areas within the external boundary over which no claim is made.<sup>10</sup>

#### *Description of the area covered by the application*

[15] Schedule B refers to Attachments B and C to describe the area covered by the application. Attachment B identifies that the application is a combined application covering the land and waters of the Kabi Kabi First Nation Traditional Owners and Kabi Kabi Undambi Area Claim areas.

[16] Attachment B has been prepared by Queensland South Native Title Services (QSNTS) and is dated 25 September 2018. It provides a description of the external boundary of the application area by metes and bounds referencing rivers and creeks, roads, Mount Bauple, the Lowest Astronomical Tide (LAT), the High Water Mark, Mary River Basin Catchment, native title determinations, lot on plan, easements, local government boundaries and coordinate points identified by Longitude and Latitude to six (6) decimal places (Geocentric Datum of Australia 1994). It includes the statement that the combined application area does not include any areas which have not been previously claimed.

[17] Schedule B provides a list of general exclusions to describe those areas not covered by the application and notes that the written description shall prevail, if there is any discrepancy between the description (Attachment B) and the map (Attachment C). Attachment B includes the specific exclusion of any lands or waters within the external boundaries subject to Native Title Determination Applications:

- QUD288/2009 Butchulla Land & Sea Claim #2
- QUD91/2012 Wakka Wakka People 4
- QUD621/2011 Wakka Wakka People #3

and Native Title Determinations:

- QUD6128/1998 Jinibara People determined 20 November 2012
- QUD6196/1998, QUD586/2011 Yugara/Yugarapul People and Turrbal People determined 16 March 2015.

[18] Schedule C refers to Attachment C which is a colour copy of a map titled ‘QUD280/2013 Kabi Kabi First Nation (Combined) Native Title Determination Application’ also prepared by QSNTS, dated 10 September 2018. The map includes the application area depicted by bold blue

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<sup>10</sup> Doepel at [122].

outline with blue stipple fill; Lot 509 on NPW594 is labelled; a commencement point; topographic base map showing roads, watercourses and place names; scalebar, coordinates grid, north point and map legend; and notes relating to the source, currency and datum of data used to prepare the map.

### *Consideration*

- [19] The information in relation to the external boundaries of the area covered by the application allows me to identify the location of those boundaries on the surface of the earth. The specific exclusions provide added certainty as to the identification of those boundaries. The general exclusions used to describe other areas not covered by the application are, in my view, sufficient to offer an objective mechanism by which to identify areas that would fall within the categories listed.
- [20] The geospatial report in relation to the application makes the assessment that the description and the map are consistent such that the area covered by the application is readily identifiable. I agree with that assessment.
- [21] I am therefore satisfied that the external boundary is identifiable and, along with the general and specific exclusions that set the internal boundaries, that it can be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

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

- [22] For the application to meet the requirements of s 190B(3), the Registrar must be satisfied that:
- (a) the persons in the native title claim group are named in the application; or
  - (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.
- [23] The only question for this condition is ‘whether the application enables the reliable identification of persons in the native title claim group’. Whether the claim has been made on behalf of the correct native title claim group is not relevant.<sup>11</sup>
- [24] Schedule A of the application describes the native title claim group as follows:
- The Kabi Kabi First Nation Traditional Owners are those people:
- (a) Who are descendants of the following apical ancestors:
1. Maggie Cadenti/Cadente/Cantidi: “Maggie”
  2. George Parson
  3. Albert Williams
  4. Ngimburum
  5. Kaloma-kuta/Galmaguda/Haloma-kuta/Kal-ma-kuta
  6. Mother of Albert Smith and Peter Graham
  7. Willie Kina
  8. Susan Andy
  9. Jacky Ball (or Baul)
  10. Maggie Cain/Caine
  11. James Crow/Crowe

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<sup>11</sup> *Doepel* at [51] and [37]; *Gudjala 2007* at [33].

12. Maggie Palmer
13. Emma Dunne
14. William/Billy Glenbar
15. Annie Laurie
16. May Burnett
17. Tuppernywoe/"King" Tommy of Noosa
18. Dundalli
19. Cob
20. Sarah Di:naba Moreton
21. Marian/Mary Ann Thompson
22. Dil:l
23. Edward Ross
24. Menvil Wanmuarn/Jackie Delaney

And

(b) Who identify as and are recognised as members of the Kabi Kabi First Nation Traditional Owners in accordance with the system of traditional laws and customs.

- [25] In my view, the description of the native title claim group is capable of being readily understood and is sufficiently clear such that it can be ascertained whether any particular person is in that group. I understand that membership of the native title claim group is regulated by descent from one or more of the Kabi Kabi ancestor(s) listed. Members of the claim group must also identify and be recognised as members of the Kabi Kabi First Nation Traditional Owners in accordance with the group's system of traditional laws and customs.
- [26] It may be that some factual inquiry is required to establish a person's descent from any of the named ancestors, their identification and recognition under traditional law and custom, but that would not mean that the group has not been sufficiently described.<sup>12</sup>
- [27] I am satisfied the claim meets the requirements of s 190B(3).

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

- [28] For the application to meet the requirements of s 190B(4), the Registrar must be satisfied that the application's description of the claimed native title rights and interests is sufficient to allow the rights and interests to be readily identified. That is, whether the claimed rights are described clearly and in a way that is meaningful and understandable.<sup>13</sup>
- [29] Schedule E of the application contains the description of native title rights and interests claimed in relation to the application area, as required by s 62(2)(d):

The non-exclusive rights to:

- a. access, be present on, move about on and travel over area;
- b. camp on the area, and for that purpose, erect temporary shelters on the area;
- c. hunt, fish and gather on the land and waters of the area for personal, domestic and non-commercial communal purposes;
- d. take, use and share Natural Resources from the land and waters of the area for personal, domestic and non-commercial communal purposes;
- e. take and use the Water of the area for personal, domestic and non-commercial communal purposes;
- f. participate in cultural activities on the area;
- g. hold meetings on the area;

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<sup>12</sup> *WA v NTR* at [67].

<sup>13</sup> *Doepel* at [99] and [123].

- h. maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and to protect those places and areas from physical harm;
- i. teach on the area the physical and spiritual attributes of the area;
- j. light fires on the area for domestic purposes including cooking, but not for the purpose of hunting or clearing vegetation;
- k. be buried and bury native title holders within the area.

[30] Whether any of these rights fall outside the scope of s 223 is, in my view, a matter for consideration under s 190B(6), whether they can be established prima facie. The description of the claimed rights and interests are, in my view, readily identifiable in the sense of being intelligible and understandable.

[31] I am satisfied the description contained in the application is sufficient to allow the native title rights and interests to be readily identified.

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

[32] As stated earlier in these reasons, the current amended application is the product of the combination of two Kabi Kabi native title determination applications: First Nation and Undambi Area (the pre combination applications or claims). The area covered by the current amended application is a combination of the two areas covered by these applications.

[33] In relation to each of the originating claims, the Form 1s, claimant affidavits and the additional material submitted directly to the Registrar differ only to the extent that the relevant geographic area dictates that they differ. Schedules F and G, providing information relevant to the factual basis condition, are identical in each application. The description of the native title claim group in the current amended application is the same as that described in each pre combination application.

### *Consideration of statement of reasons for decision in originating Kabi Kabi applications*

[34] I am of the view that it is appropriate that I have regard to the previous delegate's statement of reasons for each of the decisions listed at [11], and specifically the reasons she provided for the factual basis condition in each case. Attachment F to this amended application, which provided the factual basis for the claim made in the application, is the same as Attachment F in the two originating applications. In my view, the reasons remain relevant and applicable because the combined application covers the areas covered by those applications previously considered for registration and the applicant continues to rely on the same material relied on by the delegate in her consideration of those applications.

[35] I have read Attachment F and considered the combined application against the requirements for the provision of a sufficient factual basis. I have read the previous delegate's statements of reasons and formed the view that I agree with her summaries of the material and her assessment, reasoning and conclusions in respect of the three assertions for the factual basis condition. For all of the above reasons, I have decided to adopt the previous delegate's summaries of the material as I consider them applicable to the combined application because the same facts and law apply. Further, I have decided to adopt the reasons of the previous delegate because I have reached the same conclusions and agree with the basis for her

conclusions. In my view, the information in the application is sufficient to support the factual basis for the claim made in the combined application.

[36] In the interests of brevity I have not quoted the reasons in their entirety, but instead reference the paragraphs relevant to my consideration and quote the delegate's conclusions.

*Reasons for s 190B(5)(a)*

[37] This subsection requires that the Registrar be satisfied that the factual basis is sufficient to support the assertion that:

(a) the native title claim group currently has an association with the area covered by the application, and

(b) the predecessors of the native title claim group also had an association with the area.

[38] While it is not necessary for the factual basis to support an assertion that all members of the native title claim group have an association with the area all of the time, it is necessary to show that the claim group as a whole has an association with the area. Further, the facts alleged must 'support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)'. In other words, the factual basis should show the history of the association that those members of the claim group have, and that their predecessors had, with the application area. It should be sufficient to demonstrate that a link exists between the current claim group and its predecessors and their association with the application area.<sup>14</sup>

[39] The factual basis provided in Attachment F establishes the presence on, association with and occupation by Aboriginal people since sovereignty in the area covered by the combined application. Geographical reference is made to both the coastal and inland land and waters of the claim area. It is clear that members of the native title claim group and their predecessors were born, have lived and continue to live for all or much of their lives within or near the area covered by the combined application.

[40] The previous delegate addressed the asserted current and previous association of the native title claim group against the geographic extent of the areas covered by the pre combination claims. She was satisfied that the factual basis was sufficient to support the assertion that the native title claim group has, and its predecessors had, an association with the areas covered by each of these claims. The information at Attachment F on which she relied is the same provided in Attachment F to the combined application and on which I have also based my consideration. I have relied on her consideration of s 190B(5)(a) in each of her decisions for the pre combination applications. The statement of reasons for the First Nation application sets out the facts asserted to support the association of the native title claim group and its predecessors with that area at [77] to [86]. The delegate's consideration of this material then follows at [87] to [97]. The statement of reasons for the Undambi Area application sets out the facts asserted to support the association of the native title claim group and its predecessors at [76] to [85]. The delegate's consideration of this material then follows at [86] to [96].

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<sup>14</sup> *Gudjala 2007* at [39], [51]-[52] and [66].

[41] It was the delegate's conclusion in relation to both the pre combination applications that, firstly, there was sufficient account in the historical sources of the association of the claim group's predecessors with the claim area and its vicinity. Secondly, that the various stories and accounts of current claimants contained references to numerous places, townships and landmarks within the application and around the claim area. In her view the material was 'sufficient to support that the association is with the whole of the claim area'.

#### *Consideration*

[42] In *Gudjala 2007* Justice Dowsett considered that in assessing the factual basis material, it was necessary for the Registrar to address 'the relationship which all the members claim to have in common in connection with the relevant land'.<sup>15</sup>

[43] In my view, the previous delegate's summaries of the factual basis material for the pre combination claims are both clear and accurate. I adopt the reasons of the previous delegate because I have considered all of the same material and have reached the same conclusion. I consider that the material is sufficient to demonstrate the association of the members of the claim group and its predecessors with the now combined area. It is clear to me on my reading of the material that there is a link between the current claim group's association and its predecessors' association with the application area to be found in the application and other material before me. The information demonstrates the claim group's connection to the land and waters of the application area through descent affiliation to that area. In this way, it is clear that this current association has its origins in the preceding generations' association with the area.

[44] For these reasons and for those set out by the previous delegate in both her statements of reasons, I am satisfied that the native title claim group has, and its predecessors had, an association with the area.

#### *Reasons for s 190B(5)(b)*

[45] This subsection requires that the Registrar be satisfied that the factual material is sufficient to support the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group. These are the traditional laws and customs that give rise to the native title rights and interests claimed in the application.

[46] In *Gudjala 2007*, Dowsett J considered that the factual basis materials for this assertion must demonstrate:

- that the laws and customs currently observed by the claim group have their source in a pre-sovereignty society and have been observed since that time by a continuing society;
- the identification of a society of people living according to a system of identifiable laws and customs, having a normative content, which existed at the time of sovereignty; and
- the link between the claim group described in the application and the area covered by the application, 'identifying some link between the apical ancestors and any society existing at sovereignty'.

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<sup>15</sup> At [40].

- [47] In other words, there must be factual material capable of supporting the assertion that there are ‘traditional’ laws and customs acknowledged and observed by the native title claim group, and that they give rise to the claimed native title rights and interests.<sup>16</sup> In my view, there is sufficient factual account in the combined application to support the proposition, that under the traditional laws and customs of the claim group, there exist rights and interests that relate to the land and waters of the area covered by the application.
- [48] The previous delegate considered and summarised the material before her in relation to the nature of Kabi Kabi society and the traditional laws and customs acknowledged and observed by the native title claim group. The information at Attachment F to the application on which she relied is the same provided in the pre combination applications and on which I have based my consideration of the factual basis for the combined application. I have relied on her consideration of this material for the purposes of s 190B(5)(b).
- [49] In the statement of reasons for the First Nation application, the previous delegate summarised and considered the material at [100] to [127]. In the statement of reasons for Undambi Area application, the previous delegate summarised and considered the material at [99] to [126]. It was the delegate’s conclusion in relation to both pre combination applications that the ‘material is sufficient to support the assertion that there has been a continuation of laws and customs of the pre-sovereignty society rather than a recent revival by providing information that enables a comparison of what was acknowledged and observed in historical times to that which is acknowledged and observed currently and which was taught to claimants by their forebears’.<sup>17</sup>
- [50] The previous delegate was satisfied that there was sufficient factual basis to support the assertion that the claim group acknowledge and observe traditional laws and customs which give rise to the claim to native title rights and interests. I adopt the reasons of the previous delegate because I have considered all of the same material and have reached the same conclusions. I agree that the factual basis material is sufficient to support the assertion that there exist traditional laws acknowledged and traditional customs observed by the native title claim group that give rise to the claim to native title rights and interests.

*Reasons for s 190B(5)(c)*

- [51] This subsection requires that I be satisfied that there is sufficient factual basis to support the assertion that the native title claim group continues to hold native title in accordance with its traditional laws and customs. Dowsett J, in *Gudjala 2007*, held that this requirement ‘implies a continuity of such tenure going back to sovereignty, or at least European occupation as a basis for inferring the position prior to that date’. The factual basis material is therefore required to illustrate or demonstrate how members of the native title claim group ‘have continued to hold native title in accordance with traditional laws and customs’.<sup>18</sup>
- [52] The previous delegate considers this assertion in her statement of reasons for the First Nation application at [128] to [132] and for the Undambi Area application at [127] to [131], relying on the conclusions she reached in relation to ss 190B(5)(a) and (b). She was satisfied that there

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<sup>16</sup> *Doepel* at [17]; *Gudjala 2007* at [62], [63]; [65], [66]; [71], [72]; [96].

<sup>17</sup> At [126] and [125] respectively.

<sup>18</sup> *Gudjala 2007* at [82].

were sufficient facts in relation to both pre combination applications ‘about the continuity of the connection of the native title claim group with the claim area in accordance with their traditional laws and customs’; the material in the factual basis including descriptions by claim group members of ‘this continuity and how important adherence to law and custom remains today’.<sup>19</sup>

[53] I adopt the reasons of the previous delegate because I have considered all of the same material and have reached the same conclusion. I agree that the information in the factual basis material is sufficient to support the assertion that the native title claim group continues to hold native title in accordance with its traditional laws and customs. Attachment F contains many statements that assert the continuity of the native title claim group’s traditional laws and customs, referring to how laws and customs have been passed from generation to generation by traditional modes of oral transmission, teaching and common practice, and continue to be acknowledged and observed today among the current generations of the claim group.

#### *Conclusion*

[54] I am satisfied that the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support the assertion. In particular, there is a sufficient factual basis supporting the three assertions of subsections 190B(5)(a), (b) and (c).

#### **Prima facie case – s 190B(6): condition met**

[55] Under s 190B(6), I must be satisfied that at least one of the native title rights and interests claimed by the native title group can be established, prima facie. I have examined the factual basis for the assertion that the claimed native title rights and interests exist against each individual right and interest claimed in the application to determine whether prima facie, they:

- exist under traditional law and custom in relation to any of the land or waters under claim;
- are native title rights and interests in relation to land or waters (see chapeau to s 223(1)); and
- are rights and interests that have not been extinguished over the whole of the application area.

[56] I am of the view that it is appropriate that I have regard to the previous delegate’s statement of reasons for her decisions in relation to the pre combination applications. Her reasons in each case remain relevant and applicable to the prima facie condition.

[57] The previous delegate was satisfied that all the rights claimed in the application were established prima facie because all were evidenced in the material before her. Her statement of reasons includes examples of the activities undertaken in exercise of the claimed rights under the groups’ traditional laws and customs. She does this for the First Nation application at [140] to [174] and for the Undambi Area application at [139] to [173].

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<sup>19</sup> At [131] and [130] respectively.

[58] I adopt the reasons of the previous delegate because I have considered all of the same material and have reached the same conclusion in relation to each of the claimed rights. I agree with the basis for her conclusion and am satisfied that all the rights can be established prima facie.

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

[59] Under s 190B(7), I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application. This condition ‘can be seen as requiring some measure of substantive (as distinct from procedural) quality control upon the application’.<sup>20</sup>

[60] The previous delegate was satisfied that both the pre combination applications provided evidence that at least one member of the claim group currently has a traditional physical connection with parts of the application area. She makes the statement that ‘[t]here are numerous examples within the material of current claimants and their forebears having a traditional physical connection with the application area’ and includes examples of the activities undertaken in exercise of the rights said to exist under the group’s traditional laws and customs. She does this for the First Nation application at [176] to [184] and for the Undambi Area application at [175] to [183].

[61] I adopt the reasons of the previous delegate because I agree with the basis for her conclusion and have therefore reached the same conclusion. The applicable law and the facts in the combined application remain the same as for the pre combination applications and I am satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection.

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

[62] In my view the application does not offend the provisions of ss 61A(1), 61A(2) and 61A(3) and therefore the application satisfies the condition of s 190B(8):

Requirement	Information addressing requirement	Result
s 61A(1) no native title determination application if approved determination of native title	Geospatial report	Met
s 61A(2) claimant application not to be made covering previous exclusive possession over areas	Schedule B, paragraph [2]	Met
s 61A(3) claimant applications not to claim certain rights and interests in previous non-exclusive possession act areas	Schedule E – the application does not make a claim to exclusive possession	Met

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

[63] In my view the application does not offend the provisions of ss 190B(9)(a), (b) and (c) and therefore the application meets the condition of s 190B(9):

<sup>20</sup> *Gudjala FC* at [84].

Requirement	Information addressing requirement	Result
(a) no claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q	Met
(b) exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P	Met
(c) native title rights and/or interests in the application area have otherwise been extinguished	Schedule B, paragraph [2(c)]	Met

Procedural and other matters (s 190C)—Conditions met

Information etc. required by sections 61 and 62 – s 190C(2): condition met

[64] I have examined the application and I am satisfied that it contains the prescribed information and is accompanied by the prescribed documents.

*What is required to meet this condition?*

[65] To meet s 190C(2), the Registrar must be satisfied that the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61 and 62. This condition does not require any merit or qualitative assessment of the material to be undertaken<sup>21</sup>.

[66] I have examined the application and I am satisfied that it contains the prescribed information and is accompanied by the prescribed documents.

*Subsection 61*

[67] The application contains the details specified in s 61.

Section	Details	Form 1	Result
s 61(1)	Native title claim group	Schedule A	Met
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Schedule A	Met

*Subsection 62*

[68] The application contains the details specified in s 62.

Section	Details	Form 1	Result
s 62(1)(a)	Affidavits in prescribed form	2016 affidavits	Met
s 62(2)(a)	Information about the boundaries of the area	Schedule and 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	Attachment F	Met

<sup>21</sup> *Doepel* at [16]; at [35] to [39].

Section	Details	Form 1	Result
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	Met

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

[69] The requirement that the Registrar be satisfied in the terms set out in s 190C(3) is only triggered if there is a previously registered claim, as described in ss 190C(3)(a), (b) and (c). Section 190C(3) relates to ensuring there are no common native title claim group members between the application currently being considered for registration ('the current application') and any overlapping 'previous application' that is a registered application when the current application was made in the Court.

[70] The current application is comprised of the combination of the First Nation and Undambi Area Kabi Kabi claims that are currently entered singly on the Register. The Tribunal's geospatial report confirms these are the only native title determination applications to fall within the external boundaries of the current application. As the Kabi Kabi combined application does not overlap any other applications, there is no requirement that I consider the issue of common claim group membership.

[71] I am satisfied that no person is included in the native title claim group for this application that was a member of the native title claim group for any previous overlapping application.

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

#### ***What is required to meet this condition?***

[72] The application purports to be certified by the representative body for the area. The relevant consideration is therefore at s 190C(4)(a) which imposes upon the Registrar conditions which, according to Mansfield J in *Doepel*, are straightforward.<sup>22</sup> All that the task requires is that I be 'satisfied about the fact of certification by an appropriate representative body',<sup>23</sup> which necessarily entails:

1. identifying the relevant native title representative body (or bodies) and being satisfied of its power under Part 11 to issue the certification; and
2. being satisfied that the certification meets the requirements of s 203BE.<sup>24</sup>

[73] Section 203BE(4) requires that a written certification by a representative body must:

- include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs of s 203BE(2)(a) and (b) have been met;
- briefly set out the body's reasons for being of that opinion; and
- where applicable, briefly set out what the representative body has done to meet the requirements of subsection 203BE(3) in relation to any overlapping applications.

<sup>22</sup> *Doepel* at [72].

<sup>23</sup> *Doepel* at [78].

<sup>24</sup> *Doepel* at [80] and [81].

[74] Section 203BE(2) states that a ‘representative body must not certify ... an application for a determination of native title unless it is of the opinion that’:

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

*Identification of the representative body*

[75] The Tribunal’s geospatial report of 8 January 2019 confirms that Queensland South Native Title Services (QSNTS) is the only representative body for the whole of the area covered by the combined application. It is therefore the only body that could certify the application under s 203BE. The combined application is accompanied at Attachment R by a certificate dated 22 November 2016 and is signed by the Chief Executive Officer for QSNTS.

*Does the certificate meet the requirements of 203BE*

[76] For the purposes of s 203BE(4)(a), the certification contains statements in relation to the requirements of paragraphs 203BE(2)(a) and (b), that is:

1. all the persons in the Kabi Kabi First Nation Traditional Owners native title claim group have authorised the applicant to make the application and to deal with the matters arising in relation to it; and
2. all reasonable efforts have been made to ensure the application describes or otherwise identifies all the other persons in the native title claim group.

[77] For the purposes of s 203BE(4)(b), the certification briefly sets out the reasons for QSNTS being of that opinion, namely:

- QSNTS convened authorisation meetings on 22-23 October 2016 in Nambour to authorise amendments to the application and to replace the then applicant;
- the meetings were advertised in 3 major publications, a notice placed on the website of QSNTS and invitations enclosing notice of the meetings was sent to claim group members;
- the meetings were well attended, with attendance, meeting procedures and outcomes recorded.

[78] The certification also includes the statement that the Chief Executive Officer is satisfied that through these authorisation meetings, all the necessary steps were taken in accordance with the requirements of the Act as well as the instructions of the claim group.

[79] No statement is provided addressing s 203BE(4)(c).

*Consideration*

[80] It is clear that the certificate has not been issued afresh for the purposes of the combined application. The certificate is the same certificate that accompanied the amended First Nation application when it was made on 13 December 2016. The contents of the certificate are also the same as the certificate accompanying the Undambi Area application when it was made on 30 November 2016.

- [81] *Wakaman* is authority that an amended application does not generally require a fresh certification, if the applicant and the certifying body clearly intend that it apply to the amended application. The Court accepted that it is 'part of the delegate's function under the NTA to consider whether the certification is of the particular application under consideration', which would necessarily involve a consideration of the applicant's intention. The Court said that rejection of a certification on the sole ground that it was given in relation to an earlier version of the application would be 'unduly technical' and 'inappropriate to procedures under the Act'.<sup>25</sup>
- [82] The Court decided that because the application had been certified and the applicant and representative body 'clearly intended' the certification to apply to the amended application, the delegate was not required or permitted under s 190C(4)(a) to be satisfied about the correctness of the certification. The Court said that 'certification means that the function has been carried out by the representative body and there is no basic function for the Registrar to carry out' and concluded that the earlier certification in that case should be treated as applying to the later application.<sup>26</sup>
- [83] It is clear to me that it is the intention of the applicant and QSNTS for the earlier certification to apply to the amended application. It forms Schedule R of the Form 1 which requires that information and the Court. It has granted leave to amend to combine the First Nation and Undambi Area applications and the certificate contains the same contents as the certification in the Undambi Area application. I am satisfied that the earlier certification should be treated as applying to the combined application.
- [84] I am satisfied that the certification contains the statements and information required by s 203BE(4). The requisite statements are made in the certificate and, as summarised above, the certificate briefly sets out the reasons for QSNTS being of the opinion that the requirements of s 203BE(2)(a) and (b) have been met. As the combined application is not overlapped by any other application, I do not consider that s 203BE(4)(c) is applicable.

### *Conclusion*

- [85] For the above reasons, I am satisfied that the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application.

### *End of reasons*

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<sup>25</sup> *Wakaman* at [33]-[33].

<sup>26</sup> *Ibid* [34].

## Attachment A

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

Application name	Kabi Kabi First Nation Traditional Owners Native Title Claim Group
NNTT No.	QC2018/007
Federal Court of Australia No.	QUD20/2019

#### Section 186(1): Mandatory information

In accordance with ss 190(1) and 186 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:

11 December 2018

#### Date application entered on Register:

8 February 2018

#### Applicant:

As per Schedule of Applications (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

#### Attachments:

As per Schedule

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Lisa Jowett

8 February 2019

*Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the Native Title Act 1993 (Cth) under an instrument of delegation dated 27 July 2018 and made pursuant to s 99 of the Act.*