



## Test for Registration

<b>Application name</b>	Danggan Balun (Five Rivers) People
<b>Name of applicant</b>	Cindy Dargin, Ken Markwell, Tony Gordon, Shaun Davies, Anthony Dillon, Chris Levinge, Rory O'Connor, Melanie Gordon, Dina Paulson
<b>Application made</b>	27 June 2017
<b>Federal Court of Australia No.</b>	QUD331/2017
<b>NNTT No.</b>	NC2017/007
<b>Date of Decision</b>	14 September 2017

### Decision: Claim does pass the test

I have decided that the claim in the Danggan Balun (Five Rivers) application satisfies all of the conditions in ss 190B and 190C of the *Native Title Act 1993* (Cth)<sup>1</sup>. Therefore the claim must be accepted for registration and entered on the Register of Native Title Claims.<sup>2</sup>

---

Heidi Evans, Practice Leader

*Delegate of the Native Title Registrar*

---

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

<sup>2</sup> Sections 190A(6) and 190(1) of the Act.

### Cases cited:

*Corunna v Native Title Registrar* [2013] FCA 372 ('Corunna')  
*Griffiths v Northern Territory* [2007] FCAFC 178 ('Griffiths')  
*Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 ('Gudjala 2007')  
*Gudjala People #2 v Native Title Registrar* (2008) 171 FCR 317; [2008] FCAFC 157; ('Gudjala 2008')  
*Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 ('Gudjala 2009')  
*Martin v Native Title Registrar* [2001] FCA 16 ('Martin')  
*Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 ('Yorta Yorta')  
*Northern Territory v Doepel* (2003) 133 FCR 112; (2003) 203 ALR 385; [2003] FCA 1384 ('Doepel')  
*Sampi v State of Western Australia* [2005] FCA 777 ('Sampi')  
*Strickland v Native Title Registrar* (1999) 168 ALR 242; [1999] FCA 1530 ('Strickland')  
*Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 ('Wakaman')  
*Western Australia v Native Title Registrar* [1999] FCA 1591 ('WA v NTR')  
*Western Australia v Strickland* [2000] FCA 652 ('Western Australia v Strickland')  
*Western Australia v Ward* [2002] HCA 28 ('Ward')

### BACKGROUND

- [1] The application has been made on behalf of the Danggan Balun (Five Rivers) People and covers an area of land and waters on the Gold Coast in Queensland, north of Coolangatta and to the south east of Ipswich. The towns of Beaudesert, Beenleigh and Nerang fall within the boundary of the application area.
- [2] The Deputy Registrar of the Court gave a copy of the application and accompanying affidavits to the Native Title Registrar (Registrar) on 10 July 2017 pursuant to s 63. Given that the application was made on 27 June 2017 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.
- [3] If the claim in the application satisfies all the registration test conditions in ss 190B and 190C, then the Registrar must accept the claim for registration.<sup>3</sup> If it does not satisfy all the conditions, the Registrar must not accept the claim for registration.<sup>4</sup>
- [4] I have decided that the claim satisfies all of the registration test conditions and my reasons on each condition follow below.

### ADVERSE MATERIAL

- [5] On 13 September 2017, the day before the date of this decision, I received three emails and a total of nine attachments from a representative for certain persons objecting to the registration of the application. The way in which the material was provided was haphazard in that it did not follow any logical sequence or order, and the amount of material provided was significant.
- [6] By letter of 25 August 2017, the Practice Leader for the application had advised the applicant, the Federal Court and the State that my decision regarding registration of the application would be made on or before 15 September 2017.

---

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

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

[7] Section 190A(3) confers a discretion on the Registrar to ‘have regard to such other information as he or she considers appropriate’ in considering a claim for registration. In this instance, noting the late point in time at which the adverse material was received, the nature and extent of that material, and the fact that the parties to this matter held a reasonable expectation that my decision would be made on or before 15 September 2017, I considered that it was not appropriate for me to have regard to the adverse material received.

## Registration Conditions about merits of the claim (s 190B)

### SECTION 190B – CONDITIONS MET

[8] I am satisfied the application meets the requirements of ss 190B(2)-(9).

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

#### **Decision**

[9] For the reasons I outline below, I am satisfied the claim meets the requirements of s 190B(2). The information provided about the external boundary and internally excluded areas is sufficient to identify with reasonable certainty the particular land or waters over which native title rights and interests are claimed.

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

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

- (a) the external boundary of the area where native title rights and interests are claimed<sup>5</sup>; and
- (b) any areas within the external boundary over which no claim is made<sup>6</sup>.

#### **Does the information about the external boundary meet this condition?**

[11] Schedule B of the application refers to Attachment B as containing a description of the land and waters covered by the application. Attachment B is a metes and bounds description of the external boundary of the application area, referencing native title determinations, catchment areas, casement parcels and coordinate points. The description specifically excludes three islands that are landward of the high water mark. It also specifically excludes the areas covered by six named native title determination applications.

[12] The map at Attachment C entitled ‘Danggan Balun (Five Rivers)’ has been prepared by Queensland South Native Title Services and is dated 23 May 2017. It includes:

- the application area depicted by a dark blue outline;
- surrounding native title determinations depicted by orange stippled fill;
- surrounding native title determination applications depicted by green stippled fill;

---

<sup>5</sup> See s 62(2)(a)(i).

<sup>6</sup> See s 62(2)(a)(ii); *Doepel* at [122].

- catchment and sub-basin catchment areas;
- scalebar, northpoint and coordinate grid;
- notes relating to the source, currency and datum of data used to prepare the map.

[13] The National Native Title (Tribunal)'s Geospatial Services prepared a geospatial assessment and overlap analysis (dated 13 July 2017) (geospatial assessment) analysing the information in Attachments B and C, and concluding that the written description and map are consistent and identify the application area with reasonable certainty. Having considered that information before me, I agree with the assessment, that it allows for the boundary of the application area to be identified on the earth's surface, so that the 'particular land and waters' subject of the application can be known.

***Does the information about excluded areas meet this condition?***

[14] Schedule B also describes areas within the external boundary that are not covered by the application. A list of general exclusion clauses is provided. That is, types of interests in relation to the land that are excluded, including areas subject to previous exclusive possession acts or areas where native title has otherwise been wholly extinguished.

[15] My view is that the general and categorical exclusion clauses set out in Schedule B provide reasonable certainty for the purposes of this condition<sup>7</sup>. It will be possible to work out any internally excluded areas affected by a previous exclusive possession act or other extinguishment once historical and current tenure searches are completed<sup>8</sup>.

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

***Decision***

[16] For the reasons below, I am satisfied that the claim meets the requirements of s 190B(3). The information within the application allows for the persons comprising the native title claim group to be identified with sufficient clarity.

***What is needed to meet this condition?***

[17] To meet s 190B(3), the Registrar must be satisfied that:

- (a) the persons in the native title claim group are named in the application; or
- (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[18] The only question for this condition is 'whether the application enables the reliable identification of persons in the native title claim group': whether the claim has been made on behalf of the correct native title claim group is not relevant<sup>9</sup>.

***Does the description of the persons in the native title claim group meet this condition?***

[19] A description of the persons comprising the native title claim group appears at Schedule A of the application. It is my understanding that the description sets out three criteria, all of which must be met, in order for an individual to qualify as a member of the Danggan Balun native

---

<sup>7</sup> See *Strickland* at [50]-[55].

<sup>8</sup> See *Strickland* at [51]-[52].

<sup>9</sup> See *Doepel* at [51] and [37]; *Gudjala 2007* at [33].

title claim group. Firstly, the person must be a descendant of one of 19 named apical ancestors. Secondly, the person must identify as a member of the Danggan Balun claim group. Thirdly, the person must be recognised under the traditional laws and customs of the native title claim group as Danggan Balun.

- [20] The fact that ascertaining the persons who at any one point in time are members of the claim group would involve some research, or ‘factual inquiry’, in my view, does not prevent the description from being sufficiently clear for the purposes of this condition<sup>10</sup>. Application of the criteria to a particular individual would undoubtedly require gathering genealogical information, and information about the laws and customs of the group around group membership. However, with this information, by starting with one individual and applying the criteria, I am satisfied that the members of the group could be identified with sufficient clarity.

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

#### **Decision**

- [21] I am satisfied the description in Schedule E is sufficient for me to clearly understand and identify the claimed rights as ‘native title rights and interests.’

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

- [22] To meet s 190B(4), the Registrar must be satisfied that the application’s description of the claimed native title rights and interests is sufficient to allow the rights and interests to be readily identified. The question for this condition is whether the claimed rights are described clearly, comprehensively and in a way that is meaningful and understandable, having regard to the definition of the term ‘native title rights and interests’ in s 223(1) of the Act<sup>11</sup>.

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

- [23] Paragraph one of Schedule E describes a claim to a right of exclusive possession. That is, it is a claim to a right of possession, occupation, use and enjoyment of the application area ‘to the exclusion of all others’. In my view, the inclusion of this broadly-termed right does not prevent the description satisfying this condition of the registration test<sup>12</sup>.
- [24] Paragraph two of Schedule E includes a list of non-exclusive rights and interests claimed in relation to those areas where an exclusive right cannot be recognised. It is my view that those rights and interests are clear and understandable as ‘native title rights and interests’.

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

#### **Decision**

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

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

---

<sup>10</sup> See *WA v NTR* at [67].

<sup>11</sup> See *Doepel* at [99] and [123].

<sup>12</sup> See *Strickland* at [60].

- [26] To meet s 190B(5), the Registrar must be satisfied there is a sufficient factual basis to support the assertion that the claimed native title rights and interests exist. In particular, the factual basis must support the following assertions:
- (a) that the native title claim group have, and the predecessors of those persons had, an association with the area;
  - (b) that there exist traditional law acknowledged by, and traditional customs observed by, the native title claim group that give rise to native title rights and interests; and
  - (c) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.
- [27] The question for this condition is whether the factual basis is sufficient to support these assertions. To answer that question, I must assess whether the asserted facts can support the existence of the claimed native title rights and interests, rather than determine whether there is 'evidence that proves directly or by inference the facts necessary to establish the claim'<sup>13</sup>.
- [28] Section 62(2)(e) requires only a 'general description' of the factual basis. However, where the facts provided are not at a sufficient level of detail to enable a genuine assessment of the application by the Registrar, the application may not be able to satisfy the condition. The material must comprise 'more than assertions at a high level of generality'<sup>14</sup>.
- [29] To satisfy the condition, the material must contain sufficient details addressing the particular native title, claimed by the particular native title claim group, over the particular land and waters of the application area<sup>15</sup>.
- [30] Through reliance on the statements contained in the affidavits sworn by the applicant persons pursuant to s 62(1)(a) that accompany the application, that each deponent believes the statements contained in the application to be true, I have accepted the asserted facts as true<sup>16</sup>.
- [31] The factual basis material appears in Attachment F and in an affidavit sworn by claim group member [Name removed].

***What is needed to provide a sufficient factual basis for s 190B(5)(a)?***

- [32] To meet s 190B(5)(a), the factual basis must support the assertion that 'the native title claim group have, and the predecessors of those persons had, an association with the area'. Generally on what is needed for the 'association' assertion:
- (a) it is not necessary for the factual basis to support an assertion that all members of the native title claim group have an association with the area at all times<sup>17</sup>;
  - (b) it is necessary that the material is sufficient to support that the group as a whole presently has an association with the area and to also support an association with the

---

<sup>13</sup> *Doepel* at [16]-[17]; *Gudjala 2008* at [83] and [92].

<sup>14</sup> *Gudjala 2008* at [92].

<sup>15</sup> *Gudjala 2007* at [39].

<sup>16</sup> *Gudjala 2008* at [91] to [92].

<sup>17</sup> *Gudjala 2007* at [52].

- area by the predecessors of the whole group over the period since sovereignty, or at least since European settlement<sup>18</sup>; and
- (c) the materials must support that the association both presently and by the group's predecessors relates to the area as a whole<sup>19</sup>.

***Is the factual basis sufficient for the assertion of s 190B(5)(a)?***

- [33] The condition is met. I am satisfied the factual basis is sufficient to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the application area. There is information of a sufficient level of detail and substance addressing the present association of members of the claim group with the area, and of the claim group's predecessors with the area over the period since sovereignty. This information is geographically particular to the land and waters of the claim area.
- [34] The assertion at s 190B(5)(a) requires material that has geographic particularity to the claim area<sup>20</sup>. Throughout the material, there are specific locations identified as being places with which the group and their predecessors had and continue to have an association. Places named include Beaudesert, Nerang, Mount Tambourine, Hillview, Maroon, Bromelton and Waterford. Using the Tribunal's iSpatial database, I have considered these locations in relation to the boundary of the application area. Through this exercise, I am satisfied the material addresses an association of the group and its predecessors with the land and waters of the application area. The places identified are geographically spread across the area within the boundaries of the application area, such that I consider the association asserted to be with the entirety of the area.
- [35] At s 190B(5)(a), the material must speak to an association of the predecessors of the group with the area over the period since sovereignty or European settlement<sup>21</sup>. The material asserts settlement to have taken place in the mid-1840s, with the opening up of the Moreton Bay area for settlement and the offer of land for sale. It was primarily the establishment of pastoralism in the region that marked this period of settlement.
- [36] Attachment F of the application contains information about each of the apical ancestors named in the claim group description in Schedule A. Attachment F provides that a number of those apical ancestors were born circa 1830, with the remaining apical ancestors born in the decades that followed, the latest being in 1868. In addition to providing their birth dates, Attachment F names the places the apical ancestors are recorded in historical sources as being associated with, or places where they were born, lived, gave birth to children and/or are buried.
- [37] For example, speaking of apical ancestor Kipper Tommy Andrews, Attachment F provides:

It is estimated that Kipper Tommy Andrews was born before circa 1868 and had a lifelong connection with the Nerang region. Carril Lentz (1961:10-11) refers to Kipper Tommy who *worked for Glassis*

---

<sup>18</sup> *Gudjala 2007* at [51] and [52].

<sup>19</sup> *Corunna* at [35]-[39] and [42-44].

<sup>20</sup> See *Martin* at [26].

<sup>21</sup> *Gudjala 2007* at [51] and [52].

*many years, and an unnamed wife, both were buried in the back of the Nerang cemetery. Kipper Tommy is featured with Slab [another apical ancestor for the native title claim group] in an 1860 story of Nerang men who were taken north as police trackers but escaped and trekked back to their country... - at [40](f).*

[38] From the information of this type in Attachment F, it is my understanding that the material asserts that the apical ancestors were persons who were physically present in the application area around the time of settlement.

[39] Attachment F also contains information about the descendants of the apical ancestors. In particular, it names the persons comprising the first and second generations following the apical ancestor, and also identifies places with which those persons were associated. That is, it names places where they were born, lived, had children, and/or passed away.

[40] For example, regarding the son of apical ancestor Sarah *Warri/Warru* Clarke, Attachment F provides:

[Name removed] was born between 1853-1858 at either 'Nerang' or 'Logan, Beaudesert' according to his death and marriage certificates. [Name removed] death certificate records him as a 'native of Nerang' and his parents as 'Drumley and Warri', while his marriage certificate identifies 'George Drumley and Sarah' as [Name removed] parents. [Name removed] had 10 children with Mary Ann Sandy, the daughter of apical ancestor Mary Ann Mitchell before they married at Beaudesert in 1913. This family was largely resident in the Beaudesert area. [Name removed] passed away in 1951 at Beaudesert – at [40](a)(ii).

[41] Again, from this information, I understand the material to assert that the descendants of the apical ancestors, in the period since settlement, had a physical association with the application area.

[42] Regarding an association of the members of the claim group today with the area, within Attachment F is a table, with the heading 'Comparative table of instances of the exercise of native title rights and interests' (the Comparative table). This table contains numerous examples of particular members of the claim group spending time on the application area exercising native title rights and interests.

[43] For example, it states that claimant [Name removed] 'describes a place at the bottom of Mount Tambourine, a pool that is hidden'. It explains that '[Name removed] goes to this pool with her family before they go up the mountain', and that it 'is a sacred pool and is used to cleanse before going up the mountain.' The Comparative table also refers to claimant [Name removed], who speaks of Drumley's Walk, a track that follows the route her grandfather, [Name removed], used to take across the claim area from Beaudesert to Southport.

[44] An affidavit sworn by claim group member [Name removed] contains similar information, describing time the deponent and members of his family have spent and continue to spend on the application area. In particular, the affidavit speaks to a spiritual association of the claim group with the area. [Name removed] states:



Our people have stories and law for many areas within the boundaries of the Danggan Balun (Five Rivers) native title claim which are special to our people and relate to specific areas inside our country.

Some of those stories tell the different tribes where their country is. For example, there is an important story that starts up at the McPherson Range around Mount Maroon (the sand goanna). It's a story about a fight between the coastal (saltwater) animals and the inland animals (freshwater). This is one of many stories that tell us that the area of the Danggan Balun (Five Rivers) claim is our country. The story tells us when we have to go to the coast for the sea mullet season and when other groups come to our country. It also tells us when and how we have to travel through country (our pathways) and how we need to observe and respect other people's country – affidavit of [Name removed] at [17] and [18].

[45] From this information, and that contained in Attachment F, I am satisfied the factual basis supports a physical and spiritual association of the claim group today with the application area.

[46] I note that the application area encompasses an area of waters within Moreton Bay, off the coast of Coomera and north east of Hope Island. It is clear from the material that the claim group comprises both saltwater (coastal) people, and freshwater (inland) people – see excerpt above from affidavit of [Name removed] at [44] of these reasons. In the Comparative table in Attachment F, one claimant explains that he is a saltwater man, of the Nerang River, and that all of his Aunties and Uncles lived along the riverbank on the coast at Southport. The material also contains references to claimants and their predecessors travelling across the application area to the coast, to fish and to gather with other members of the claim group for ceremony. In his affidavit, claimant [Name removed] explains how one of the group's creation stories references journeys across to the coast for the sea mullet season<sup>22</sup>. Places referred to in this material include Burleigh Heads and Coolangatta<sup>23</sup>.

[47] In my view, this information that speaks to the use of resources from the ocean and gatherings on the coastline is sufficient in supporting an assertion that the members of the group and their predecessors had an association with these waters. From this information, I consider it reasonable to infer the claim group and its predecessors accessed and spent time in these waters.

[48] It follows that I am satisfied the factual basis is sufficient to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the area.

***What is needed to provide a sufficient factual basis for s 190B(5)(b)?***

[49] To meet s 190B(5)(b), the factual basis must support the assertion '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'.

---

<sup>22</sup> At [18].

<sup>23</sup> See Attachment F, Comparative table.

[50] The case law indicates the following is required of the material at s 190B(5)(b):

- information supporting the existence of a society of people living in the area at sovereignty, or at least European settlement, acknowledging laws and customs of a normative character<sup>24</sup>;
- an explanation of how the laws and customs of the claim group are ‘traditional’, that is, how they have been passed down through the generations to the claim group and how they are rooted in the laws and customs of a society at sovereignty<sup>25</sup>;
- an explanation of the link between the claim group described in the application and the area covered by the application, which may require identification of a link between the apical ancestors named in Schedule A, and the society at sovereignty<sup>26</sup>;
- evidence of the claim group’s acknowledgement and observance of laws and customs in relation to the claim area<sup>27</sup>.

***Is the factual basis sufficient for the assertion of s 190B(5)(b)?***

[51] I am satisfied the factual basis is sufficient to support the assertion at s 190B(5)(b). The material in support of the assertion contains information that speaks of a society at settlement in the area acknowledging and observing shared laws and customs, and of laws and customs of the native title claim group today rooted in those of the society at settlement. The information explains the link between the apical ancestors and that society.

[52] The starting point at this condition must be the identification of an Indigenous society in the area at European settlement<sup>28</sup>. As above, Attachment F provides that settlement of the region in which the application area is situated took place in the inland areas in the mid-1840s, however was as late as the 1860s and 1870s in some coastal parts of that region. The material includes a number of excerpts from historical sources recording early explorers’ and settlers’ observations of Indigenous people in the region. For example, Attachment F provides that in 1770 Captain Cook sailed up the east coast of Australia, observing camp fires along the coastline around Cape Byron and Point Danger (at Coolangatta), and also fires further inland<sup>29</sup>.

[53] These excerpts provide the following information:

- In 1828, explorers of the area observed a campsite by the Logan River, constructed of sticks and bark, and containing dilly bags, fishing nets, a shield and other tools<sup>30</sup>;
- On the same expedition, markings on the earth in the form of battle circles or ceremony circles were observed and described in detail<sup>31</sup>;
- In 1829, an explorer observed grass fires throughout the area that had been lit by the Indigenous occupants<sup>32</sup>;

---

<sup>24</sup> *Gudjala 2007* at [63].

<sup>25</sup> *Yorta Yorta* at [46]; *Gudjala 2009* at [72].

<sup>26</sup> *Gudjala 2007* at [66] and [81].

<sup>27</sup> *Gudjala 2009* at [74].

<sup>28</sup> *Gudjala 2007* at [65] and [66].

<sup>29</sup> Attachment F at [11].

<sup>30</sup> Attachment F at [27].

<sup>31</sup> Attachment F at [28].

- The explorer also observed the local Indigenous people gathering honey from trees using hatchet-like tools<sup>33</sup>;
- This explorer and his party later faced an attack at a campsite within the application area from the Indigenous persons living there<sup>34</sup>;
- An important site for the Indigenous people of the area near Maroon was recorded by early settlers – in the 1860s it was noted as being a site for corroborees, battles with neighbouring tribes, and the production and trade of tools<sup>35</sup>;
- A local station owner near Maroon recorded an event in early settlement times where he faced significant anger from the local Indigenous people when he ploughed through one of their campsites<sup>36</sup>;
- In 1864 it was recorded that around 300 Indigenous persons gathered from the Pimpama, Coomera and Tambourine districts to hold a corroboree at Waterford – local settlers were invited and the brother of apical ancestor Jackey Jackey/Bilin Bilin, [Name removed], was one of the participants in the corroboree<sup>37</sup>;
- The [Name removed] family memoirs, dated circa 1853 record a local Aboriginal story about the creation of Mount Murrin [Maroon], meaning sand goanna, that was transmitted from generation to generation<sup>38</sup>.

[54] Regarding the Danggan Balun people, Attachment F provides that the group and their ancestors have occupied and owned the land and waters comprising the application area since before 1788 until the present day. It is explained that the group ‘represent an aggregation of localised traditional landholding groups whose members identify at various levels from clan/estate-names... to dialect-named groups’<sup>39</sup>. The material further explains that members of the group comprise both saltwater and freshwater people, and that the five rivers – the Logan, the Albert, the Pimpama, the Nerang and the Tweed Rivers – ‘intrinsicly link the freshwater people from the inland and western parts of the claim area with the saltwater’<sup>40</sup>. From the information before me, I understand claim group members and their predecessors typically identify in terms of their membership of localised country groups, but also, in some contexts, as Yugambeh-Bundjalung people, which is a language/dialect label<sup>41</sup>.

[55] While this information speaks to the composition of the claim group today, from further information within Attachment F and the affidavit of [Name removed]<sup>42</sup>, it is my understanding that these localised clan-estate groups are cultural structures that have been passed down through the generations to the members of the group today.

---

<sup>32</sup> Attachment F at [29].

<sup>33</sup> Attachment F at [29].

<sup>34</sup> Attachment F at [30].

<sup>35</sup> Attachment F, Comparative table.

<sup>36</sup> Attachment F, Comparative table.

<sup>37</sup> Attachment F, Comparative table.

<sup>38</sup> Attachment F, Comparative table.

<sup>39</sup> Attachment F at [4].

<sup>40</sup> Attachment F at [5].

<sup>41</sup> Attachment F at [6].

<sup>42</sup> See for example information from claimant Graham Dillon in Attachment F, Comparative table at p. 39; affidavit of Kenneth Roy Markwell at [5].

- [56] From this information, I accept the material to assert that there was an Indigenous society occupying the application area at and prior to settlement. Further, I understand the material to assert that these persons were united by the common observance of shared laws and customs, and that these laws and customs included those dealing with occupation and use of the application area and its resources, protecting and defending the application area from intruders, ceremonies, battles and trade with neighbouring groups, and the intergenerational transfer of creation stories and mythologies. In this way, I am satisfied the factual basis is sufficient in supporting an assertion of a society at settlement in the area acknowledging and observing laws and customs.
- [57] As explained above in my reasons at s 190B(5)(a), I am satisfied the factual basis supports an assertion that the apical ancestors of the Danggan Balun native title claim group are persons who were born prior to, or around the time of, settlement in the area, and who's birthplace was in and were thereafter associated with, places within the application area. In this way, I understand the material to assert that the apical ancestors were, in fact, members of the society in the area at settlement. It follows that I am satisfied the factual basis explains the link between the apical ancestors and the society at settlement.
- [58] Section 190B(5)(b) requires the material to address traditional laws and customs. That is, laws and customs that have been passed down from generation to generation of a society, usually by word of mouth and common practice, that are rooted in the laws and customs of a society at settlement. Traditional laws and customs are also those that have been acknowledged and observed since sovereignty without substantial interruption.
- [59] In my view, the material addresses traditional laws and customs. Firstly, it is clear from the material that laws and customs have been passed down through the generations to the claimants today. For example, in his affidavit, claimant [Name removed] states:
- I have been given traditional responsibility for looking after and protecting Wangerriburra country under our lores and customs... I was given this responsibility by a senior Wangerriburra Elder because of my connection to Wangerriburra country but more importantly because I was selected by him to learn and be responsible for Wangerriburra lores, customs and country.<sup>43</sup>
- [60] Elsewhere, [Name removed] explains that in the same way he was taken out on country by his 'old people', and taught his laws and customs, today, he takes his children and other young people out on country to 'teach them the basics of these laws and customs'<sup>44</sup>. Attachment F also provides information about claimant [Name removed], who as a child was shown scarred trees within the application area by her mother and father, and was 'told that the old people "used to use the bark from the trees to wrap their babies in and to make shields"'<sup>45</sup>.
- [61] Paragraphs [56] to [62] of Attachment F set out information describing the system of laws and customs acknowledged and observed by the Danggan Balun people. I have relied on a number

---

<sup>43</sup> Affidavit of Kenneth Roy Markwell at [11].

<sup>44</sup> Affidavit of Kenneth Roy Markwell at [27].

<sup>45</sup> Attachment F at [46].

of aspects of the material in forming the view that those laws and customs asserted are traditional laws and customs.

[62] Firstly, the Comparative table in Attachment F explains that a historical source from early settlement times (circa 1853) records a local Indigenous story about the creation of Mount Murrin [Maroon], which means sand goanna, and that this story was transmitted from generation to generation. In his affidavit, claimant [Name removed] explains that his people have never left their traditional country, and that this ensured connections to country were maintained, and 'laws, customs, country, languages and stories were passed down'<sup>46</sup>. He explains that his people have stories and law for particular places within the application area, and then goes on to share the story of the sand goanna which 'starts up at the McPherson Range around Mount Maroon'<sup>47</sup>. [Name removed] describes the purpose and instruction provided by this story for his people, and the way it prescribes certain behavior in engaging with country.

[63] From this information before me, I consider it reasonable to infer that this story, and other similar creation stories, form an aspect of the laws and customs of the Danggan Balun people that have been passed down through the generations to the claim group today in an uninterrupted manner since settlement, noting that claim group members possess a detailed knowledge of the story - its purpose, meaning and relevance for them today.

[64] Secondly, within the material are a number of references to historical sources around the time of settlement recording incidents where Indigenous people within the application area sought to defend their territory, and/or prevent foreigners accessing certain places and sites. For example, as set out above at [53], one early settler faced hostility from the local Indigenous people in the Maroon area after he destroyed a campsite with his plough. Another source explains how in 1829, local Indigenous persons set fire to the grass surrounding a campsite of explorers in the vicinity of the application area.

[65] There is also information before me that explains the operation of laws and customs of this nature today. Claimant [Name removed] explains that he was taught laws and protocols about accessing other people's country by his Elders and that he continues to observe these, as it is the 'right way'<sup>48</sup>. He goes on to explain these protocols in more detail, stating:

We have the right to invite people to our country, which we did and still do. This also means we have the right to refuse, restrict access to our country and if needed enforce our laws and customs on our traditional lands and waters. This includes exercising these rights on other groups who do wrong by our country, laws and customs<sup>49</sup>.

[66] From this information, I understand the material to assert that defending and protecting traditional country from intruders is a further aspect of the laws and customs of the Danggan

---

<sup>46</sup> Affidavit of Kenneth Roy Markwell at [16].

<sup>47</sup> At [18]-[19].

<sup>48</sup> Affidavit of Kenneth Roy Markwell at [20].

<sup>49</sup> Affidavit of Kenneth Roy Markwell at [22].

Balun people that has been passed down through the generations to members of the claim group today.

- [67] Finally, the material refers a number of times to large gatherings, for corroborees and trade and fighting with neighbouring clans, which took place on the application area around the time of settlement. For example, as set out above at [53], the material speaks of a large corroboree that took place in 1864 at Waterford. The material explains that the brother of apical ancestor Jackey Jackey, [Name removed], was a participant in the corroboree. Another source mentioned in the Comparative table in Attachment F recorded a settler's recollection in 1935 of Burleigh Heads being 'a very sacred' area for ceremony.
- [68] Regarding laws and customs of the native title claim group today, in his affidavit, claimant [Name removed] explains that he has participated in ceremony on 'sacred places' within the application area. He also explains that he is a descendant of Jackey Jackey. From this information, I consider it reasonable to infer that ceremonies and gatherings are a further aspect of the laws and customs of the Danggan Balun society at settlement that has been passed down through the generations to the claim group today.
- [69] In light of my reasoning above, therefore, I am satisfied that the material speaks to traditional laws and customs. That is, laws and customs acknowledged and observed by the members of the native title claim group today that are rooted in those of the society at settlement, and that have been passed down through the generations by the group's predecessors to the claim group today.
- [70] I am satisfied the factual basis is sufficient to support an assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group giving rise to the claim to native title.

***What is needed to provide a sufficient factual basis for s 190B(5)(c)?***

- [71] To meet s 190B(5)(c), the factual basis must support the assertion 'that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.'
- [72] The case law indicates the following matters must be addressed by the factual basis at this condition of the registration test:
- that there was a society at settlement that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed to the claim group;
  - that there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement<sup>50</sup>.

***Is the factual basis sufficient for the assertion at s 190B(5)(c)?***

- [73] I am satisfied the factual basis is sufficient to support the assertion at s 190B(5)(c).

---

<sup>50</sup> *Gudjala 2007* at [82].

- [74] I have already set out above at s 190B(5)(b), the reasons for which I am satisfied the factual basis is sufficient to support an assertion of a society at settlement in the application area acknowledging and observing laws and customs from which the laws and customs of the claim group today are derived. I have also set out at s 190B(5)(b), the material that speaks to the way in which these laws and customs have been passed down through the generations from settlement to the members of the claim group today.
- [75] In my view, certain aspects of the material also address continuity in the acknowledgement and observance of traditional laws and customs by the group and its predecessors. One such aspect is the material addressing the way in which members of the group and their predecessors have remained on their traditional country throughout the period since settlement, enabling them to acknowledge and observe their laws and customs without substantial interruption. For example, Attachment F describes the way in which predecessors of the claim group worked on pastoral stations in the application area and how this ‘allowed some claimant families to maintain long-term associations with particular stations’ and, in many instances, allowed those predecessors ‘to continue to acknowledge and practice their own laws and customs in relative security and anonymity’<sup>51</sup>. Attachment F further explains that Elders of the claim group today recall how ‘they and their older relatives continued to work on stations and farms as well as in other enterprises like on the railways, in the meatworks and as oysterman and fisherman [sic] in or close to their traditional country well into the mid-to-late twentieth century’<sup>52</sup>.
- [76] From this information, I understand the material to assert that the predecessors of the claim group, throughout the period since settlement, were not prevented from maintaining a physical connection with their traditional country. Further, I understand the material to assert that this uninterrupted physical presence on the land and waters of the application area enabled those persons to acknowledge and observe the laws and customs passed down to them by their Elders, in the same way they had as before settlement.
- [77] Another aspect of the material that in my view supports an assertion of a system that has had ‘a continuous existence and vitality’<sup>53</sup> since settlement is the material that speaks of the way in which language has been passed down to the claim group members today and continues to be taught.
- [78] The Comparative table in Attachment F sets out claimant [Name removed] explanation of her father’s father, [Name removed], who was born in the 1860s at Bromelton Station. The information provides [Name removed] description of her grandfather, that he had initiation scars on his body and spoke ‘a lot of lingo’. She tells how some of that language was passed to her father and that in turn, her father passed that language on to his daughters. [Name removed] explains that she and her sister have passed some of the lingo they were taught onto their children and grandchildren<sup>54</sup>.

---

<sup>51</sup> Attachment F at [37].

<sup>52</sup> Attachment F at [38].

<sup>53</sup> *Yorta Yorta* at [47].

<sup>54</sup> Attachment F, Comparative table at p. 49.

[79] The information in the Comparative table provides that [Name removed] paternal uncle and maternal uncle were both informants for a linguist working in the region in the 1970s, sharing with the linguist the Mununjali language<sup>55</sup>. Elsewhere in the material, it is explained that according to the traditional laws and customs of the native title claim group, members of the group often identify using a language/dialect label rather than using an estate-based/clan label<sup>56</sup>. In this way, I understand language to be a key element of the system of laws and customs asserted by the material, and one that has, and continues today to, play a role in defining the persons comprising the native title claim group.

[80] From this material before me, I am satisfied the factual basis supports an assertion of a system of laws and customs that has had a continuous existence and vitality since settlement, and one that has been acknowledged and observed by the group and its predecessors since settlement without substantial interruption.

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

#### **Summary of findings for the ‘prima facie case’ condition**

[81] I consider that all of the claimed rights and interests have been established on a prima facie basis. Therefore, the claim satisfies the condition of s 190B(6).

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

[82] To meet s 190B(6), the Registrar ‘must consider that, prima facie, at least some of the native title rights and interests claimed can be established.’ I note the following comments by Mansfield J in relation to this condition:

- (a) it requires some measure of the material available in support of the claim;<sup>57</sup>
- (b) although s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed, this does not itself require some weighing of that factual assertion as that is the task required by s 190B(6);<sup>58</sup>
- (c) s 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed.<sup>59</sup>

[83] Mansfield J found that the use of the words ‘prima facie’ in s 190B(6) means that ‘if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis’ – at [135].

[84] Noting the definition of ‘native title rights and interests’ in s 223(1) of the Act, in order for me to consider a right or interest prima facie established, it must be shown to be a right or interest that is:

- (a) possessed under the traditional laws and customs of the native title claim group<sup>60</sup>;
- (b) a right or interest in relation to the land or waters of the application area<sup>61</sup>; and

---

<sup>55</sup> Attachment F, Comparative table at p. 49.

<sup>56</sup> Attachment F at [4] and [6].

<sup>57</sup> *Doepel* at [126].

<sup>58</sup> *Doepel* at [127].

<sup>59</sup> *Doepel* at [132].

<sup>60</sup> Section 223(1)(a).



(c) not extinguished in relation to the entirety of the application area<sup>62</sup>.

[85] Schedule E includes a claim to a right of exclusive possession, and a claim to 16 non-exclusive rights. Having considered the list of non-exclusive rights, it is my view that some of those rights are very similar in substance. That is, they involve the members of the claim group carrying out similar activities in relation to the land and waters of the application area. For that reason, I have grouped those similar rights together in my reasons below and considered the material in support of them collectively.

***Can a right of exclusive possession be established on a prima facie basis?***

[86] I consider the right, prima facie, established. I have before me information that speaks to the way in which the members of the native title claim group, pursuant to a traditional law or custom, are able to exclude people from their country. The information also addresses the right of members of the group to speak for their traditional country, and to be asked permission by others for access to that country. This information is sufficient for me to consider the right established on a prima facie basis.

[87] To allow me to consider a right of exclusive possession established on a prima facie basis, as indicated by the case law, the material may need to address how, pursuant to their traditional laws and customs, the members of the claim group:

- speak for the area subject of the application<sup>63</sup>;
- are entitled to be asked permission when others seek to access the area subject of the application<sup>64</sup>;
- make decisions about the access to and use of the land by others<sup>65</sup>;
- are able to exclude from their country people not of their community<sup>66</sup>;
- act as gatekeepers for the purposes of preventing harm and avoiding injury to country<sup>67</sup>.

[88] The existence of the right depends on what the material reveals about its content under the laws and customs of the group. The material is not required to provide evidence in support of a right equivalent to a proprietary right<sup>68</sup>.

[89] The material contains information that, in my view, addresses a right of exclusive possession. Attachment F states that the members of the claim group are the owners of their country according to their traditional laws and customs. It explains that one feature of the group's laws and customs is a regional requirement that those wishing to enter the claim group's

---

<sup>61</sup> Section 223(1)(b).

<sup>62</sup> Section 223(1)(c).

<sup>63</sup> See *Ward* at [88].

<sup>64</sup> See *Ward* at [88].

<sup>65</sup> See *Sampi* at [1072].

<sup>66</sup> See *Griffiths* at [127].

<sup>67</sup> See *Griffiths* at [127].

<sup>68</sup> See *Griffiths* at [71].

country should ask to do so. Further, it is stated that where a person fails to seek permission, they are a trespasser, and open themselves to danger from spirit-beings<sup>69</sup>.

[90] Elsewhere in Attachment F, information taken from historical sources is provided. In particular, that information provides that there were a number of instances around the time of or prior to settlement in the region where colonisers faced hostility and/or attacks from the local Aboriginal people while camping, or carrying out activities, on parts of the application area. For example, it is explained that Aboriginal men set fire to the grass surrounding a group of explorers camping in the application area in 1829<sup>70</sup>. In my view, it is reasonable to infer that this action was taken against the explorers on the basis of their being trespassers on the area. In this way, I consider it an example of the right being exercised by the predecessors of the native title claim group prior to settlement.

[91] A right in the nature of an exclusive right is also addressed in the affidavit of claim group member [Name removed]. He states:

The traditional laws and customs observed by us include a traditional law that states you can't trespass on other people's country. But that law has another part to it which states you have to ask permission from the people that own that country or give notice that you are coming over. This means we can exclude others from our country who are not part of our mob. It also means that we have the right to camp, hunt, fish and conduct ceremony on our country.

We have the right to invite people to our country, which we did and still do. This also means we have the right to refuse, restrict access to our country and if needed enforce our laws and customs on our traditional lands and waters. This includes exercising these rights on other groups who do wrong by our country, laws and customs.<sup>71</sup>

[92] Elsewhere, [Name removed] explains that he was chosen by his Elders to receive important knowledge about his laws and customs and country and culture, and to be the custodian of this information. Today, [Name removed] has the role of passing on this knowledge to younger generations, and discerning the appropriate time when he should impart that knowledge to such persons<sup>72</sup>. In this way, I accept that the information [Name removed] provides about the right of exclusive possession is part of the knowledge of the claim group's laws and customs passed down to him by his Elders.

***Can non-exclusive rights to access, enter and remain on, use and enjoy, and move about on the area be established on a prima facie basis?***

[93] I consider these rights established on a prima facie basis. Being satisfied that there is sufficient material before me to support a right of exclusive possession, it follows that I also consider these non-exclusive rights prima facie established as they involve claim group members carrying out activities that are incidental to a right of exclusive possession. Notwithstanding this, the material contains sufficient information to allow me to consider the rights, prima facie, established.

---

<sup>69</sup> Attachment F at [61](m).

<sup>70</sup> Attachment F at [30].

<sup>71</sup> Affidavit of Kenneth Markwell at [21]-[22].

<sup>72</sup> Affidavit of Kenneth Markwell at [15].

[94] Attachment F explains the way in which the members of the native title claim group, throughout the period since settlement, were able to maintain a physical presence on the application area, specifically by engaging in various types of employment in the area<sup>73</sup>. It is clear that many claim group members continue to live and spend time in the application area<sup>74</sup>.

[95] A particular example of the type of information before me that speaks to these rights is in Attachment F where one claimant explains that he knows where predecessor [Name removed] old camp used to be, and the route he would take across the application area from Beaudesert to Southport on the coast, now known as Drumley's Walk<sup>75</sup>. From the information of this type before me, I consider the material supports these rights as ones held pursuant to traditional laws and customs, exercised by the claimants' predecessors and passed down through the generations. These rights are established on a prima facie basis.

***Can non-exclusive rights to camp and erect shelters on be established on a prima facie basis?***

[96] I consider these rights established on a prima facie basis. The material before me speaks to these rights being exercised by the claimants' predecessors and by the members of the claim group today, such that I consider the material to support these rights as held pursuant to traditional laws and customs.

[97] An example of the material before me that speaks to these rights is in Attachment F, where one claimant explains that as a child she lived 'out bush' with her parents, and that they used to make their own 'gunyahs' to camp in. She describes how her mother used potato sack bags to put on the roof as part of these structures. According to the material, they camped on river banks at places such as Kerry, Hillview and Tamrookum<sup>76</sup>.

[98] From the information addressing these rights in Attachment F, I understand claimants today continue to camp on the application area in the same way their predecessors did before them, including prior to settlement.

***Can non-exclusive rights to hunt and fish on the area be established on a prima facie basis?***

[99] I consider these rights established on a prima facie basis. The material contains information that speaks to the existence of each of these rights, and indicates that claimants today exercise the rights in the same way their predecessors did before them. The material also speaks of the rules claimants were taught by their Elders about taking animals for food by their Elders. I consider, therefore, the material speaks to the rights as ones held pursuant to the traditional laws and customs of the group.

[100] Attachment F provides excerpts from historical sources which record the claim group's predecessors hunting and fishing in the application area. One excerpt refers to a Reverend

---

<sup>73</sup> Attachment F at [37]-[38].

<sup>74</sup> See for example affidavit of Kenneth Roy Markwell at [15].

<sup>75</sup> Attachment F, Comparative table at p. 39.

<sup>76</sup> Attachment F, Comparative table at p. 40.

who was travelling through the application area in 1853, and presented with a turtle that the local Aboriginal people had speared<sup>77</sup>.

[101] Attachment F also explains the way members of the claim group today exercise this right. In particular, it speaks of a claim group member who shares the rules taught to her about hunting baby porcupine. Another claim group member tells of walking along the riverbank and going to a resource place where he would get fish, crab, and eel. The material explains that his family members also went to this place to fish for these animals<sup>78</sup>.

***Can a non-exclusive right to gather and use natural resources of the application area be established on a prima facie basis?***

[102] I consider this right established on a prima facie basis. The material speaks to the exercise of this right by the claimants' predecessors around the time of settlement, and by members of the claim group today.

[103] Attachment F refers to a historical source which records the observations of an early settler of a corroboree event in the 1860s, where people gathered fire wood during the day for large fires at night time, and used white clay to paint their bodies<sup>79</sup>. It also refers to a claimants' explanation of how, as a child, her mother showed her scarred trees on the application area, and taught her that the old people used to take the bark from the trees to wrap their babies in, and to make shields<sup>80</sup>.

[104] From this information, I consider the material supports the right as one held pursuant to the laws and customs of the claim group, having been passed down to them by their predecessors.

***Can a non-exclusive right to have access to and use the natural water resources of the application area be established on a prima facie basis?***

[105] I consider this right, prima facie, established. The material contains information which explains the exercise of this right by the claim group and its predecessors. From this, I accept that the right is held pursuant to the traditional laws and customs passed down to the claim group by their predecessors.

[106] Many of the observations recorded in the historical sources referred to in Attachment F involve the claimants' predecessors spending time in or on waterways. I consider it reasonable to infer from the excerpts of those historical sources, that the predecessors would have used water taken from those waterways for various uses, including cooking, drinking, bathing.

---

<sup>77</sup> Attachment F, Comparative table at p. 42.

<sup>78</sup> Attachment F, Comparative table at p. 45.

<sup>79</sup> Attachment F, Comparative table at p. 45.

<sup>80</sup> Attachment F, Comparative table at p. 45.

[107] The material also speaks to the use of water from the claim area today. In Attachment F, one claimant explains that she and her family cleanse themselves in a sacred pool at the bottom of Mount Tambourine before they go up the mountain<sup>81</sup>.

***Can a non-exclusive right to share and exchange resources derived from the area be established on a prima facie basis?***

[108] I consider the right established on a prima facie basis. The material speaks to this right being exercised by the predecessors of the claim group pursuant to the laws and customs of the group.

[109] Attachment F contains information from a historical source where an early settler describes a battle site at Maroon which was also a place for the production and trade of stone tools by the local Aboriginal people<sup>82</sup>. It also explains the way in which ‘structured sharing’ of natural resources forms a key aspect of the laws and customs of the claim group today. The material provides that this structured sharing plays out through the bunya nut feast and sea mullet fishing events held pursuant to the group’s laws and customs<sup>83</sup>.

***Can non-exclusive rights to hold meetings, participate in cultural and spiritual activities, and conduct ceremonies and rituals on the area be established on a prima facie basis?***

[110] I consider these rights established on a prima facie basis. The material speaks to each of these rights and the way the claimants and their predecessors have exercised the rights pursuant to the traditional laws and customs of the group.

[111] As above, Attachment F contains excerpts from historical sources which give details of large gatherings of the predecessors of the claim group around the time of settlement, for the purposes of corroborees, battles and trade with neighbouring tribes, bunya nut feasts and sea mullet fishing events<sup>84</sup>. In his affidavit, claim group member [Name removed] describes the way he exercises these rights today, stating that he has ‘participated in ceremony on [his people’s] sacred places’ and ‘participated in the repatriation of [his] peoples’ remains to country’. He explains that he has taken part in these activities as part of his traditional responsibilities according to the group’s laws and customs<sup>85</sup>.

***Can a non-exclusive right to maintain and protect places of importance in the area be established on a prima facie basis?***

[112] I consider the right established on a prima facie basis. The material indicates this right was exercised by the claimants’ predecessors around the time of settlement. The material gives specific examples of how the right is exercised by members of the claim group today and explains that the right has been passed down to members of the claim group by their predecessors in accordance with traditional laws and customs.

---

<sup>81</sup> Attachment F, Comparative table at p. 39.

<sup>82</sup> Attachment F, Comparative table at p. 45.

<sup>83</sup> Attachment F at [61](n).

<sup>84</sup> See for example at [61](n).

<sup>85</sup> Affidavit of Kenneth Roy Markwell at [15].

[113] As above, Attachment F includes excerpts from historical sources, one of which refers to local Indigenous people expressing anger when their campsite was destroyed by an early pastoralist, and another from 1935 which speaks of a sacred site at Burleigh Heads. Access to this site is recorded as being highly restricted<sup>86</sup>.

[114] Regarding the right exercised by the claim group today, in his affidavit, [Name removed] states:

...[I] continue to manage our sacred places to ensure they are maintained and protected from harm in accordance with our lore and custom, including my traditional responsibilities. Some of the Elders have now passed away so I am now responsible for this business, including selecting young people to teach what I was taught.<sup>87</sup>

***Can a non-exclusive right to transmit traditional knowledge to members of the claim group on the application area be established on a prima facie basis?***

[115] I consider the right, prima facie, established. The material speaks to the way claimants and their predecessors have spent time on country, teaching younger generations about places and boundaries of the application area, among other aspects of traditional knowledge.

[116] Attachment F describes how claimant [Name removed] was taken to places within the application area as a child by her father, and taught about her country. [Name removed] father took her to a ‘special place’ which included a lagoon and a ‘burial cave of the little people’<sup>88</sup>. Attachment F also describes [Name removed] recollections of how when they were travelling, her father would point out when they left their traditional country (Mununjali country), namely when they reached a point ‘half way to Boonah’<sup>89</sup>. Elsewhere, Attachment F explains that [Name removed] continues to pass on knowledge about significant places bestowed on her by her father and grandfather to younger generations, according to her laws and customs<sup>90</sup>.

[117] I consider this information sufficient to allow me to consider the right one possessed pursuant to the traditional laws and customs of the group, and therefore, that it is established on a prima facie basis.

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

***Decision***

[118] The condition is met. I am satisfied that at least one member of the native title claim group currently has or previously had, a traditional physical connection with some part of the claim area.

***What is needed to meet this condition?***

---

<sup>86</sup> Attachment F, Comparative table at p. 46.

<sup>87</sup> Affidavit of Kenneth Roy Markwell at [15].

<sup>88</sup> See Attachment F at [52].

<sup>89</sup> See Attachment F at [50].

<sup>90</sup> See Attachment F at [55].

[119] To meet s 190B(7), the Registrar ‘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’<sup>91</sup>.

[120] The following principles have emerged from the case law about what is required at s 190B(7):

- The material must satisfy the delegate of particular facts;
- Evidentiary material is, therefore, required; and
- The focus is confined to the relationship of at least one member of the native title claim group with some part of the claim area<sup>92</sup>;
- The physical connection must be shown to be in accordance with the traditional laws and customs of the claim group<sup>93</sup>;
- The material may need to address an actual presence on the area<sup>94</sup>.

[121] Noting the wording of s 190B(7), I have focused my attention at this condition on the material relating to one particular claim group member. That claim group member is [Name removed].

[122] Attachment F contains the following information about [Name removed]:

- She is a Mununjali woman who was born in Beaudesert;
- She is descended from three of the named apical ancestors for the claim group;
- She has clear memories of living on country with her parents and siblings during which time her parents passed traditional knowledge to her about her country;
- As a child she camped with her family on the river banks at Kerry, Hillview, Tamrookum and Running Creek, on the Lyons Road west of Rathdowney;
- This included knowledge about significant places, the boundaries of her country, the way her predecessors used the land and waters and their resources;
- She remembers her grandfather as a man who ‘had scars and spoke a lot of lingo’ – her father explained to her that the scars were initiation scars , and taught her some of the Mununjali language; and
- Her mother showed her where scarred trees were in the application area and explained that the ‘old people’ used to take the bark from these trees to wrap their babies in and to make shields<sup>95</sup>.

[123] From this information, it is clear that [Name removed] has spent time on the application area, having been born in the area, and having spent her childhood camping with her family at places throughout the application area. Consequently, I am satisfied she has a physical connection with the area.

[124] From the material, I am also satisfied that [Name removed] physical connection with the area can be said to be a traditional one. The material addresses the way in which [Name removed]

---

<sup>91</sup> See s 190B(7)(a).

<sup>92</sup> *Doepel* at [17].

<sup>93</sup> *Gudjala 2007* at [89].

<sup>94</sup> *Yorta Yorta* at [184].

<sup>95</sup> See Attachment F at [42]-[55].

mother and father took her to specific places, and showed and taught her about particular aspects and features of her country. As discussed above in my reasons at s 190B(5)(b), I am satisfied the factual basis supports an assertion of the passing on of knowledge about country being a key aspect of the traditional laws and customs of the group<sup>96</sup>. It follows that I am satisfied [Name removed] physical connection with the area is in accordance with the traditional laws and customs of the group.

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

#### **Decision**

[125] Based on the information referred to in the table below, I have formed the view that the application satisfies the requirement at s 190B(8) as there is nothing before me to indicate that the application should not have been made because of s 61A.

<b>Requirement</b>	<b>Information addressing requirement</b>	<b>Met/ Not met</b>
s 61A(1) no native title determination application if approved determination of native title	Geospatial assessment dated 13 July 2017, GeoTrack: 2017/1029	Met. There is no approved determination of native title for the application area.
s 61A(2) claimant application not to be made covering previous exclusive possession over areas	Schedule B, paragraph 1	Met. Schedule B expressly excludes any such areas.
s 61A(3) claimant applications not to claim certain rights and interest in previous non-exclusive possession act areas	Schedule B, paragraph 3	Met. Schedule B states exclusive possession is not claimed over areas subject to previous non-exclusive possession acts.

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

[126] To meet s 190B(8), 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.’

[127] This section provides that applications must not be made:

- (a) over areas already covered by an approved determination of native title<sup>97</sup>;
- (b) over areas where a previous exclusive possession act attributable to the Commonwealth or a State or Territory was done<sup>98</sup>;

<sup>96</sup> See above at [55]-[57].

<sup>97</sup> See s 61A(1).

<sup>98</sup> See s 61A(2).



- (c) which claim exclusive possession, occupation, use and enjoyment in relation to areas where a previous non-exclusive possession act was done and is attributable to the Commonwealth or a State or Territory<sup>99</sup>.

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

#### **Decision**

[128] Based on the information referred to in the table below, I am satisfied that the application meets the requirement at s 190B(9).

<b>Requirement</b>	<b>Information addressing requirement</b>	<b>Met / Not met</b>
(a) no claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q	Met. Schedule Q states the application does not claim ownership of these things wholly owned by the Crown.
(b) exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P	Met. Schedule P states the application does not include an exclusive claim to an offshore place.
(c) native title rights and/or interests in the application area have otherwise been extinguished	Schedule B, paragraph 6	Met. Schedule B excludes areas in relation to which native title rights and interests have been wholly extinguished.

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

[129] To meet s 190B(9), '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 of or include ownership of minerals, petroleum or gas—the Crown in right of the Commonwealth, a State or Territory wholly owns the minerals, petroleum or gas; or
- (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; or
- (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 ss 47(2), 47A(2) or 47B(2)).'

<sup>99</sup> See s 61A(3).

## Registration conditions about procedural requirements of the claim (s 190C)

### SECTION 190C – CONDITION MET

[130] I am satisfied the application meets the requirements of ss 190C(2)-(4).

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

#### **Decision**

[131] I have examined the application and I am satisfied that it contains the prescribed information and is accompanied by the prescribed documents, as noted in the table below.

<b>Condition</b>	<b>Location of information in application</b>	<b>Met/Not met</b>
s 61(1) Native title claim group	Schedule A	Met
s 61(3) Name and address for service	Part B	Met
s 61(4) Native title claim group named/described	Schedule A	Met
s 62(1)(a) Affidavits in prescribed form	Annexure to the application	Met
s 62(2)(a) Information about the boundaries of the area	Schedule B, Attachment B	Met
s 62(2)(b) Map of external boundaries of the area	Attachment C	Met
s 62(2)(c) Searches	Schedule D	Met
s 62(2)(d) Description of native title rights and interests	Schedule E	Met
s 62(2)(e) Description of factual basis:	Attachment F	Met
s 62(2)(f) Activities	Schedule G	Met
s 62(2)(g) Other applications	Schedule H	Met
s 62(2)(ga) Notices under s 24MD(6B)(c)	Schedule HA	Met
s 62(2)(h) Notices under s 29	Schedule I	Met

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

[132] To meet s 190C(2), the Registrar must be satisfied that the application contains all of the details and other information, and is accompanied by any affidavit or other document, required by ss 61 and 62.

***Does the claim contain the prescribed information and is it accompanied by prescribed documents?***

[133] The claim meets this condition because it contains the prescribed details and other information, as set out in the following reasons.

***Applications that may be made: s 61(1)***

[134] This section provides that a native title determination application may be made by ‘a person or persons authorised by all the persons (the native title claim group) who, according to their traditional laws 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’.

[135] It is only where, on the face of the application, it appears that the group described is a sub-group, or part only, of the actual native title claim group that the application will fail to meet this condition<sup>100</sup>.

[136] A description of the persons comprising the native title claim group appears at Schedule A. Having considered that description, on its face, there is nothing to indicate that it seeks to exclude persons, or that it describes only a sub-group of the actual native title claim group. The requirement is met.

***Applicant’s name and address for service: s 61(3)***

[137] This information is provided at Part B of the Form 1.

***Applications authorised by persons: s 61(4)***

[138] This section provides that a ‘native title determination application that persons in a native title claim group authorise the applicant to make must: (a) name the persons; or (b) otherwise describe the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons’.

[139] The task here is merely to determine that the persons are named or a description provided. The question of whether those details are sufficient is the task of the corresponding merit condition in s 190B(3)<sup>101</sup>. I am not to consider the correctness of the information provided<sup>102</sup>.

[140] As above, Schedule A contains a description of the persons in the native title claim group. The requirement is met.

***Affidavits in prescribed form: s 62(1)(a)***

[141] This section requires the application to be accompanied by an affidavit in the prescribed form sworn by the applicant addressing the five matters in s 62(1)(a)(i)-(v).

---

<sup>100</sup> Doepel at [36].

<sup>101</sup> Gudjala 2007 at [31] – [32].

<sup>102</sup> Wakaman at [34].

[142] The applicant comprises nine persons. The application is accompanied by an affidavit sworn by each of these persons, and all have been competently witnessed. The affidavits contain identical statements addressing the matters prescribed by ss 62(1)(a)(i)-(v). The requirement is met.

***Information about the boundaries of the area covered by the application and any areas within those boundaries not covered and map showing the boundaries: s 62(2)(a) & (b)***

[143] Section 62(2)(a) requires firstly, that there be information to identify the boundary of the application area; and secondly, information to identify any areas within those boundaries that are not covered by the application.

[144] Schedule B refers to a description of the external boundary of the application area in Attachment B. Attachment B contains this written description. Schedule B also sets out general exclusion clauses to describe those areas not covered by the application. A map showing the external boundary is labelled Attachment C. The requirement is met.

***Searches of any non-native title rights and interests carried out: s 62(2)(c)***

[145] This section requires the details of all searches of non-native title rights and interests carried out by or on behalf of the native title claim group.

[146] Schedule D of the application contains this information. The requirement is met.

***Description of native title rights and interests claimed in relation to particular land or waters: s 62(2)(d)***

[147] This section requires a description of the claimed native title rights and interests and it cannot merely be a general statement that the rights and interests are all those that might exist, or those that have not been extinguished at law.

[148] Schedule E contains a list of specific native title rights and interests claimed. The requirement is met.

***Activities: s 62(2)(f)***

[149] Details of any activities the native title claim group currently carry out in the claimed area are to be provided. Schedule G contains details of these activities. The requirement is met.

***General description of factual basis for assertion that native title exists: s 62(2)(e)***

[150] Section 62(2)(e) requires a general description of the factual basis for the three assertions in ss 62(2)(e)(i)-(iii) (which broadly speaking, relate to association, traditional laws and customs and continuing to hold native title).

[151] Attachment F contains material addressing the three assertions in s 62(2)(e). In my view, this material is sufficient in comprising a 'general description' of the factual basis. The requirement is met.

***Other applications: s 62(2)(g)***

[152] This section requires details of any other applications (to the High Court, Federal Court or a recognised State/Territory body) that seek a determination of native title or

compensation in relation to the whole or part of the claim area, of which the Applicant is aware.

[153] Schedule H contains this information. This requirement is met.

***Future act notices: ss 62(2)(ga) and (h)***

[154] Section 62(2)(ga) requires details of any s24MD(6B)(c) notifications relating to the whole or part of the claimed area of which the applicant is aware. Schedule HA contains this information. This requirement is met.

[155] Section 62(2)(h) requires details of any section 29 notifications relating to the whole or part of the claimed area of which the Applicant is aware. Schedule I contains this information. This requirement is met.

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

***Decision***

[156] For the reasons below, my conclusion is that the requirement is met. I am satisfied that no person included in the native title claim group for the current application was a member of the claim group for a previous application.

***What is needed to meet this condition?***

[157] To meet s 190C(3), the Registrar ‘must be satisfied that no person included in the native title claim group for the application (the ***current application***<sup>103</sup>) was a member of a native title claim group for any previous application’. To be a ‘previous application’:

- (a) the application must overlap the current application in whole or part;
- (b) there must be an entry for the claim in the previous application on the Register of Native Title Claims when the current application was made; and
- (c) the entry must have been made or not removed as a result of the previous application being considered for registration under s 190A.

[158] It is only where there is an application meeting all three criteria at s 190C(3), that is, a ‘previous application’, that the requirement for me to consider the possibility of common claimants is triggered<sup>104</sup>.

[159] The geospatial assessment of 13 July 2017 shows that there are no applications overlapping any part of the current application area. As the first criterion is not satisfied, there is no need for me to consider the remaining criteria. The requirement is met.

**Certification or authorisation - s 190C(4): condition met**

***Decision***

[160] The claim satisfies the requirement at s 190C(4)(a), as it has been certified by each representative body that can certify the application.

---

<sup>103</sup> Emphasis in original.

<sup>104</sup> See *Western Australia v Strickland* at [9].

***What is needed to meet this condition?***

[161] To meet s 190C(4), the Registrar must be satisfied that either of the following is the case:

- (a) the application has been certified by all representative Aboriginal/Torres Strait Islander bodies that could certify the application in performing its functions<sup>105</sup>; 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<sup>106</sup>.

[162] Schedule R provides that the application is certified. Therefore, it is the requirement at s 190C(4)(a) of which I must be satisfied.

[163] The requirement is that I am satisfied of the fact of certification by an appropriate representative body<sup>107</sup>. This is a two-pronged test. Firstly, does the representative body who certified the application have the appropriate powers to certify? And secondly, does the certification comply with s 203BE(4)?

[164] The geospatial assessment confirms that there is only one representative body in relation to the application area, namely, Queensland South Native Title Services (QSNTS). A copy of a certificate titled 'Certification of Danggan Balun (Five Rivers) People Native Title Determination Application', signed by the Chief Executive Officer of QSNTS and dated 20 June 2017 accompanies the application at Attachment R.

[165] The certificate states that QSNTS is a body funded under s 203FE(1) for the purpose of performing the functions of a representative body. The certificate also provides that the CEO is a duly appointed executive officer of QSNTS who has been delegated the function to certify the application. From this information, I understand the certificate to assert QSNTS to be a body funded to perform the functions of a representative body, including the function to certify native title determination applications.

[166] The Tribunal's national 'Representative Aboriginal and Torres Strait Islander Body Areas' map, on the Tribunal's website, confirms the status of QSNTS as a body funded pursuant to s 203FE(1) to perform the functions of a representative body. From this information, and that contained in the certificate, I am satisfied that QSNTS is an appropriate body who can certify the application.

***Does the certificate comply with s 203BE(4)?***

[167] The certificate complies with s 203BE(4).

[168] The second element of the requirement at s 190C(4)(a) is that the certificate must comply with s 203BE(4). That provision requires that the certificate:

---

<sup>105</sup> See s 190C(4)(a).

<sup>106</sup> See s 190C(4)(b).

<sup>107</sup> *Doepel* at [78].

- (a) include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs (2)(a) and (b) have been met<sup>108</sup>; and
- (b) briefly set out the body's reasons for being of that opinion<sup>109</sup>; and
- (c) where applicable, briefly set out what the representative body has done to meet the requirements of subsection (3)<sup>110</sup>.

[169] The certificate contains the statement required by s 203BE(4)(a). It appears on page one of the certificate following the information setting out the basis on which QSNTS can certify the application.

[170] Following the required statement, the certificate sets out five paragraphs labelled as the 'reasons' for which QSNTS is of the opinion stated. In my view, this information is sufficient in 'briefly setting out' those reasons.

[171] The certificate does not speak to the matter dealt with in s 203BE(4)(c). I note, however, as per the wording of that subsection, the certificate is only required to address the requirements of subsection (3) of s 203BE 'where applicable'. Section 203BE(3) relates to overlapping applications. Where there is an overlapping application or proposed application of which the representative body is aware, the body must make all reasonable efforts to achieve agreement between overlapping claimants and minimise the number of overlapping applications.

[172] The geospatial assessment provides that there are no applications overlapping any part of the current application area. Noting this, and the fact the certificate does not speak to the efforts made by QSNTS to address overlapping applications, it is my understanding there are no overlapping applications or proposed applications of which QSNTS is aware. On that basis, I do not consider the failure of the certificate to address the requirement at s 203BE(4)(c) fatal to the validity of the certificate. Consequently, my view is that the certificate complies with s 203BE(4).

*End of reasons*

---

<sup>108</sup> See s 203BE(4)(a).

<sup>109</sup> See s 203BE(4)(b).

<sup>110</sup> See s 203BE(4)(c).

## Attachment A

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

Application name	Danggan Balun (Five Rivers) People
NNTT No.	QC2017/007
Federal Court of Australia No.	QUD331/2017

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

In accordance with ss 190(1) and 186 of the *Native Title Act 1993* (Cth), the following is to be entered on the Register of Native Title Claims for the above application.

#### Application filed/lodged with:

Federal Court of Australia

#### Date application filed/lodged:

27 June 2017

#### Date application entered on Register:

14 September 2017

#### Applicant:

[as per the Schedule]

#### Applicant's address for service:

[as per the Schedule]

#### Area covered by application:

[as per the Schedule]

#### Persons claiming to hold native title:

[as per the Schedule]

#### Registered native title rights and interests:

[as per the Schedule – all native title rights and interests claimed to be registered]

---

Heidi Evans

14 September 2017

*Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the Native Title Act 1993 (Cth) under an instrument of delegation dated 23 August 2017 and made pursuant to s 99 of the Act.*