

National Native Title Tribunal

REGISTRATION TEST

EDITED REASONS FOR DECISION

DELEGATE: Danielle Malek

Application Name: Djungan People #2
Names of Applicants: James Archer, George Archer, Samuel Wason, Walter Richards Snr,
Kenneth Jackson, Lola Brown, Alfred Neal Snr, Percy Neal, Saul Burns
Snr, Ernie Burns, Stanley Miller, Vincent Wason, John Grainer,
Maxwell Underwood, Andrew Garrett
Region: Far North Queensland NNTT No.: QC96/5
Date Application Made: 19 April 1996 Federal Court No.: QG6022/98

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).

Danielle Malek

24th March 2003
Date of Decision

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

Information considered when making the Decision

In making my decision pursuant to s. 190A 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 working, notification, registration test and legal services files for this application QG6022/98 (Tribunal reference QC96/5), for the other two applications made on behalf of the Djungan People, namely QG208/97 (Djungan #1) and QG6116/98 (Djungan #3), and for three discontinued applications made on behalf of the Kuku Djungan People, namely QG6121/98, QG6122/98 & QG6123/98 (Tribunal references QC97/11, QC97/12 & QC97/13) (including Form 1 applications, amended Form 1 applications (if any), accompanying documents filed in the Federal Court, additional information provided to the Registrar in the course of s.190A registration testing of these applications, Federal Court Orders and other correspondence from the Federal Court and communications between the Tribunal and the applicants' legal representatives)
- The National Native Title Tribunal Geospatial Database (including the Schedule of Applications – Federal Court)
- Geospatial Assessment and Overlaps Analysis dated 19 February 2003
- The Register of Native Title Claims, including for applications that overlap the area of this application (if any)
- The National Native Title Register
- Register of Indigenous Land Use Agreements
- Extracts from 'A Report into Ethnographic Issues Regarding the Djungan Native Title Claim QC95/11' by [Anthropologist 1 – name deleted] and [Anthropologist 2 – name deleted] (1998), provided by the applicants to the Registrar in November 2002, for the purposes of the registration test

Note:

- The applicants have advised that the State of Queensland is in possession of a copy of the expert report identified above. In the interests of procedural fairness, the State of Queensland has been informed by the Tribunal that extracts from the report have been provided to the Registrar for the purposes of the registration tests, and offered an opportunity to comment in relation to same. The State has not provided any comments or other information relevant to the conditions of the registration test prior to making this decision.
- Information and materials provided in the course of mediation of any of native title claims made on behalf of the people comprising this native title group have 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. Any references to the NNTT are to the National Native Title Tribunal, and to the Registrar are to the Native Title Registrar, unless otherwise specified.

Preliminary

The Djungan People #2 native title determination application was originally lodged with the Tribunal on 19 April 1996. The applicants filed an amended application in 1999. On 14 May 1999, a delegate of the Registrar considered the application for registration pursuant to s.190A and accepted the application for registration.

The applicants filed further amendments to the application on 27 March 2001 and 2 December 2002. On 12 February 2003, the Federal Court granted the applicants leave to amend the application in the form filed on 2 December 2002. It is this latest application that I am considering for registration.

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) The native title claim group includes all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.

Reasons relating to this sub-condition

Under s. 61(1) of the NTA, the Registrar or his delegate must be satisfied that the native title claim group for an application includes all the persons “who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.” In *Risk* [2000] FCA 1589, O’Loughlin J commented that:

"A native title claim group is not established or recognised merely because a group of people (of whatever number) call themselves a native title claim group. It is incumbent on the delegate to satisfy herself that the claimants truly constitute such a group...[T]he tasks of the delegate included the task of examining and deciding who, in accordance with traditional law and customs, comprised the native title claim group." - at paragraph 60.

In applying s. 61(1), the delegate must be satisfied that the composition of the native title group is not of recent origin but has common rights and interests in the claim area having regard to traditional laws and customs (cf: *Risk* [2000] FCA 1589, O’Loughlin J at paras 30-31, 60; *Ward* (1998) 159 ALR 483 at 505 1-20, 545 35-45, 550 to 552). This requires me to be satisfied that the application is made on behalf of a native title claim group constituted according to traditional laws and customs with common rights and interests. In applying s. 61(1) I must also be satisfied that the native title claim group includes all of the persons who hold common or group rights and interests comprising the particular native title claimed.

Schedule A describes the persons in the native title claim group as follows: ‘The Djungan People, being the persons (and their descendants) contained in the list, marked ATTACHMENT “A”. Listed [sic?] prepared and filed in Federal Court in July 1998 in Djungan No. 1, list prepared from genealogies by [Anthropologist 1], Professional Linguist and social anthropologist.’

The list in Attachment A of the application is entitled ‘Persons of Djungan Descent’. This is followed with an alphabetical list of names. Each person is listed with his/her surname, first name and (in most cases) with a postal address. In some instances, a person’s middle name and date of birth are included. The list is 19 pages long and appears to identify the Djungan people comprehensively. In addition, I note that all individuals listed on previous Djungan files (QC95/11, QC 96/5, QC97/6) have been included in the claim group description of the current application, with the exception of one individual, [Person 1 – name deleted]. [Person 1] is the sole registered native title claimant for the QC98/39 Western Yalanji application, and appears now to identify with his Western Yalanji heritage. At any rate, there are other [Person 1] named in Attachment A of the current application.

There is no material before me to suggest that there are other people who hold common or group rights and interests in this claim, who have not been included in the Djungan native title claim group described in this application.

For these reasons, I am satisfied that the application includes all of the persons who hold common or group rights and interests in this claim.

Result: Requirements met

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

Reasons relating to this sub-condition

The applicants' names are stated at Part A of the application. The address for service is provided at Part B of the application.

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

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

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

s.61(5)(a)

The application is in the form prescribed by Regulation 5(1)(a) of *Native Title (Federal Court) Regulations 1998*.

s.61(5)(b)

The application was filed in the Federal Court as required pursuant to s.61(5)(b).

s.61(5)(c)

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 s.62 (1)(b) and s.62(2) below.

s.61(5)(d)

There are fifteen applicants. The application is accompanied by an affidavit sworn by each of the applicants that addresses the matters in s62(1)(a)(i) to (v).

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 affidavits from each of the fifteen applicants. The affidavits satisfactorily address 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

Details of traditional physical connection are found at Schedules F and G and in two affidavits referred to in Schedules F & M (affidavits by two of the applicants at Attachment F).

Result: 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 outlined under s.190B(2) I am satisfied that the application contains information that enables the external boundaries of the area covered by the application to be identified.

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 outlined under s.190B(2), I am satisfied that the application contains information that enables the internal boundaries of areas that are excluded from the claim 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 outlined under s.190B(2) I am satisfied that the application contains a map showing 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

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

At Schedule D the applicant states that the State has carried out a tenure search on this land and the State's documentation is available to the NNTT. This report, dated May 1996, identifies non-native title rights and interests over parcels covered by this application, and also provides information in relation to the area covered by the Djungan People's #1 application, QG6208/97.

The present application contains details and results of searches carried out to determine non-native title rights and interests at Attachment C of the application. Attachment C is a colour map showing each of the claimed parcels identified in Schedule B of the application. The legend to the map reveals that the claimed parcels shown and labelled on the map are colour-coded according to whether the tenure over them is lands lease, reserve or unallocated state land. I am of the view that the information that is on the map in Attachment C, being a summary of the types of non-native title rights and interests that may exist over the claim area, amounts to details and results of searches found in the State's tenure history report.

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 in the application appears 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 the native title rights and interests that may exist, or that have not been extinguished, at law. See also my reasons under s. 190B(4).

Result: Requirements met

s. 62(2)(e) *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.

The decision in *Queensland v Hutchison* [2001] FCA 416 at [25] is authority for the proposition that the general description of the factual basis must be contained in the application, and can not be the subject of additional information provided separately to the Registrar or his delegate.

A general description of the factual basis on which it is asserted that the native title claimed exists and for the particular assertions in s. 62(2)(e)(ii) and (iii) is found in Schedules F and G and in affidavits by two of the applicants at Attachment F. See my reasons under s. 190B(5) for details of this material.

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

This information is found in Schedule G of the application.

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

Details are provided at Schedule H. The applicants state that there are no overlapping applications.

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

Schedule I contains details of several s.29 notices over the claim area of which the applicants were aware.

Result: Requirements met

Reasons for Decision under s190C(2):

For the reasons outlined above, I consider that the application meets the conditions contained in s.190C(2).

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, dated 19 February 2003, confirms that there are no overlapping applications that cover the whole or part of the claim area. On the basis of this information, this application complies with the provisions of s190C(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 section 203BE, or has been certified under the former 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*
- (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 by an Aboriginal/Torres Strait Islander representative body that could certify the application under Section 203BE. This being the case, the Act provides that the delegate must be satisfied that the applicants are members of the native title claim group and are authorised to make the application and to deal with matters arising in relation to it by all the other persons in the native title claim group. Authorisation of a claimant application is a fundamental requirement of the Act,¹ and all claimant applications, whether they purport to satisfy s.190C(4)(a) or s. 190C(4)(b) of the Act must be properly authorised.

¹ *Strickland (on behalf of the Maduwongga People) v Native Title Registrar* (1999) 168 ALR 242; *Moran v Minister for Land and Water Conservation for the State of NSW* [1999] FCA 1637, per Wilcox J; *Ward v Native Title Registrar* [1999] FCA 1732, per Carr J; *Western Australia v Strickland* (2000) 99 FCR 33; *Risk v NNTT* [2000] FCA 1589.

The word 'authorise' is defined at s.251B of the Act. The Act requires that all the persons in a native title claim group authorise a person or persons to make a native title determination application and to deal with matters arising in relation to it if:

- where there is a decision-making process under the traditional laws and customs of the group that must be complied with in relation to authorising things of that kind, that this process has been followed in relation to the application (as described in subsection (a) of s. 251B); or
- if there is no such traditionally based decision-making process, then the authorisation is in accordance with a decision-making process that has been agreed to and adopted by the group (as described in subsection (b) of s. 251B).

In order to satisfy the Registrar, or his delegate, that the application is properly authorised according to the Act, s.190C(4)(b) provides that the applicant must be a member of the native title claim group, and that the applicant must be authorised to make the application and deal with matters arising in relation to it by all other persons in the claim group.

The following statements appear in the application in satisfaction of the requirement that applicants are members of the native title claim group and are authorised to make the application and to deal with matters arising in relation to it:

Each of the 15 affidavits deposes in his/her s.62 affidavit that s/he is a member of the native title claim group. In addition, each applicant is identified as a member of the native title claim group in the Attachment A list of persons of Djungan descent.

Part A,2 of the application reads:

“The Djungan people have authorised this application to be made and amended at meetings in Mossman, Kuranda, Mareeba and Yarrabah in May 1998 and again in Mareeba on March 12, 1999.

At a meeting of Djungan People held at Mareeba on 1 May 2002, twelve additional applicants were authorised by the Native Title claim group in a manner consistent with their traditional laws and customs, to bring this application, together with the three original applicants on behalf of the Native Title claim group.

The fifteen applicants named in this amended application were also authorised by the Native Title claim group to deal with matters arising in relation to the amended application.”

Schedule R notes that the application has been authorised by members of the native title claim group in a manner consistent with traditional law and custom. Reference is made to the applicants' s.62 affidavits, and to an affidavit by the acting executive officer employed by the ATSI native title representative body, also the applicants' legal representatives. All of these affidavits are identified in schedule R as Attachments “R1” to “R16”.

Each of the applicants has provided an affidavit pursuant to s. 62(1)(a). In their affidavits, 12 of the applicants depose² to the following in relation to their authorisation:

“I have been authorised by all the persons in the native title claim group to make this application and to deal with matters arising on relation to it.”

“The basis on which I am authorised as mentioned in paragraph (5) is:

- (a) The North Queensland Land Council, the Native Title Representative Body in the region contacted members of the claim group to attend a Meeting in Mareeba on 1 May 2002.
- (b) In accordance with traditional law and custom, the members of the claim group discussed who was authorised to act as a representative of the Native Title Claim Group and to make decisions

² See paras. 5 and 6 respectively

about the Claim, including this Application. It was decided that a further twelve members of the claim group would be authorised as applicants in addition to the three applicants already authorised, to represent the different claim group families..

- (c) I was authorised in accordance with traditional law and custom to act as an applicant and representative of the claim group and to deal with matters arising from this Application.”

The three remaining applicants are the three applicants for the original application, which was amended following commencement of the 1998 amended NTA. In the s. 62 affidavits which accompany this application, these three applicants depose that they are authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it. The basis of this authorisation is found in further affidavits that accompany the application at Attachments “R1”, “R2” and “R3” and which explain the traditional laws and customs that govern Djungan people when making decisions to authorise applicants. The applicants depose that:

- The Djungan people have a traditional decision-making process that must be complied with when land issues are involved.
- That process is that Elders and the heads of families discuss the issue amongst themselves and their relatives and then the Elders reach a consensus among themselves after considering the views of others.
- Under Djungan customary law and tradition, land is men’s business and only male Elders may speak for land issues.
- Under Djungan customary law and tradition, Elders decide land business for all Djungan people. A decision of the Elders is final and Djungan people who are not male Elders cannot disagree publicly with the Elders about such a decision.

Each deponent then recounts the events and meetings that lead to the decision to authorise them as applicants commencing in 1995 and until 1999.

The final source of information in relation to the decision to authorise the fifteen applicants is found in an affidavit by the acting executive officer of the NQLC³ at Attachment “R16”. This deponent provides information in relation to the latest meeting of the native title claim group on 1 May 2002. He states that the meeting was called by NQLC who has a database containing names and addresses of Djungan people, and that they were notified personally and by mail of the forthcoming meeting. He states that the meeting was advertised in a local Cairns newspaper. He states that he is informed and verily believes that members of the Djungan native title claim group also informed other Djungan people of the meeting by telephone and personal communication. The deponent states that he was in attendance at the meeting of 1 May 2002 in Mareeba, and that that meeting was attended by over 160 people. He states that, according to extensive research by his organisation, this represented all Djungan families identified as part of the native title claim group. The deponent recounts that discussion centred around increasing the number of applicants so that the applicants are more representative of all the Djungan families, and a decision was made authorising a further twelve applicants, in addition to the three original applicants. It is stated that the deponent understands and believes that the authorisation was consistent with the traditional laws and customs of the group which provides that decisions which bind the group are made by the Elders. He concludes that the Djungan people at the meeting endorsed the decision of the Elders.

I am satisfied that the applicants are all members of the native title claim group and have been authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it. The statements and brief setting out of the grounds for these statements are contained in the application, as required by s. 190C(5). I am satisfied that the native title claim group has a traditional decision making process that must be complied with when making decisions of this kind. That process is that the Elders make the decision after consulting with and considering the views of other Djungan people. It appears that the Djungan people hold meetings at which the authorisation of applicants is discussed. It appears that meetings have been held in relation to the decision to authorise a further 12 applicants, and that this meeting in May 2002, affirmed the decision by Elders to authorise the original 3 applicants and another 12 applicants.

³ this the regional ATSI representative body and legal representative for the applicants

There is no information before me that disputes the sworn testimony of the applicants and their adviser about their people's traditional decision-making process and compliance by the Djungan people with their traditional laws and customs when authorising the applicants to make and deal with the application.

For these reasons I find that the requirements of s. 109C(4) and s. 190C(5) 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

Schedule B describes the application area as one hundred and twenty four (124) discrete land parcels with reference to their Lot on Plan details.

Schedule C refers to Attachment C1. Attachment C1 is a colour map originally prepared Native Title Services, Department of Natural Resources, QLD dated 7 November 2000. This map includes each of the 124 parcels identified at Schedule B, labelled and shaded according to tenure type, two insets showing the land parcel details within Kingsborough and Thornborough, scale-bar, north point, legend, locality map, projection, datum references and source notes for data used to prepare the map.

Each parcel is described by reference to a lot and plan reference, drawn from the State of Queensland's cadastral database. These references provide a reasonably certain means of identifying where the parcel is located on the earth's surface and satisfy the requirements of s.190B(2) and s. 62(2)(a)(i).

The map at Attachment C clearly shows the external boundaries of each of the claimed parcels. The line-work on the map is finely drawn and easy to read. This map clearly identifies the locality of the claim area, being the area that is coloured (according to the tenure-legend on the map) and within the fine black lines drawn on the map. It is a map that shows the location of Mount Mulligan, Kingsborough and Thornborough towns, the Mount Mulligan cliff-face, and a number of rivers and roads that bound or traverse the claim area. There are two insets for Kingsborough and Thornborough which clearly identify the parcels within those towns that are claimed. The claimed parcels are labelled with their lot/plan reference.

The detail contained on the map, and the lot/plan references listed at Schedule B provides the means to ascertain the claimed area with reasonable certainty in compliance with s. 190B(2). It follows that the application contains a map showing the external boundaries of the claim area which meets the requirements of s. 62(2)(b).

An expert Geospatial assessment, dated 19 February 2003, concludes that the description and map are consistent with one another and identify the application area with clarity and certainty.

For these reasons I am satisfied that the application meets the requirements of s. 190B2 in relation to the external boundaries of the claim area.

Internal Boundaries

Schedule B of the application contains information identifying the internal boundaries of the claimed area by way of a formula that excludes from claim any areas of land covered by a variety of tenure classes. These exclusions identify the classes of tenure referred to in s. 23B of the Act, being a description of previous exclusive possession acts (PEPAs) that may not be claimed in a native title determination application. The application also excludes areas where the native title rights and interests claimed have otherwise been extinguished (except to the extent that such extinguishment is to be disregarded under sections 47, 47A or 47B pursuant to s. 190B(9)(c)). Further, Schedule B states that if any of the tenure classes identified fall within the exceptions at sections 23B(9), (9A), (9B), (9C) or (10) of the Act, then the area is not to be excluded from this application.

I am of the view that the stated exclusion amounts to information that enables the internal boundaries of areas that are not claimed to be identified with reasonable certainty. This may require 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 information provided by the applicants.

I am satisfied that the application complies with s.190B(2) and s.62(2)(a)(ii) insofar as the internal boundaries of the claim area are concerned.

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

Section 190B(3) requires the Registrar to be satisfied that the persons in the native title claim group are named in the application (subsection (a)) or that these persons are described sufficiently clearly so that it can be ascertained whether any particular person is in that group (subsection (b)). The description of the persons in the native title claim group is found at Schedule A of the application. The persons in the native title claim group are said to be the Djungan people, being those persons (and their descendants) contained in the list found at Attachment A of the application. Although the application contains a list of names of persons in the native title claim group, it does not purport to list descendants of those individuals named in Attachment A. Nevertheless, I am satisfied that the description at Schedule A & Attachment A is sufficiently clear to satisfy the requirements of s.190B(3)(b).

The list at Attachment A names each person on the list by first name, surname and (in most cases) with a postal address. In some cases, the person's middle name and date of birth is also included. The identification of persons in the group by name and their descendants is acceptable under s.190B(3)(b), even though these descendants are not always named, and some factual inquiry may be required to determine if a particular person is a member of the group.

For these reasons 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.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 the readily identified.

Reasons for the Decision

Native Title Rights and Interests Claimed by the Applicants

The native title rights and interests claimed by the applicants are described in Schedule E as follows:

“1) With respect to all unallocated State land (USL) within the land and waters covered by the application (‘claim area’) where there has been no prior extinguishment of Native Title or where the non-extinguishment principle applies (as found in s.238), the Native Title rights and interests claimed are the right to possess, occupy, use and enjoy the claim area as against the whole world, pursuant to the traditional laws and customs of the claim group.

2) With respect to all remaining tenures within the claim area the Native Title rights and interests claimed are not to the exclusion of all others and are the right to have access to and use of the claim area and its natural resources including:

- (i) maintain and use the claim area;
- (ii) conserve the natural resources of the claim area;
- (iii) protect the claim area and the natural resources of the claim area for the benefit of the Native Title holders;
- (iv) manage the claim area for the benefit of the Native Title holders;
- (v) use the claim area and the natural resources of the claim area for social, cultural, economic, religious, spiritual, customary and traditional purposes;

and more particularly to:

- A. reside on, camp on and travel across the land;
- B. exercise rights of use and disposal over the natural resources;
- C. exercise and carry out economic life on the claim area including the creation, growing, production, husbanding, harvesting and exchange of natural resources and that which is produced by the exercise of the Native Title rights and interests;
- D. discharge cultural, spiritual, traditional and customary rights, duties, obligations and responsibilities on, in relation to, and concerning the claim area and its welfare including to:
 - preserve sights of significance to the Native Title holders and other Aboriginal people on the claim area;
 - conduct secular, ritual and cultural activities on the claim area;
 - conduct burials on the claim area;
 - maintain the cosmological relationship beliefs, practices and institutions through ceremony and proper and appropriate custodianship of the claim area and special and sacred sites, to ensure the continued vitality of culture, and the well being of the Native Title holders;
 - inherit or dispose of Native Title rights and interests in relation to the claim area in accordance with custom and tradition;
 - determine who are the Native Title holders;
 - resolve disputes between the Native Title holders and other Aboriginal persons in relation to the claim area;
- E. construct and maintain structures for the purpose of exercising the Native Title.

3) The Native Title rights are subject to:

- a) the valid laws of the State of Queensland and the Commonwealth of Australia
- b) the rights (past or present) conferred upon persons pursuant to the laws of the Commonwealth and the laws of the State of Queensland.”

The rights and interests claimed are further clarified and circumscribed by the following statement in Schedules Q: “The applicants do not claim ownership of minerals, petroleum or gas wholly owned by the Crown.”

The Requirements of the Act

S.190B(4) requires the Registrar or his delegate to be satisfied that the description of the native title rights and interests (found at Schedule E of the application) is sufficient to allow the claimed rights and interests *to be readily identified*. The phrases ‘native title’ and ‘native title rights and interests’ are defined in s.223 of the *Native Title Act 1993* (Cwth).

S.223(1) reads as follows:

“The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia.”

Rights which are not readily identifiable include the right to control the use of cultural knowledge that goes beyond the right to control access to lands and waters,⁴ rights to minerals and petroleum under relevant Queensland legislation,⁵ an exclusive right to fish offshore or in tidal waters and any native title right to exclusive possession offshore or in tidal waters.⁶

To meet the requirements of s. 190B(4), I need only be satisfied that at least one of the rights and interests sought is sufficiently described for it to be readily identified.

This is a claim to exclusive possession occupation use and enjoyment over all unallocated State land (USL) where there has been no prior extinguishment of native title or where the non-extinguishment principle applies. Over all remaining tenures within the claim area, it is stated that the native title rights and interests are not to the exclusion of all others and is the right to have access to and use the claim area and its natural resources. A list then follows of the particular rights and interests claimed over such areas which flow from this right to use and have access to the subject area.

In *Western Australia v Ward* (2002), the majority of the High Court found that a right to possess, occupy, use and enjoy as against the whole world (equivalent to that claimed in the present application) is a readily identifiable native title right and interest: at [51]. Subject to my findings in s.190B(5) and (6), I am therefore satisfied that the right to “possess, occupy, use and enjoy the claim area as against the whole world” is readily identifiable.

I am also satisfied that the rights and interests claimed over areas where exclusive possession is not available are readily identifiable as required by s.190B (4). Although the applicants claim a right to “conserve the natural resources” of the subject area (para. 2(ii)) and to “use the claim area and the natural resources of the claim area” (para 2(v)), the applicants do not claim ownership of minerals, petroleum or gas wholly owned by the Crown (Schedule Q); and I am satisfied that the claim to “natural resources” does not include a claim to minerals and petroleum which are not claimable under the relevant Queensland legislation.

Furthermore, I note that in *Ward*, the High Court confirmed that a right to protect and prevent the misuse of cultural knowledge does not amount to a right in the lands or waters and is therefore not a right which is readily identifiable: [64]. Their Honours considered that ‘recognition’ of such a right went beyond denial or control of access to land and would involve, for instance, the restraint of visual or auditory reproductions of what was to be found, or what was to take place there. They stated:

⁴ *Western Australia v Ward* (2002) 191 ALR 1, para [59].

⁵ *Western Australia v Ward*, para [383] and [384]; *Wik v Queensland* (1996) 63 FCR 450 at 501-504; 134 ALR 637 at 686-688.

⁶ *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 144-145.

“However, it is apparent that what is asserted goes beyond [a right to control access] to something approaching an incorporeal right akin to a new species of intellectual property... the recognition of this right would extend beyond denial of right of access to land held under native title... it is here that the second and fatal difficulty appears....”: at [59].

In the current application the applicants claim the right to ‘maintain the cosmological relationship beliefs, practices and institutions through ceremony, and proper and appropriate custodianship of the claim area and special and sacred sites to ensure the continued vitality of culture and the well being of the native title holders’. It is my view that this native title right and interest can be distinguished from the right sought to be recognised by the native title group in *Ward*. The right claimed does not seek to restrain or control the dispersion of cultural knowledge; it does not embody the concepts of protection or prevention of the misuse of cultural knowledge disallowed in *Ward*. In addition, the right refers specifically to practices on land in relation to special and sacred sites; these activities clearly connect the Djungan people to their land and waters as required by s.223, and are linked to traditional laws and customs by use of the word ‘through’ in the phrase, ‘[m]aintain... beliefs, practice and institutions *through* ceremony and proper and appropriate custodianship’. As a consequence I am satisfied that this right is readily identifiable for the purposes of s.190B(4).

Consequently, I am satisfied that the rights and interests listed can be readily identified from the description provided at Schedule E of the application. Refer also to my reasons for decision in respect of s.190B(6).

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

To satisfy the requirements of s. 190B(5), the Registrar (or his delegate) is not limited to consideration of statements contained in the application (as for s62(2)(e)) but may refer to additional material supplied to the Registrar under this condition: *Martin v Native Title Registrar* [2001] FCA 16. Regard will be had to the application as a whole; subject to s190A(3), regard will also be had to relevant information that is not contained in the application. The provision of material disclosing a factual basis for the claimed native title rights and interests is the responsibility of the applicant. It is not a requirement that the Registrar (or his delegate) undertake a search for this material: *Martin v Native Title Registrar* per French J at [23].

In *Queensland v Hutchinson* (2001) 108 FCR 575, Kiefel J said that “[s]ection 190B(5) may require more than [s62(2)(e)], for the Registrar is required to be satisfied that the factual basis asserted is sufficient to support the assertion. This tends to assert a wider consideration of the evidence itself, and not of some summary of it.” For each native title right or interest claimed, there should be some factual material that demonstrates the existence of the traditional law and custom of the native title claim group that gives rise to the right or interest.⁷

In *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (the *Yorta Yorta* decision), the majority of the High Court noted that the word ‘traditional’ refers to a means of transmission of law or

⁷ See *Ward* at [382].

custom, and conveys an understanding of the age of traditions. Their Honours said that ‘traditional’ laws and customs are those normative rules which existed or were “rooted in pre-sovereignty traditional laws and customs”: at [46], [79]. This normative system must have continued to function uninterrupted from the time of acquisition of sovereignty to the time when the native title group sought determination of native title. This is because s.223(1)(a) speaks of rights and interests as being ‘possessed’ under traditional laws and customs, and this assumes a continued “vitality” of the traditional normative system. Any interruption of that system which results in a cessation of the normative system would be fatal to claims to native title rights and interests because the laws and customs which give rise to the rights and interests would have ceased to exist and could not be effectively reconstituted even by a revitalization of the normative system. Their Honours noted, however, that this does not mean that some change or adaptation of the laws and customs of a native title claim group would be fatal to a native title claim; rather that an assessment would need to be made to decide what significance (if any) should be attached to the fact that traditional law and custom had altered. In short, the question would be whether the law and custom was ‘traditional’ or whether it could “no longer be said that the rights and interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood in the sense earlier identified” - at [82] and [83].

There is information which goes to the factual basis of this claim at Schedules F, G, L and M (which refers me to two affidavits by members of the native title claim group at Attachment F):

At Schedule F, the applicants state that:

“The native title rights and interests claimed are set out in Schedule E and are pursuant to the traditional laws and customs of the claim group, based on the following facts:

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

Examples of the facts giving rise to the assertion of Native Title include:

- i. Members of the claim group continue to have a close association, including a spiritual connection with the claim area according to their traditional law and custom.
- ii. Members of the claim group continue to pass onto their descendants traditional laws and customs stories and beliefs concerning their traditional country including the claim area
- iii. Members of the claim group continue to use the claim area for traditional hunting and fishing and for the gathering of traditional bush medicines and other materials.
- iv. Members of the claim group continue to care for their traditional country, including the claim area, in accordance with traditional laws and customs passed down to them by their forebears and predecessors
- v. Members of the claim group continue to exercise a body of traditional laws and customs which have been passed down to them from generation to generation by their forebears and predecessors which traditions and customs include traditional laws and customs which deal with caring for country, controlling access to country, the holding of ceremonies on traditional country, the use and care of traditional country. These traditions and customs apply to the claim area because the claim area is part of the traditional country of the Djungan People.

Note:

In relation to the Native Title rights and interests asserted:

- They do not operate exclusive of the Crown’s valid ownership of minerals, petroleum or gas;
- They are not exclusive rights or interests if they relate to waters in an offshore place; and
- They will not apply if they have been extinguished in accordance with valid State and Commonwealth laws.

Also see affidavit of [**Applicant 1 – name deleted**] and [**Applicant 2 – name deleted**] at “Attachment ‘F’”

Schedule G states:

“The claimant group regularly hunt, gather and utilise natural resources in the claim area.

The claimant group cares for the country in the claim area and are the custodians of the sites of significance in their traditional country, which includes the claim area. They are involved in the protection, maintenance and preservation of country, natural resources and sites of significance.

Members of the claimant group raise their children on country while others take their children onto country in accordance with their law and custom. This includes imparting traditional knowledge with respect to natural resources and sites of significance and the laws and customs pertaining to them.

Members of the claimant group speak for country in accordance with the laws and customs of Aboriginal people of the region.

The claimant group is involved in cultural heritage work with archaeologists including site clearances and cultural site mapping.

The claimant group negotiate with miners and other stakeholders regarding proposed activities within the claim area.”

S.190B(5) requires that the Registrar (or his delegate) must be satisfied that the application contains a sufficient factual basis 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 following assertions is sufficient to support those assertions: that the native title claim group have, and their predecessors had, an association with the area claimed, that the traditional laws and customs, acknowledged and observed by the native title group exist, and that the native title claim group continue to hold native title in accordance with those traditional laws and customs.

A general description of the factual basis on which it asserted that the three criteria identified at s.190B(5)(a)-(c) are met is provided in Schedule F, G and M of the application. Schedule F in turn refers to the affidavits of [**Applicant 1**] and [**Applicant 2**] at “Attachment “F” (who are applicants for this Djungan application). Schedule G provides details of activities currently carried out within the claim area. Schedule M also refers to the affidavits of [**Applicant 1**] and [**Applicant 12**] at “Attachment “F” but in relation to the traditional physical connection of members of the claim group to the area claimed.

Pursuant to s.190A(3) of the Act, regard is also to be had to relevant information that is not contained in the application. Consequently, I have had regard to the extracts from ‘A report into Ethnographic Issues Regarding the Djungan Native Title Claim QC95/11’ by [**Anthropologist 1**] and [**Anthropologist 2**] (1998) (‘the Ethnographic report’). Given the proximity of the area claimed in that application to the area claimed in the current application and the fact that much of the information in the report refers to broader Djungan country, I am of the view that it is appropriate to consider this information as relevant to the current application.

This report provides further information regarding the association of the Djungan People with the claim area, the traditional laws and customs from which the native title rights and interests claimed derive, and the relationship between those traditional laws and customs and the native title rights and interests claimed.

It is not the role of the delegate to reach definitive conclusions about complex anthropological issues pertaining to applicants' relationships with country subject to native title claimant applications. What I must do is consider whether the factual basis provided by the applicants is sufficient to support the assertion that claimed native title rights and interests exist. In particular this material must support the assertions noted in s.190B(5) (a), (b) and (c). I have formed the view that the additional information referred to above provides sufficient probative detail to address each element of this condition. I will now deal in turn with each of these elements.

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

At Schedule F of the application, it is stated that members of the claim group continue to have a close association, including a spiritual connection, with the claim area according to their traditional law and custom.

The factual basis provided in the affidavits of [Applicant 1] and [Applicant 2] is sufficient to support an assertion that the Djungan People have an association with the claim area and are descended from people who also had an association with the claim area. The deponents provide examples of their association and the association of family and other Djungan people with the area claimed. Refer:

- Affidavit of [Applicant 1] (22/3/99) at [3], [4], [6]-[8], [10]-[15], [18], [20]-[24]
- Affidavit of [Applicant 2] (March, 99) at [3]-[4], [6]-[8], [10]-[13], [16]-[18], [20]-[23]

At Schedule G of the application the applicants state that the claim group regularly hunts, gathers and utilises natural resources in the claim area, and that they care for the country and are the custodians of significant sites in their country including the claim area. Schedule G also states that members of the claim group raise their children on country while others take their children onto country in accordance with traditional law and custom.

The Ethnographic report outlines the anthropological, archaeological, and linguistic evidence for the association of the Djungan people with the claim area (pp. 18-21). The report makes these propositions in relation to the current and past association of Djungan people with their country:

- The Djungan claim as their traditional domain that area of land between the Walsh and Mitchell Rivers as far as Doolans Creek in the west and Leadingham in the east (p 18).
- Djungan attachment to these estates is recorded as far back as reliable records can be established (p 18).
- Djungan people were in the Mount Mulligan area from European contact, a fact borne out by “the patronage expressed to them through employment and the bestowal of names by significant European Australian families” (p. 45). This, the writer states, “not only implies their continuing residence in the area, but entails their engagement in service or small business activities in the Mount Mulligan area” (p. 45).
- The importance to Djungan mythology of the story of the creation of Mount Mulligan (Ngarrabulgan) and its status as a sacred Djungan place (p. 47).
- The occupation by members of the native title claim group of vacant crown land within Djungan traditional country (p. 61).
- A discussion of the extensive traditional knowledge of country and its plants, sites and stories exhibited by members of the group whilst visiting and exploring country with the writers of the report (p. 65-69, 78-80, 82, 91, 93).

The research suggests that the domain claimed by the Djungan is well accepted by neighbouring groups as being legitimate (pp. 18). It would appear from the extract provided that the authors conducted extensive interviews and field trips with members of the native title group and documented their knowledge of significant sites in the claim area.

Having regard to the information contained in the application and the additional material referred to above, I am satisfied that there is a sufficient factual basis to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the area subject to this application.

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.

The affidavits of [Applicant 1] and [Applicant 2] at Attachment F refer to traditional laws and customs relating to genealogical transmission of Djungan identity, knowledge and use of bush medicine, hunting and fishing techniques, knowledge of significant sites and Djungan language, observance of traditional customs when entering those sites, and looking after traditional country. See:

- Affidavit of [Applicant 1] (22/3/99) at [3], [4], [9]-[13], [16], [17], [19], [20], [23]

- Affidavit of [Applicant 2] (March, 99) at [3], [4], [9], [12]-[15], [18], [21]], [22], [24]

Schedule F states that:

- Members of the claim group continue to pass onto their descendants traditional laws and customs stories and beliefs concerning their traditional country including the claim area
- Members of the claim group continue to use the claim area for traditional hunting and fishing and for the gathering of traditional bush medicines and other materials.
- Members of the claim group continue to care for their traditional country, including the claim area, in accordance with traditional laws and customs passed down to them by their forebears and predecessors
- Members of the claim group continue to exercise a body of traditional laws and customs which have been passed down to them from generation to generation by their forebears and predecessors which traditions and customs include traditional laws and customs which deal with caring for country, controlling access to country, the holding of ceremonies on traditional country, the use and care of traditional country. These traditions and customs apply to the claim area because the claim area is part of the traditional country of the Djungan People.

Schedule G lists activities in regard to traditional usage of their country to support these traditional laws and customs. These activities include:

- hunting and gathering food on country;
- speaking for and caring for country, and being custodians of significant sites
- raising children on country and taking children on country;
- conducting cultural heritage work on country.

The ethnographic report describes some of the traditional laws and customs of the Djungan people from which the claimed native title rights and interests derive. These include:

- the observance of traditional customs which require people to call out to the old people or spirits prior to entering sites on country, and Djungan laws relating to the boundaries of their country, and special Djungan places and stories, central to their traditional ownership of Djungan country (pp. 36, 41, 47-48, 50-51, 65-67, 69)
- observance of traditional laws relating to marriage unions by Djungan people (p. 55)
- observance of traditional laws relating to inheritance and genealogical transmission of Djungan identity (p. 55-57)
- the status of traditional Eldership within the Djungan community (p. 60)
- the use by Djungan people of traditional customs when utilising natural resources when hunting and fishing (p. 78-79)

The information outlined above provides a sufficient factual basis to support the assertion that traditional laws and customs exist, that those laws and customs are acknowledged and observed by the native title claim group, and that those laws and customs give rise to the claimed native title rights and interests.

The requirements of s190B5(b) are therefore met.

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

Assertions of the continued observation of traditional laws and customs from which the native title rights and interests claimed are said to derive are provided as follows:

- The affidavit of [Applicant 1] establishes that he continues to collect wood and to fish, and to visit his country in accordance with traditional laws and customs;
- The affidavits of [Applicant 1] and [Applicant 2] tell of recent participation in important events on country, and in site clearances and cultural heritage protection work;
- Assertions detailing activities conducted by the native title claim group on the lands and waters of the claim area pursuant to traditional laws and customs (refer Schedule G).
- the ethnographic report identifies traditional Djungan laws and customs relating to marriage, sacred sites and stories, traditional boundaries, and acquisition or transmission of Djungan identity since European contact, and clearly identify the roots of contemporary practices in traditional laws and customs. They

also document the ongoing transmission of cultural knowledge relating to sacred sites and stories, bush medicine and tucker and hunting and gathering techniques.

In my view the evidence of [Applicant 1] and [Applicant 2] 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 the ethnographic report. For these reasons, I am satisfied that there is a sufficient factual basis to support an assertion that the native title claim group continues to hold native title in accordance with their traditional laws and customs.

Conclusion

As a result, I am satisfied that the factual basis provided sufficiently supports all of the assertions outlined in s.190B(5).

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

Under s190B(6) I must consider that, prima facie, at least some of the native rights and interests claimed, as defined at s.223 of the Act, can be established. The Registrar takes the view that this requires only one right or interest to be registered.

The term “prima facie” was considered in *North Galanjanja Aboriginal Corporation v Qld* (1996) 185 CLR 595. In that case, the majority of the court (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ) noted:

“The phrase can have various shades of meaning in particular statutory contexts but the ordinary meaning of the phrase “prima facie” is: “At first sight; on the face of it; as it appears at first sight without investigation.” [citing *Oxford English Dictionary* (2nd ed) 1989].”

I have adopted the ordinary meaning referred to by their Honours in considering this application, and in deciding which native title rights and interests claimed can be established *prima facie*.

Schedule E describes the native title rights and interests claimed by the applicants. The claim is for the right to possess, occupy, use and enjoy the claim area as against the whole world over areas of unallocated state land (USL) where there has been no prior extinguishment of native title or where the non-extinguishment principle (s. 238) applies. At Schedule L, the applicants claim the benefit of s.47B in relation to any USL land in the claim area; presumably then, the applicants claim the exclusive rights of “possession, occupation, use and enjoyment” over these USL areas.

Over all remaining tenures the rights and interests claimed are stated not to be to the exclusion of all others and are the right to have access to and use of the claim area and its natural resources. For the “non-exclusive” areas, a number of particular rights that derive from the right to access and use of the claim area are identified. The express statements in para. 2 of Schedule E indicate that the applicants do *not* claim the right to control access to or use of the claim area. I am consequently satisfied that claims to “manage”, “conserve” or “protect” the area are not intended to denote a degree of control but rather suggest a non-exclusive right to use and have access to the subject area.

Over areas where a claim to exclusive possession cannot be sustained, the majority in *Ward* (Gleeson CJ, Gaudron, Gummow and Hayne JJ) questioned the appropriateness of claims to control access to and use of

the land: “without a right of possession of that kind [i.e., an exclusive right], it may be greatly doubted that there is any right to control access to land or make binding decisions about the use to which it is put” - at [52]. *Ward* is authority for the proposition that rights which amount to a right to control access to the land or a right to control the use made of the land, are not capable of registration where a claim to exclusive possession cannot be maintained. I am satisfied from the express wording in Schedule E that the applicants are not claiming “non-exclusive” possession occupation use and enjoyment, and that the language of those rights and interests claimed at para. 2 of Schedule E do not indicate a claim to control access to or use of the subject area.

In considering this condition I have had regard to information in Schedules F and G, the affidavits in Attachments F of the application by [**Applicant 1**] and [**Applicant 2**], and the extracts from the Ethnographic report prepared by [**Anthropologist 1**] and [**Anthropologist 2**]. I have also had regard to the decisions of the Full Court of the Federal Court and the High Court of Australia in the *Ward* cases.

I will firstly consider the access and use rights found in para. 2 of Schedule E. My findings in relation to the particular access and use rights will be useful when considering the right to exclusively possess, occupy, use and enjoy USL parcels of land that are covered by the application.

2) *With respect to all remaining tenures within the claim area the Native Title rights and interests claimed are not to the exclusion of all others and are the right to have access to and use of the claim area and its natural resources including:*

- (vi) *maintain and use the claim area;*
- (vii) *conserve the natural resources of the claim area;*
- (viii) *protect the claim area and the natural resources of the claim area for the benefit of the Native Title holders;*
- (ix) *manage the claim area for the benefit of the Native Title holders;*
- (x) *use the claim area and the natural resources of the claim area for social, cultural, economic, religious, spiritual, customary and traditional purposes;*

Established, *prima facie*

See:

- o [**Applicant 1**] (22/3/99) at [9]-[11], [14]-[17], [20], [24] & [**Applicant 2**] (March 99) at [8]-[11], [15]-[18], [20]-[22], [24] – telling of their use of the claim area for camping, visiting sites, hunting, fishing & collection of bush medicine materials.
- o [**Applicant 1**] (22/3/99) at [12], [13] & [**Applicant 2**] (March 99) at [12]-[15], [18] telling of their observance of traditional customs when entering places of significance, their traditional knowledge of Djungan language, places and stories and their cultural heritage and protection work on country
- o statement in Schedule G – ‘the claimant group regularly hunt, gather and utilise natural resources in the claim area’; ‘the raising of children on country and taking them there to impart traditional knowledge about its natural resources and sites of significance’; ‘they are involved in the protection, maintenance and preservation of country, natural resources and sites of significance’.
- o the Ethnographic report describes members of the claim group continuing to use the claim area and its resources, including descriptions of their hunting, fishing, foraging and collecting bush foods; their strong attachment to their country, which is given expression by their extensive knowledge of it (including its sacred places and plant life) and their commitment to the preservation and protection of the environment and its cultural heritage (pp. 65-67, 69, 79-80).
- o information in the Ethnographic report about the production by members of the claim group of Aboriginal artefacts on a commercial scale, including exporting to overseas markets (p. 61)

and more particularly to:

- A. *reside on, camp on and travel across the land;*

Established, *prima facie*

See:

- statements by [Applicant 1] at [20] & [24] that he still goes on country to fish, collect wood, hunt, gather and visit sites of significance.
- the Ethnographic report at p. 61 telling of the members of the claim group setting up home on a parcel of vacant crown land within Djungan country, and see also information at pages 78-80 in relation to the Djungan living and occupying their lands.
- statements by [Applicant 1] and [Applicant 2] about how they and their families have lived, worked and camped on Djungan country throughout their lives.
- statements in Schedule G about members of the group raising their children on country, and others taking their children there to impart knowledge of Djungan laws and customs.

B. exercise rights of use and disposal over the natural resources

Established, prima facie

See:

- statements by [Applicant 1] at [20] & [24] that he still goes on country to fish, collect wood, hunt and gather.
- statements by [Applicant 1] and [Applicant 2] describing how they and their families have fished, hunted and foraged for food.
- information in the Ethnographic report about the extensive knowledge displayed by members of the group in relation to the natural food and plant resources on their country (pp.65-67).
- information in the Ethnographic report about the production by members of the claim group of Aboriginal artefacts on a commercial scale, including exporting to overseas markets (p. 61)

C. exercise and carry out economic life on the claim area including the creation, growing, production, husbanding, harvesting and exchange of natural resources and that which is produced by the exercise of the Native Title rights and interests;

Not established

Despite information in the material relating to personal use by members of the claim group and their families of traditional foods, and production of Aboriginal artefacts for commercial sale by [Applicant 1], there is insufficient information in the application to establish *prima facie* the existence of a traditional economic system relating to production, husbanding, harvesting and exchange of natural resources, nor the traditional laws and customs that give rise to this particular native title right and interest.

D. discharge cultural, spiritual, traditional and customary rights, duties, obligations and responsibilities on, in relation to, and concerning the claim area and its welfare including to:

- *preserve sights of significance to the Native Title holders and other Aboriginal people on the claim area;*

Established, prima facie

Schedule G provides information relating to the claimants carrying out cultural heritage protection work on country. Reference is made to protecting significant sites and carrying out cultural heritage work in the affidavit by [Applicant 2] at [15] & [18]-[19].

In the extracts from the Ethnographic report prepared by [Anthropologist 1] and [Anthropologist 2], the authors document the extensive knowledge that members of the group have of significant sites in Djungan country and their desire to protect these sites according to responsibilities which arise for Djungan people from traditional laws and customs.

- *conduct secular, ritual and cultural activities on the claim area;*

Established, prima facie

See:

- the applicants' Attachment F affidavits describe their observance of traditional customs of introducing themselves to the spirits; these affidavits also describe learning about traditional fishing methods and bush medicine and practising these things.
- see the Ethnographic report describing the group's attachment to traditional sites, and knowledge of the mythological importance to the Djungan of the stories associated with a place of central importance in Djungan country, *Ngarrabulgan*.
 - *conduct burials on the claim area;*

Established, *prima facie*

See:

- the Ethnographic report at page 80 discussing burial sites on country.
 - *maintain the cosmological relationship beliefs, practices and institutions through ceremony and proper and appropriate custodianship of the claim area and special and sacred sites, to ensure the continued vitality of culture, and the well being of the Native Title holders;*

Established, *prima facie*

In my reasons for decision under s.190B(4), I noted that I was satisfied that this right did not amount to a right 'approaching an incorporeal right akin to a new species of intellectual property' and could be distinguished from the right to cultural knowledge disallowed in *Ward*. Rather, the right appears to relate to the conduct of ceremony on country and proper custodianship of the native title land, activities which clearly connect the Djungan people to their land and waters pursuant to s.223 of the Act.

In Schedule G the applicants provide information relating to the Djungan People carrying out cultural heritage protection on country and maintaining their spiritual connection with Djungan country, including imparting traditional knowledge about significant sites and their country's natural resources to their children. The affidavits at Attachment F identify the acquisition by the deponents of traditional knowledge about significant sites, language, bush medicine, and fishing methods from their parents and elders. This is also supported by information in the Ethnographic report identifying the strong and persistent knowledge by members of the group of Djungan mythology, sacred sites, and stories attached to those sites, and the plant life on their country. This knowledge suggests that members of the group continue to conduct traditional activities relating to fishing and foraging and passing on of knowledge of sacred sites and stories on the claim area. See, for example, pages 60, 80, 91 & 93 of the report.

- *inherit or dispose of Native Title rights and interests in relation to the claim area in accordance with custom and tradition;*

Established, *prima facie*

The affidavits of [Applicant 1] and [Applicant 2] provide evidence for the transmission of cultural knowledge directly related to the use of the land: for example observance of customary rules when fishing, learning about bush medicine, visiting significant places and passing on of knowledge between the generations about culturally significant places on country. See also the Ethnographic report at pp.56-57.

- *determine who are the Native Title holders;*

Established, *prima facie*

The affidavits at Attachment R1-R3 indicate that membership of the group is determined through traditional law and custom. There appears to be no discretion to deviate from these rules. Thus, only the native title claim group is able to determine who are native title holders within their group in accordance with traditional law and custom.

In the affidavits at Attachment F the deponents state how they derive their Djungan identity through their father. The statements in the affidavits illustrate the development of rules of succession from the traditional patrilineal model throughout the Cape York Peninsula region as discussed in the Ethnographic report. In their report, [Anthropologist 1] and [Anthropologist 2] describe how the Djungan now acknowledge a less strict mode of succession, either through the male or female line. (pp. 55-57).

- *resolve disputes between the Native Title holders and other Aboriginal persons in relation to the claim area;*

Established, prima facie

The affidavits at Attachment R *prima facie* support the establishment of this right. The affidavits outline how the Djungan People make decisions in relation to Djungan land business, in accordance with their custom and tradition. The process involves Elders making the decision by consensus after discussing it among themselves and heads of families and considering the views of others. In my view this decision making process has a sufficient nexus with the use of the land to support the establishment of this right on a *prima facie* basis.

E. construct and maintain structures for the purpose of exercising the Native Title

Established, prima facie

It is stated in Schedule G that members of the claimant group raise their children on country, while others take their children on country. It is stated that the group regularly hunt, gather and utilise natural resources in the claim area. The Ethnographic report identifies the establishment of residences and other improvements on vacant crown land by members of the Djungan people. I note also the statement in Schedule L of the application that the Djungan people continue to occupy the USL land claimed in the application.

The extracts from the Ethnographic report records ample evidence of the residence of members of the native title claim group in the claim area; the authors conducted extensive field work and obtained detailed information about the location of residences and the history of occupation of Djungan families in the area, notably the [Family 1 – name deleted] and [Family 2 – name deleted] families.

I now consider the primary right to possess occupy use and enjoy USL parcels where there has been no prior extinguishment or where the non-extinguishment principle exists.

Established, prima facie

The material referred to above provides ample evidence of the native title group exercising a body of traditional law and custom that gives rise to the native title rights of exclusive possession occupation use and enjoyment where such rights and interests can be sustained over the area covered by the application (namely USL land where there has been no prior extinguishment or where the non-extinguishment principle exists).

With the exception of the right to “exercise and carry out economic life on the claim area including the creation, growing, production, husbanding, harvesting and exchange of natural resources and that which is produced by the exercise of the Native Title rights and interests”, all of the rights and interests described at Schedule E have been established *prima facie*. Consequently, the requirements of s. 190B(6) are met.

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

The requirements of this section are such that 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.

‘Traditional physical connection’ is not defined in the Act. I am interpreting this phrase to mean that physical connection should be in accordance with the particular traditional laws and customs relevant to the claim group. The explanatory memorandum to the *Native Title Act* 1993 explains that this “connection must amount to more than a transitory access or intermittent non-native title access” (para 29.19 of the 1997 EM on page 304).

The affidavits by [Applicant 1] and [Applicant 2] establish that they are members of the native title claim group (see their sworn testimony and their names on the list of Djungan people at attachment A of the application). The material in these affidavits is discussed extensively in my reasons under s. 190B(5). For the requirements of this section, I provide the following summary of the evidence that points to their traditional physical connection with the claim area:

- [Applicant 1] talks of growing up on part of the lands claimed and of working on the cattle station in the claim area; he talks also of traditional hunting and fishing on lands and waters within the claim area and also of camping in the claim area;
- [Applicant 2] talks of working on the cattle station in the claim area; he talks of traditional hunting and fishing on lands and waters within the claim area; of camping in the claim area; and of undertaking site clearances and heritage protection work within the claim area.

Based on the evidence contained in these two affidavits, I am satisfied that both [Applicant 1] and [Applicant 2] have 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

S190B(8) provides that the application and accompanying documents must not disclose, and the Registrar (or his delegate) must not be otherwise 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.

S61A(1) – Native Title Determinations

A search of the National Native Title Register and the Geospatial database reveals that there are no determinations of native title falling within the external boundary of the present application.

S61A(2) - Previous exclusive possession acts

Schedule B states that previous exclusive possession acts (as described in s.23B) have been excluded from the area of the application.

S61A(3) - Previous non-exclusive possession acts

It is clear from Schedule E that the applicants do not claim exclusive possession, occupation, use and enjoyment over areas within the claim area that are not unallocated state land or where there has either been prior extinguishment of native title or where the non-extinguishment principle (s. 238) does not apply.

S61A(4) - s.47, 47A 47B

At Schedule L, the applicants claim the benefit of s. 47B over USL areas within the application area. The application contains evidence of occupation of vacant crown land within Djungan traditional country by members of the native title claim group (see for example statements in Schedules F, and G, the affidavits of [Applicant 1] and [Applicant 2] and the Ethnographic report).

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 it is stated that the applicants do not claim ownership of “minerals, petroleum or gas which are wholly owned by the Crown”.

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 would appear that no offshore places are claimed – see map of claim area in Attachment C and statements to this effect at Schedule P.

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

Schedule B of the application excludes areas over which native title has otherwise been extinguished. In addition, there is no information in the application or otherwise to indicate that any native title rights and/or interests in the claim area have been extinguished.

Result: Requirements met

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