

National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION

DELEGATE: Susan Walsh

Application Name: Djungan People #4

Names of Applicant(s): Mr Desmond Grainer

Region: Far North Queensland NNTT No.: QC01/38

Date Application Made: 05/10/01 Federal Court No.: Q6036/01

The delegate has considered the application against each of the conditions contained in s.190B and s.190C of the *Native Title Act 1993* (Cwlth).

DECISION

The application IS ACCEPTED for registration pursuant to s.190A of the *Native Title Act 1993* (Cwlth).

Susan Walsh

5 November, 2001

Date of Decision

Delegate of the Registrar pursuant to sections 190, 190A, 190B, 190C, 190D

EDITED STATEMENT OF REASONS FOR DECISION

Summary in relation to the Application

This application was filed in the Federal Court, Queensland District Registry, on 5/10/01, in response to a low impact exploration permit (application notice) issued pursuant to the *Mineral Resources Act 1989 (Qld)*. To be entitled to be consulted pursuant to s488(1) of the *Mineral Resources Act* the applicant must be a registered native title claimant in relation to land covered by the application notice at the start of the consultation period.

This application is the fourth native title determination application on behalf of the Djungan People. Each application has been lodged by a Djungan native title claim group, with identical membership. The details of the other three applications are:

QC95/11

This is the first registered application lodged by the native title claim group over Djungan country. It is currently in mediation with the Native Title Tribunal. It is a claim over traditional country that is in the same general locality as the claim area of the application I am currently considering under s190A.

QC96/5

This is the second registered application lodged over Djungan country. It covers a specific parcel of land within a pastoral holding held on behalf of the Djungan People. This holding is proximate to the claim area. The application remains active and is currently in mediation with the Native Title Tribunal. It is entered on the Register of Native Title Claims. It has been accepted for registration pursuant to s190A.

QC97/6

This is the third registered application over Djungan country. The two claim areas share a boundary and are closely proximate. This third application remains active and is currently in mediation with the Native Title Tribunal. It has been accepted for registration pursuant to s190A.

Information considered when making the Decision

In determining this application I have considered and reviewed the application and all of the information and documents from the following files, databases and other sources:

- The National Native Title Tribunal's Legal Services Files and Registration Testing Files for QC01/38, and for native title determination applications lodged by the Djungan People over other parts of their traditional country in QC95/11, QC96/5, and QC97/6.
- Tenure information acquired by the Tribunal in relation to the area covered by this application (if any).
- The National Native Title Tribunal's files and related materials for Native title applications that overlap the area of this application (if applicable);
- The National Native Title Tribunal Geospatial Database;
- The Register of Native Title Claims and Schedule of Native Title Applications;

- The National Native Title Register;
- Affidavit (provided directly to the Registrar as additional information) by [name deleted] (5/10/01);
- Form 1 applications, affidavits and other documents considered in the registration testing of the previous Djungan applications QC95/11, QC96/5 and QC97/6.

Copies of the affidavit and other material provided directly to the Registrar by the applicants in this application and in the other Djungan applications have been provided to the State. The State has not provided any comment in response to the material I have had reference to.

Note: Information and materials provided in the context of mediation on any of the native title determination applications by the Djungan People has not been considered in making this decision. This is due to the without prejudice nature of mediation communications and the public interest in maintaining the inherently confidential nature of the mediation process.

All references to legislative sections refer to the Native Title Act 1993 unless otherwise specified.

A. Procedural Conditions

s.190C(2)

Information, etc., required by section 61 and section 62:

The Registrar must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.

Details required in section 61

s.61(1) Persons who may make an application for a determination of native title – a person or persons authorised by all the persons (the native title claim group) who, according to their traditional law and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group

Reasons relating to this sub-condition

It is stated in the Schedule A that the persons claiming to hold native title are the Djungan People as set out in an attached list (Attachment A) and their descendants. The list which is attached sets out the names and (where known) addresses of approximately 875 Djungan persons. It is stated in schedule A that the list of Djungan persons was prepared from genealogies by an anthropologist. It is stated in schedule A that:

- the group is known to itself and neighbouring Aboriginal groups as the Djungan
- the group is continuous in terms of descent and in terms of continuous transmission of the Djungan identity from the group of the same name recorded in and around the claim area late last century (I take this to be a reference to the 19th century), and in various written sources since.

I note that this description of the native title claim group, in particular the list of Djungan persons, is the same as provided for in each of the previous 3 Djungan People applications (QC95/11, QC96/5, QC97/6).

There is no suggestion in any of the information that I have considered that the Djungan native title claim group is part only of a larger group who hold common or group rights in the claim area. I am satisfied that the Djungan native title claim group is a clearly defined and properly constituted group of people based on descent from named ancestors.

Result: Requirements met

s.61(3) Name and address for service of applicants

Reasons relating to this sub-condition

The name of the applicant is detailed at Part A. The details of address for service appear on page 14 of the application, under Part B.

Result: Requirements met

s.61(4) Names the persons in the native title claim group or otherwise describes the persons so that it can be ascertained whether any particular person is one of those persons

Reasons relating to this sub-condition

Schedule A of the application describes the native title claim group. For the reasons which led to my conclusion (below), that the requirements for s.190B(3) have been met I am satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Result: Requirements met

s.61(5) Application is in the prescribed form, lodged with the Federal Court, contains prescribed information, and is accompanied by any prescribed documents

Reasons relating to this sub-condition

The application is in the form prescribed by Regulation 5(1)(a) of the *Native Title (Federal Court) Regulations* 1998. The application was filed in the Federal Court as required pursuant to s.61(5)(b) of the Act.

The application meets the requirements of s.61(5)(c) and contains all information prescribed in s.62. I refer to my reasons in relation to those sections. As required by s.61(5)(d) the application is accompanied by an affidavit as prescribed by s.62(1)(a) and a map as prescribed by s.62(2)(b). I refer to my reasons in relation to those sections of the Act.

Result: Requirements met

Details required in section 62(1)

s.62(1)(a) Affidavits address matters required by s.62(1)(a)(i) – s.62(1)(a)(v)

Reasons relating to this sub-condition

The application is accompanied by an affidavit sworn 5 October 2001. The affidavit is competently witnessed. I am satisfied that the affidavit satisfactorily addresses the matters required by s.62(1)(a)(i)-(v).

Result: Requirements met

s.62(1)(c) Details of traditional physical connection (information not mandatory)

Comment on details provided

The affidavit does not contain details relating to traditional physical connection. However, as this is not a mandatory requirement, this does not adversely affect my decision.

Result: Not provided

Details required in section 62(2) by section 62(1)(b)

s.62(2)(a)(i) Information identifying the boundaries of the area covered

Reasons relating to this sub-condition

For the reasons which led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the information and maps in the application are sufficient to enable the area covered by the application to be identified with reasonable certainty.

Result: Requirements met

s.62(2)(a)(ii) Information identifying any areas within those boundaries which are not covered by the application

Reasons relating to this sub-condition

For the reasons which led to my conclusion that the requirements of s.190B (2) have been met, I am satisfied that the information contained in the application is sufficient to enable any areas within the external boundaries of the claim area which are not covered by the application to be identified.

Result: Requirements met

s.62(2)(b) A map showing the external boundaries of the area covered by the application

Reasons relating to this sub-condition

For the reasons that led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the maps contained in the application show the external boundaries of the claim area.

Result: Requirements met

s.62(2)(c) Details/results of searches carried out by the applicant to determine the existence of any non-native title rights and interests

Reasons relating to this sub-condition

There is no information provided at Schedule D or Attachment D which indicate that the applicant, at the time of making the application, has conducted any searches.

Result: Requirements met

s.62(2)(d) Description of native title rights and interests claimed

Reasons relating to this sub-condition

A description of the native title rights and interests claimed by the applicant is contained in Schedule E of the application. The description does not merely consist of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law (see my reasons s.190B(4)).

Result: Requirements met

s.62(2)(e)(i) The application contains a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and in particular that:

- (i) the native title claim group have, and the predecessors of those persons had, an association with the area; and*
- (ii) there exist traditional laws and customs that give rise to the claimed native title; and*
- (iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.*

Reasons relating to this sub-condition

Information relevant to this subsection is contained at schedules A, F and G of the application. It is my view that this information amounts to a general description of the factual basis so as to comply with the requirements of s.62(2)(e) (see reasons under s190B5).

Result: Requirements met

s.62(2)(f) If native title claim group currently carry on any activities in relation to the area claimed, details of those activities

Reasons relating to this sub-condition

The application provides details of activities that the native title claim group carries out in relation to the area claimed at schedule G.

Result: Requirements met

s.62(2)(g) Details of any other application to the High Court, Federal Court or a recognised State/Territory body the applicant is aware of (and where the application seeks a determination of native title or compensation)

Reasons relating to this sub-condition

It is stated in schedule H that the applicants are not aware of any other registered native title determination applications that cover any part of the claim area.

Result: Requirements met

s.62(2)(h) *Details of any s.29 notices given pursuant to the amended Act (or notices given under a corresponding State/Territory law) in relation to the area, which the applicant is aware of*

Reasons relating to this sub-condition

Details of an application notice pursuant to the *Mineral Resources Act* are found at Schedule I and attachment I of the application.

Result: Requirements met

Reasons for the Decision under s190C2:

For the reasons identified above the application contains all the details and other information, and is accompanied by the affidavits and other documents, required by ss61 and 62 of the Act. I am satisfied that the application meets the requirements of this condition.

Aggregate Result: Requirements met

s.190C(3)

Common claimants in overlapping claims:

The Registrar must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:

- (a) the previous application covered the whole or part of the area covered by the current application; and*
- (b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made; and*
- (c) the entry was made, or not removed, as a result of consideration of the previous application under section 190A.*

Reasons for the Decision

A search of the Geospatial database and Register of Native Title Claims reveals that there are no other applications covering the claim area on the Register of Native Title Claims as a result of a consideration pursuant to s190A or otherwise.

I am satisfied that the current Djungan application does not offend the provisions of s.190C(3).

Result: Requirements met

s.190C(4)(a) or s.190C(4)(b)

Certification and authorisation:

The Registrar must be satisfied that either of the following is the case:

- (a) the application has been certified under paragraph 202(4)(d) by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part: or*

Note: An application can be certified under section 203BE, or may have been certified under the former paragraph 202(4)(d)

- (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.**

Note: s.190C(5) – Evidence of authorisation:

If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:

- (a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and
(b) briefly set out the grounds on which the Registrar should consider that it has been met.

Reasons for the Decision

The application has not been certified pursuant to s190C4(a) and I must therefore be satisfied that the requirements of s190C4(b) are met.

At Part A(2) of the application it is stated that the applicant is a member of the Native Title claimant group, the Djungan People, and is authorised under their traditional laws and customs to make the application and to deal with matters arising in relation to the application. It is asserted that the applicant was so authorised at a meeting on the Djungan People in Cairns on 25/9/01. It is said that the grounds for this assertion are set out in affidavits by the applicant and the principal legal officer employed by the applicant's legal representative and the recognised representative body for the region in which the claim is located (NQLC) (see attachments R1 and R2).

It is stated in schedule R that the authorisation was in a manner consistent with traditional law and custom of the Djungan people which provides that decisions on behalf of Djungan people are made by the Djungan elders and that such decisions bind the group as a whole.

The applicant's affidavit (attachment R2) provides a brief statement setting out the grounds on which I should consider that the requirements of s190C4(b) are met (see para. 5, [applicant] (5/10/01)). The affidavit tells of:

- NQLC, as agent for the native title claim group, contacting members of the claim group;
- members of the claim group attending a meeting in Cairns on 25/9/01 and using traditional law and custom to authorise him as applicant;
- a brief description of the process of Djungan traditional law for decision making and authorisation of this kind, being that decisions on behalf of the Djungan people are made by the Djungan elders and bind the Djungan as a whole.

I am satisfied that the statements in the application (at Part A(2) and schedule R) and the affidavit in attachment R2 meets the requirements of s190C(5).

I am also satisfied that the first limb of s190C(4)(b) has been met – it is stated at Part A(2) of the application that the applicant is a member of the native title claimant group. The applicant is listed as a Djungan person at attachment A of the application.

Further information regarding the authorisation of the applicant (particularly as to the authorisation process described in para. 5 of the applicant's s62 affidavit) is found in the attachment R1 affidavit by the NQLC principal legal officer. This affidavit sets out the process used by NQLC as the representative body for the area in organising and holding an authorisation meeting for the Djungan people to authorise the applicant. The deponent states

that he understands that the authorisation was made in accordance with Djungan law and tradition, being that Djungan elders make decisions and that such decisions bind the group as a whole.

I am satisfied that this native title claim group has a process of decision making that pursuant to its traditional laws and customs must be complied with when making a decision to authorise an applicant pursuant to s190C(4)(b). This involves the elders of the group making decisions that bind the group of Djungan People as a whole.

I am satisfied that the Djungan People are a closely connected group of people who observe long-standing customs and traditions. This is supported by the evidence of material set out in the document “A Report into Ethnographic Issues Regarding the Djungan Native Title Claim – by B&F Sommer” (May 1988), prepared as connection material for the Djungan in support of their first application QC95/11 (Djungan #1).

For all of these reasons I am satisfied that the Djungan elders are recognised by the members of the group as having the authority to make decisions for the group, such as the authorisation of the applicant for their fourth native title determination application. I am also satisfied that the group has followed its traditions and customs when authorising the applicant to make the application and deal with matters arising in relation to it.

I therefore find that the requirements of s.190C(4)(b) are met.

Result: Requirements met

B. Merits Conditions

s.190B(2)

Description of the areas claimed:

The Registrar must be satisfied that the information and map contained in the application as required by paragraphs 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land and waters.

Reasons for the Decision

External Boundaries

The claim area is situated in Far North Queensland. It is a claim comprised of three discrete areas of land - a ‘northern part’, a ‘southern part’ and a ‘western part’. The ‘northern part’ is immediately to the north of the northern boundary of Lot 5112 HG843453 (‘Kondaparinga Pastoral Holding’) (part of Djungan application QC97/6). The ‘southern part’ is on the southern boundary of Kondaparinga. The ‘western part’ is immediately to the west of the north-western corner boundary of Kondaparinga.

The written description of the external boundaries is found in attachment B1. Maps showing the external boundaries are found in attachment C1.

The written description defines the external boundary using metes and bounds with reference to coordinates, land parcels and rivers. Explanatory notes are provided with respect to the use of coordinates, cadastral boundaries and watercourses.

The maps in attachments C1 are:

- a BLINMAP from the Department of Natural Resources – the external boundary of each section for the claim area are shown in black ink. This map contains a series of coordinate references and a scale. The boundaries of Kondaparinga coincidental with the claim area boundaries are identified on the map.
- a map drawn to a scale and also containing geographic coordinates – the external boundaries are shown in black ink. The map also shows geographic features and place names.

This is the relevant text from an assessment of the written description and maps prepared by the Tribunal's Geospatial & Mapping Division ("Geospatial") dated 24/10/01:

"The following errors have been identified:

Northern part

- *Point A Latitude should read 16°32'18" (instead of 16°32'20")*
- *Point AU Longitude should read 145°4'39" (instead of 145°10'39")*
- *According to spatial data held by Geospatial the area is approximately 5020 ha (not 5001ha)*

Western part

- *Point AR Latitude should read 16°37'37" (instead of 16°37'30")*
- *According to spatial data held by Geospatial the area is approximately 36.7ha (not 32.9ha)*

Southern part

- *According to spatial data held by Geospatial the area is approximately 28.5 ha (not 28.8ha)"*

"Two maps are provided. The first prepared by the C&B Group for the North Queensland Aboriginal Land Council A on 3 October 2001. This map clearly shows the three discrete parts of the application area, which is depicted by a bold outline and hatched. Reference to a datum, coordinate grid, legend, data sources and a scale bar are included. Other features (eg, Mitchell Creek and Kondaparinga Pastoral Holding) relevant to the definition of the boundary are also shown and labelled. Coordinate points, as described are clearly labelled.

The boundary of the proposed exploration permit 13357 which this application partly relates to is also shown, however it is difficult to discern due to the poor quality of the map provided. The map provided with the future act notice attached at Attachment I and the sub-block description at page 5 of Attachment B1 clarifies this.

The second map shows the application area marked on a Department of Natural Resources and Mines (Qld) BLINMAP. The boundary is consistent with the first map and more specifically identifies the cadastral boundaries relevant to the application."

I am satisfied that the errors identified are mere slips and that they do not affect the ability of this application to meet the requirements of s190B2. I direct that the Register entry for the claim record that the information above that identifies the errors. In this regard, I note that confirmation has been received from the applicant's surveyor that these are in fact errors: see email from the applicant's surveyor dated 15/10/01. In making this decision, I have also had regard to the following opinion in the Geospatial assessment dated 26/10/01:

“Two types of error have been identified in the description.

The first relates to the coordinates. On comparison with the map these appear to be typographical in nature. Furthermore, the coordinates provided are intended to be a guide only (see Use of ... Coordinates at end of description). Correspondence from C&B Group has also confirmed it is the applicants’ intention to claim the areas shown in the map.

The second area relates to the area. The variations are most likely to be attributed to the method of calculation. The definition of the boundary is not dependent on this information which has been offered as an approximation only.

Despite these minor inconsistencies the description and map define the application area with reasonable certainty.”

The maps and written description appear to me to satisfactorily locate the external boundaries of the claim area on the earth’s surface. It follows that I am satisfied that external boundaries of the claim area can be identified with reasonable certainty, having regard to the written description and maps that are contained in the application.

I am satisfied that the physical description of the external boundaries meets the requirements of s62(2)(a)(i) and that the map shows the boundaries of the claim area in compliance with the requirements of s62(2)(c).

Internal Boundaries

The internal boundaries are described in schedule B of the application. These boundaries are described by a formula that excludes a variety of tenure classes from the claim area.

This form of class exclusion (and exceptions) follows the wording of s23B. In my view it amounts to information that enables the internal boundaries of the application area to be adequately identified. This may require considerable research of tenure data held by the State of Queensland, but nevertheless it is reasonable to expect that the task can be done on the basis of the information provided by the applicants.

I am also satisfied that the information in the application regarding the internal boundaries of the claim area meets the requirements of s62(2)(a)(ii).

The requirements of s62(2)(a), s62(2)(b) and s190B2 are met.

Result: Requirements met

s.190B(3)

Identification of the native title claim group:

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.*

Reasons for the Decision

An exhaustive list of names of the persons in the native title claim group has not been provided. It is therefore necessary to consider if the application meets the requirements of s.190B(3)(b).

It is stated in schedule A that the persons in the group are those named in a list of Djungan persons at attachment A and their descendants. The attachment A list identifies a first name and surname for each member of the group. In many cases, the person's address is also identified. In some cases the person's date of birth is identified.

The named persons and any descendants of those persons named could be identified with minimal inquiry. This description of the persons in the group provides an objective means of ascertaining whether a person is a member or not.

Result: Requirements met

s.190B(4)

Identification of claimed native title:

The Registrar must be satisfied that the description contained in the application as required by paragraph 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified.

Reasons for the Decision

Under this limb, I must be satisfied that the native title rights and interests detailed in the application can be readily identified.

The description contained at Schedule E describes the native title rights and interests as: *'The native title rights and interests claimed are the right to exclusive possession, occupation, use and enjoyment of the claimed area as against the whole world, pursuant to the traditional laws and customs of the claim group'*.

The claimed rights and interests are qualified by these statements in the application:

- schedule E – *'Where the area is covered by a valid, previous non-exclusive possession act (s.23F) the native title claim group does not claim possession, occupation, use and enjoyment of the area to the exclusion of all others'*;
- schedule Q – *'The native title claim group does not claim ownership of minerals, petroleum or gas where they are wholly owned by the Crown in a manner which is inconsistent with continuing native title rights residing in those substances'*;
- schedule B – *'The area covered by the application excludes land or waters where the native title rights and interests claimed have otherwise been extinguished (except to the extent that extinguishment is required to be disregarded under subsections 47(2), 47A(2) or 47B(2)) pursuant to s190B(9)(c)'.*

I consider the description in schedule E enables the claimed rights and interests to be readily identified – they are rights of possession, occupation, use and enjoyment. This satisfies the requirements of s190B4.

Result: Requirements met

s.190B(5)

Sufficient factual basis:

The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:

- (a) **that the native title claim group have, and the predecessors of those persons had, an association with the area;**
- (b) **that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests;**
- (c) **that the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.**

Reasons for the Decision

I must be satisfied pursuant to s190B5 that:

- a description of the native title rights and interests claimed in relation to the area affected by the application is provided in the application.
- a sufficient factual basis is provided to support the assertion that the rights and interests claimed in the application exist.

In particular, I must be satisfied that the factual basis provided to support the assertions that:

- the native title claim group have, and their predecessors had, an association with the area claimed;
- traditional laws and customs, acknowledged and observed by the native title group, exist;
- the native title claim group continue to hold native title in accordance with those traditional laws and customs;

is sufficient to support those assertions: see *Martin v Native Title Registrar* [2001] FCA 16.

A description of the claimed native title rights and interests is provided in the application (see schedule E and my reasons under s190B4). A general description of the factual basis for the assertions in s190B5 is contained in Schedules A, F and G of the application.

It is stated in schedule A that the group is known to itself and all neighbouring groups as the Djungan. It is also stated in schedule A that the group is continuous both in terms of descent and in terms of continuous transmission of the Djungan identity from the group of the same name recorded in and around the claim areas late last century (I take this to be a reference to the 19th century).

It is stated in schedule F that:

- the native title claim group has, and predecessors of those persons had, since the assertion of British sovereignty possessed, occupied, used and the enjoyed the claim area;
- such possession, occupation, use and enjoyment has been pursuant to and possessed under the laws and customs of the claim group including traditional laws and customs that rights and interests in land vest in members of the group on the basis of (but not limited to) birth, filiation, adoption, place of death and burial of relatives, linguistic affiliation, personal name, occupation and place of initiation;
- there exist traditional laws and customs that give rise the claimed native title rights and interests;
- examples of facts giving rise to the assertion of native title include:
 - group members continue to have a close association including a spiritual connection with the claim area according to their traditional law and custom
 - group members continue to pass on to their descendants traditional laws and customs stories and beliefs concerning their traditional country including the claim area
 - group members continue to use the claim area for traditional hunting and fishing and for the gathering of traditional bush medicine and other materials

- group members continue to care for their traditional country, including the claim area, according to traditional laws and customs passed down to them by their forbears and predecessors
- group members continue to exercise a body of traditional laws and customs, which has been passed down to them from generation to generation by their forbears and predecessors. Such traditions and customs include traditional laws and customs that deal with caring for country, controlling access to country, the holding of ceremonies on traditional country, the use and care of traditional country.
- the rights and interests are capable of being recognised by the common law of Australia.

It is stated in schedule G that members of the group have continued to carry out activities consistent with the claimed rights and interests and provides details of activities carried out, including, for example, passing on of stories, traditional fishing, hunting and gathering, caring for country.

In considering the requirements of this section, I have had regard to:

- information contained at Schedules A, F and G of the application
- Affidavit of **[name deleted]** sworn on 5/10/01 (not forming part of the application)
- An anthropological report by Zoe Ellerman dated April 1996 (“the Ellerman report”)
- An anthropological report by Bruce and Elaine Sommer dated May 1998 (“the Sommer report”)

190B(5)(a) - that the native title claim group have, and the predecessors of those persons had, an association with the area.

Current Association

[name deleted] (5/10/01) states at paras. 3 and 4 of his affidavit that he is Djungan, taking his identity from his father, also a Djungan traditional owner. It is apparent from the affidavit of **[name deleted]** that he has lived most of his life in the Mt Mulligan area (proximate to the claim area). He spent his childhood walking, hunting and living with his family in different parts of Djungan traditional country. He was taught traditional walking tracks including one track that goes from the Hodgkinson River and travels northeast from Mt Mulligan all the way up to Skull Lagoon near the Mitchell River which lies within the claim area (refer paras. 5, 6). The claim maps at attachment C1 of the application indicates that this route to the Mitchell River is within the boundaries of the claim area.

[name deleted] also swears to the fact that he has a strong spiritual connection to Djungan country having walked the country with his father and grandfather as a boy (refer para. 8). He states that he still visits the area with young Djungan people to take them along the tracks and to show them traditional tracks and places (refer para 8).

[name deleted] states that there are other Djungan traditional owners who also continue to access and use the country within the application area (refer para 9).

The information set out in Schedules F and G and in the affidavit of **[name deleted]** (5/10/01) provides a sufficient factual basis for the assertion that the native title claim group has a current association with the claim area.

Predecessor’s Association with the Land

With respect to the second limb of s190B5(a), I have taken the following into account on the issue of the association of the claim group's predecessors with the land:

- the Sommer report appends a number of genealogies at Appendix 3, including genealogies of the **[name deleted]** family at page 116 and tracing that family and some of the other Djungan families back to the late 1800's;
- the **[Anthropologist 1]** report recounts historical, archaeological, anthropological and linguistic studies since contact in the 1880's and concludes that:
- historically, on contact with Europeans in the mid to late 1880's indigenous peoples lived in the area of land between the Walsh and Mitchell Rivers (I note that the Mitchell River forms the northern boundary of the claim area in this application) as far as Doolans Creek in the west and the Leadingham in the east (page 3-18);
- archaeological studies by **[Anthropologist 2]** (1992:31) have revealed that rock art (pre-dating contact) in the Djungan area is distinctive and shows minimal variation, thereby suggestive of it being produced by a single group with long residence in the area (page 22);
- anthropological and linguistic studies by **[Anthropologist 3]** (1886-87) and **[Anthropologist 4]** (1926) show that the indigenous population within the general area of the lands under claim were speakers of a continuously identifiable language within the first decade of European occupation (page 25);
- the studies by **[Anthropologist 4]**, in the opinion of the authors of the **[Anthropologist 1]** report, extend the occupation of the same group of speakers as those recorded by **[Anthropologist 3]** into the mid 1920's (page 25);
- **[Anthropologist 4]** studies also encompassed an account of the Eekoo, a spirit believed to inhabit Mt Mulligan and a list of local place names applied to sites by the original inhabitants, known also by European Australian appellations (page 26);
- The list of site names was checked against the memories of senior Djungan (including **[name deleted]**) who stated that they had encountered some of the places so named (page 26);
- The authors of the **[Anthropologist 1]** report have allocated AMG UTM grid references for 26 of the 29 named sites on the map at page 86 of the report. It is apparent from an examination of this map that some of the sites so located are within the boundaries of the land claimed in this application (page 26);

[Person 1] also recounts historical data and concludes that this establishes that there were indigenous people in the region which includes the land subject to claim on contact with Europeans in the mid to late 1800's (sections 1 and 4 of the **[Person 1]** report);

These extracts from the **[Anthropologist 1]** and **[Person 1]** reports support a finding that the factual basis provided supports an assertion that the predecessors of the native title claim group had an association with a territory of land, within which the claim area is located.

190B(5)(b) – that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests.

This subsection requires me to be satisfied that the factual basis provided supports the assertion that traditional laws and customs exist; those laws and customs are respectively acknowledged and observed by the native title claim group; and those laws and customs give rise to the claim to native title rights and interests.

The applicant has sworn an affidavit at attachment R2 recounting the Djungan traditional decision making process for dealing with land issues and how the Djungan complied with that process in authorising this native title application. He talks of the Elders reaching a decision that binds the group of Djungan People as a whole. He talks of a meeting of Djungan in September 2001 where the group followed their traditional laws and customs in deciding to authorise the applicant.

In the affidavit of **[name deleted]** (5/10/01) he talks of:

- taking his identity as Djungan from his father;
- learning from his father and grandfather Djungan language and names of places;
- learning from his father and grandfather to hunt on Djungan country;
- learning from his father and grandfather about walking tracks, stories, traditional medicine, and how to survive in the bush.

[name deleted] affidavit establishes that he has acquired from his forbearers a large body of Djungan traditional knowledge and customs:

- language;
- stories that relate to places and sites of significance;
- travel through Djungan country on walking tracks;
- hunting and gathering;
- traditional medicinal uses of plants.

The **[Person 1]** report at section 3 details much information about the flora of Djungan country and is expressed to have been compiled from **[name deleted]** knowledge of traditional flora. **[Anthropologist 1]** noted at p.79 that they themselves witnessed the extensive knowledge of Djungan flora exhibited by **[name deleted]** and other senior Djungan.

[Anthropologist 1] also noted the practice by a Djungan person of introducing himself to the “old people” or spirits when visiting sites (page 36).

[Anthropologist 1] also notes at page 48 that Djungan people still fear the Eekoo (a spirit who played a part in the creation of Ngarrabullgan (aka Mt Mulligan) and the spiritual centre of the Djungan) and will not camp overnight near Lake Kungarra where he is believed to reside.

On the basis of the evidence recounted above I find that that the factual basis provided supports an assertion that there continue to exist traditional laws and customs acknowledged and observed by the native title claim group. I reach this finding because of the observance by contemporary Djungan of traditional hunting activities, their knowledge of Djungan language, sites of significance and stories; their observance of traditional customs such as announcing themselves to the spirits when on their country and their acknowledgment of Djungan laws and customs as to traditional decision making processes when dealing with land in authorising this application.

190B(5)(c) - that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

I am of the view that the information considered under 190B5(a) and (b) is relevant to whether the application meets the requirements of s.190B5(c).

Having considered this information, I am satisfied that the factual basis provided supports the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

In my view the evidence of [name deleted] describes a traditional process by which spiritual and cultural knowledge and rights and interests associated with land in the claim area has been acquired, and is currently practiced by members of the claim group. This is supported by material in both the [Anthropologist 1] report and [Person 1] report. I particularly refer to this statement by [name deleted], quoted in the [Peron 1] report at section 2, page 7:

“We were taught all our history by our father, and our grandfather and grandmother, and mother. They taught us all about the bush, bush tucker, bush medicine, the waterholes, the movement of birds, how to hunt, how to hunt daytime, nighttime”.

Result: Requirements met

s.190B(6)

Prima facie case:

The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.

Reasons for the Decision

The claimed rights and interests (see schedule E) are:

“The native title rights and interests claimed are the right to exclusive possession, occupation, use and enjoyment of the claimed area as against the whole world, pursuant to the traditional laws and customs of the claim group.

Where the area is covered by a valid, previous non-exclusive possession act (s.23F) the native title claim group does not claim possession, occupation, use and enjoyment of the area to the exclusion of all others.”

In making my findings under this section, I rely on the information contained in schedules A, G and F, and in the affidavit of [name deleted] (5/10/01).

This material supports a finding that there is a factual basis for these assertions:

- there exist traditional laws and customs acknowledged and observed by the claimant group that give rise to the native title rights and interests claimed (see my reasons under s190B5 for details of the material that supports this finding);
- members of the native title claim group carrying out activities in accordance with native title rights to occupation, use and enjoyment of the claim area;
- members of the native title claim group living on the claim area and wider traditional Djungan country throughout their lives with other Djungan people, knowing about sacred places and stories on Djungan country, practicing traditional activities on country such as hunting and foraging for bush medicine and passing on traditional knowledge to young Djungan people;
- members of the native title claim group assert traditional rights and interests in the claim area, including having responsibility to care for their country and controlling access to country.

On the basis of this information, I am satisfied that rights and interests of “exclusive possession, occupation, use and enjoyment”, with the stated qualifications, can be prima facie established, within the limits of that recognised by the common law. The stated qualifications to this claim (see my reasons under s190B4 for the text of the qualifications that appear in the application) satisfy me that rights are not claimed where these are not recognised at law.

Result: Requirements met

s.190B(7)

Traditional physical connection:

The Registrar must be satisfied that at least one member of the native title 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 a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:*
 - (i) the Crown in any capacity; or*
 - (ii) a statutory authority of the Crown in any capacity; or*
 - (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.*

Reasons for the Decision

Under s190B(7)(a) 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.

As I must only be satisfied that one member of the claim group has or previously had a traditional physical connection with any part of the land claimed, I will make my finding in relation to only one member of the native title claim group.

Details of the physical connection of a member of the claim group are provided in a sworn affidavit by a member of the group ([name deleted], 5/10/01). See my reasons under s190B5 and s190B6 for details of the evidence from this affidavit.

Based on the affidavit before me, I am satisfied [name deleted] has the requisite physical connection.

Result: Requirements met

s.190B(8)

No failure to comply with s.61A:

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s.61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

Reasons for the Decision

For the reasons that follow I have concluded that there has been compliance with s61A.

S61A(1)- Native Title Determination

A search of the Native Title Register has revealed that there is no determination of native title in relation to the area claimed in this application.

S61A(2)- Previous Exclusive Possession Acts

In Schedule B any area that is covered by a previous exclusive possession act, as defined in s23B of the Native Title Act, is excluded from the claim area.

S61A(3) – Previous Non-Exclusive Possession Acts

I am satisfied that the applicants are not seeking exclusive possession over areas the subject of previous non-exclusive possession acts - refer to my reasons under s190B4 for the full statement in schedule E of the application that makes it clear that exclusive possession is not claimed where the area is covered by a non-exclusive possession act defined in s23F.

S.61A(4) – s47, 47A, 47B

At Schedule L, the applicants state that they are unaware of any area within the claim area to which the provisions of s47 or s47A and that all vacant Crown Lands within the claim area are areas to which the provisions of s47B apply. The applicants' express statements with respect to the provisions of that section are sufficient to meet the requirements of s190B(8). Subsection 61A(4) of the Act provides that an application may be made in these terms. Whether or not the applicants have provided sufficient information to bring any area of land and waters covered by the application within the ambit of s47B is a matter to be settled in another forum.

Conclusion

For the reasons identified above the application and accompanying documents do not disclose and it is not otherwise apparent that because of Section 61A the application should not have been made.

Result: Requirements met

s.190B(9)(a)

Ownership of minerals, petroleum or gas wholly owned by the Crown:

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:

- (a) *to the extent that the native title rights and interests claimed consist or include ownership of minerals, petroleum or gas – the Crown in the right of the Commonwealth, a State or Territory wholly owns the minerals, petroleum or gas;*

Reasons for the Decision

At Schedule Q of the application it is stated : *“The native title claim group does not claim ownership of minerals, petroleum or gas where they are wholly owned by the Crown in a manner which is inconsistent with continuing native title rights residing in those substances”.*

Result: Requirements met

s.190B(9)(b)

Exclusive possession of an offshore place:

The application and accompanying documents must not disclose, and the Registrar must not be otherwise aware, that:

- (b) *to the extent that the native title rights and interests claimed relate to waters in an offshore place – those rights and interests purport to exclude all other rights and interests in relation to the whole or part of the offshore place;*

Reasons for the Decision

It is apparent from the description and maps of the external boundaries of the claim area that it is located inland of the coast and does not encompass any offshore areas.

I am satisfied that this statement ensures that the application complies with the requirements of s190B9(b).

Result: Requirements met

s.190B(9)(c)

Other extinguishment:

The application and accompanying documents must not disclose, and the Registrar must not be otherwise aware, that:

- (c) *in any case – the native title rights and interests claimed have otherwise been extinguished (except to the extent that the extinguishment is required to be disregarded under subsection 47(2), 47A(2) or 47B(2)).*

Reasons for the Decision

The application does not disclose, and I am not otherwise aware of, any other extinguishment of native title rights and interests in the area claimed. I am satisfied that the requirements of this section have been met. A search of the Register of Indigenous Land Use Agreements shows that there are no registered agreements within the boundaries of the claim area where native title rights and interests have been extinguished by surrender.

Result: Requirements met

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