National Native Title Tribunal

Registration test decision

Application name	Edarrbur (Rubibi # 18)
Name of applicant	Mark Manolis, Gordon Dixon, Kevin Puertollano, Caroline Everett, Stephen Pigram, Michael Corpus, Gavin Pigram and Dean Mathews
NNTT file no.	WC2015/005
Federal Court of Australia file no.	WAD655/2015

I have considered this claim for registration against each of the conditions contained in ss 190B and 190C of the *Native Title Act 1993* (Cth) (the Act).

For the reasons attached, I am satisfied that each of the conditions contained in ss 190B and 190C are met. I accept this claim for registration pursuant to s 190A of the Act.

Date of decision: 3 December 2015

_____

Nadja Mack

Delegate of the Native Title Registrar [1]

[1] Pursuant to sections 190, 190A, 190B, 190C, 190D of the Act under an instrument of delegation dated 17 August 2015 and made pursuant to s 99 of the Act.

Reasons for decision

Introduction

[1] This document sets out my reasons, as the delegate of the Native Title Registrar (the Registrar), for the decision to **accept** the claim for registration pursuant to s 190A of the Act.

Application overview and background

[2] The application was filed in the Federal Court of Australia (Federal Court) on 11 November 2015. The Registrar of the Federal Court gave a copy of the application to the Registrar on 12 November 2015 pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

[3] I have reached the view that the claim satisfies all of the conditions in ss 190B and 190C. This document sets out my reasons, as the delegate of the Registrar, for my decision to accept the claim for registration pursuant to s 190A of the Act.

Information considered when making the decision

[4] As required by s 190A(3) I have had regard to the following information when considering the claim: the application, including its attachments, additional material provided by the applicant directly to the Registrar and the geospatial assessment and overlap analysis (geospatial report) prepared by the Tribunal's Geospatial Services on 17 November 2015.

[5] I have not considered any information that may have been provided to the National Native Title Tribunal (Tribunal) in the course of the Tribunal providing assistance under ss 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK of the Act. Neither have I considered any information that may have been provided to the Tribunal in the course of mediation in relation to this or any other claimant application.

Procedural fairness steps

[6] As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are made in a fair, just and unbiased way. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication—*Hazelbane v Doepel* [2008] FCA 290 at [23]–[31]. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

- On 11 November 2015, the Registrar received further information in support of the application for consideration in the registration test process from the applicant's legal representative.

- On 17 November 2015, the Tribunal wrote to the State of Western Australia (State), seeking the State to enter into a confidentially agreement in relation to some of the further information. The State advised on 24 November 2015 that it did not wish to make any submissions in relation to the information. On that basis, the further information was not provided to the State.

Procedural and other conditions: s 190C

Subsection 190C(2)
Information etc. required by ss 61 and 62

> The Registrar/delegate 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.

[7] The application satisfies the condition of s 190C(2), because it does contain all of the details and other information and documents required by ss 61 and 62, as set out in the reasons below.

[8] This condition is procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss 61 and 62. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s 190C(2)[2].

[9] It is also my view that I need only consider those parts of ss 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s 190C(2)). I therefore do not consider the requirements of s 61(2), as it imposes no obligations of this nature in relation to the application. I am also of the view that I do not need to consider the requirements of s 61(5). The matters in ss 61(5)(a), (b) and (d) relating to the Court's prescribed form, filing in the Court and payment of fees, in my view, are matters for the Court. They do not, in my view, require any separate consideration by the Registrar. Paragraph 61(5)(c), which requires that the application contain such information as is prescribed, does not need to be considered by me under s 190C(2). I already test these matters under s 190C(2) where required by those parts of ss 61 and 62 which actually identify the details/other information that must be in the application and the accompanying prescribed affidavit/documents.

[10] Below I consider each of the particular parts of ss 61 and 62, which require the application to contain details/other information or to be accompanied by an affidavit or other documents.

Native title claim group: s 61(1)

[11] The native title claim group is described in Attachment A to Schedule A of the application.

[12] I note that, if the description of the native title claim group was to indicate that not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group, then the requirement of s 61(1) would not be met and the claim could not be registered—*Doepel* at [36].

---

[2] *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (Doepel) at [16] and also at [35] to [39]

[13] On the face of the application, there is nothing to indicate that not all the persons in the native title claim group are included, or that it is in fact a sub-group of the native title claim group that brought this claim.

[14] The application **contains** all details and other information required by s 61(1).

Name and address for service: s 61(3)

[15] The name and address for service of the persons who are the applicant are provided in Part B.

[16] The application **contains** all details and other information required by s 61(3).

Native title claim group named/described: s 61(4)

[17] This section requires the applicant either to name all persons in the claim group or to describe them in a way so that it can be ascertained whether a person belongs to the group or not. This application contains a description of the persons in the claim group in Attachment A.

[18] The application **contains** all details and other information required by s 61(4).

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

[19] The application is accompanied by the affidavits required by s 62(1)(a) from each person jointly comprising the applicant, namely Mark Manolis, Gordon Dixon, Kevin Puertollano, Caroline Everett, Stephen Pigram, Michael Corpus, Gavin Pigram and Dean Mathews. Each of these affidavits is signed by the deponent and competently witnessed. I am satisfied that each of the affidavits sufficiently addresses the matters required by s 62(1)(a)(i)-(v).

[20] The application **is** accompanied by the affidavit required by s 62(1)(a).

Details required by s 62(1)(b)

[21] Subsection 62(1)(b) requires that the application contain the details specified in ss 62(2)(a) to (h), as identified in the reasons below.

Information about the boundaries of the area: s *62(2)(a)*

[22] Schedule B refers to Attachment B which sets out a description of the external boundary of the application area. Schedule B also describes the areas within the external boundaries that are excluded from the application.

Map of external boundaries of the area: s *62(2)(b)*

[23] Schedule C refers to Attachment C which contains a map showing the external boundary of the area covered by the application.

Searches: s *62(2)(c)*

[24] Schedule D, which appears to be incomplete, notes that an overlap analysis was conducted by the Tribunal's Geospatial Service which is attached as Attachment D. Schedule D also lists additional land tenure 'known to be present'.

Description of native title rights and interests: s *62(2)(d)*

[25] Schedule E provides a description of the native title rights and interests claimed in relation to the particular land and waters covered by the application. The description does not consist only of a statement to the effect that the native title rights and interests are all the rights and interests that may exist, or that have not been extinguished, at law.

[26] I assess the adequacy of the description in the corresponding merit condition at s 190B(4) below.

Description of factual basis: s *62(2)(e)*

[27] Kiefel J in *Queensland v Hutchinson* (2001) 108 FCR 575; [2001] FCA 416 notes that it is not enough to merely recite the general or the three particular assertions in s 62(2)(e); what is required to meet the requirement of s 62(2)(e) is a 'general description' of the factual basis for the three particular assertions —at [25].

[28] The Full Federal Court (French, Moore, Lindgren JJ) commented in obiter on the requirements of s 62(2)(e) in *Gudjala People # 2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*). Their Honours said:

> The fact that the detail specified by s 62(2)(e) is described as a 'general description of the factual basis' is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description to be true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality.

[29] Schedule F contains a description of the rights and interests claimed and the factual basis for the assertions set out in s 62(2)(e). Schedule F also refers to Attachments F to F4 for more information. The description does more than recite the particular assertions and in my view, meets the requirements of a general description of the factual basis for the assertions identified in this section.

[30] I assess the adequacy of the description in the corresponding merit condition at s 190B(5) below.

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

[31] Schedule G sets out details of activities currently carried out by the native title claim group in relation to the area claimed.

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

[32] Schedule H notes that no other relevant applications have been made.

Section 24MD(6B)(c) notices: s *62(2)(ga)*

[33] Schedule HA states that the Tribunal's Geospatial Services conducted an overlap analysis on 5 November 2015 and lists four notifications under s 24MD(6B)(c) which have been recorded.

Section 29 notices: s *62(2)(h)*

[34] Schedule I states that the Tribunal's Geospatial Services conducted an overlap analysis on 5 November 2015 and lists the notifications under s 29 notifications that have been recorded in that analysis. I note that Attachment D sets out, amongst other things, a list of s 29 notices as notified to the Tribunal as at 5 November 2015. From the list I can see that the application is future act affected – see WS2015/1820 with a notification date of 12 August 2015.

Conclusion

[35] The application **contains** the details specified in ss 62(2)(a) to (h), and therefore **contains** all details and other information required by s 62(1)(b).

Subsection 190C(3)
No common claimants in previous overlapping applications

> The Registrar/delegate 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) 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 the previous application being considered for registration under s 190A.

[36] The requirement that the Registrar be satisfied in the terms set out in s 190C(3) is only triggered if all three of the conditions found in s 190C(3)(a), (b) and (c) are satisfied—see *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*)—at [9].

[37] The geospatial report shows that there is no other application on the Register of Native Title Claims that covers all or part of the area covered by this amended application. The requirement to consider common members therefore does not arise.

[38] The application **satisfies** the condition of s 190C(3).

Subsection 190C(4)
Authorisation/certification

> Under s 190C(4) the Registrar/delegate must be satisfied that either:
> (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application; 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: The word ***authorise*** is defined in section 251B.
>
> Under s 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

[39] I must be satisfied that the requirements set out in either ss 190C(4)(a) or (b) are met, in order for the condition of s 190C(4) to be satisfied.

[40] My consideration is governed by s 190C(4)(a) as the one representative body for the application area, the Kimberley Land Council Aboriginal Corporation (KLC), has certified the application. The signed certification dated 10 November 2015 is attached to the application as Attachment R.

[41] For the certification to satisfy the requirements of s 190C(4)(a), it must comply with the provisions of s 203BE(4)(a)–(c). I note that it is not the task of the Registrar under s 190C(4)(a) to look behind a certification, nor is he required to be satisfied that the applicant is authorised—see *Doepel* at [79]–[82].

[42] In my view, the certification complies with s 203BE(4)(a) as it contains the required statement of the representative body's opinion that all persons in the native title claim group have authorised the applicant to make the application and deal with all matters in relation to it; and all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

[43] Further, the certification complies with s 203BE(4)(b) as it briefly sets out the reasons for being of the above opinion. In summary, the certificate states that:

Authorisation

- KLC attended the authorisation meeting on 9 November 2015 in Broome. The meeting was organised and facilitated by Nyamba Buru Yawuru Ltd.
- Members of the Yawuru Community present at the meeting confirmed that there is no decision-making process under the traditional laws and customs of the Yawuru Community that must be complied with and a decision-making process was agreed to and adopted by the

meeting. The process is described in the affidavits of the eight persons who comprise the applicant.
- KLC staff at the meeting observed that the resolution that authorised the applicant was in accordance with that decision-making process. KLC is aware that the same process was followed by the Yawuru Community over a number of years at previous meetings dealing with native title matters.

Identification of all persons within the native title claim group
- KLC through its staff and consultants has previously over a number of years undertaken extensive anthropological and genealogical research and community consultations with the Yawuru Community for the purpose of identifying all persons who hold native title rights and interests in an area which includes the claim area.
- The evidence was accepted by the Federal Court when it found that the Yawuru Community held native title rights and interests in the land and waters which surround the claim area.
- KLC is aware that Nyamba Buru Yawuru Ltd undertook a number of steps to notify persons who hold or may hold native title in the area of the claim. [These steps are set out in a table in the certificate].
- Prior to making the authorisation decision, meeting attendees confirmed that the meeting was sufficiently representative.

[44] The certificate is silent on the requirements of section 203BE(4)(c) which requires the representative body to, 'where applicable, briefly set out what it has done to meet the requirements of s 203BE(3)'. I understand that this section is not applicable to the matter before me.

[45] For the above reason I am of the view that the requirements set out in s 190C(4)(a) are **met.**

Merit conditions: s 190B

Subsection 190B(2)
Identification of area subject to native title

> The Registrar must be satisfied that the information and map contained in the application as required by ss 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 or waters.

[46] Schedule B and Attachment B provide a description of the external boundary of the claim area and Attachment C a map depicting its boundaries. The geospatial report which provides an analysis of the description and map, and advises whether the application area has been described with reasonable certainty, notes the following:

> **Description**
> Schedule B states:
> 'The area covered by the application is all of the land and waters described in Attachment B.'

Attachment B contains a written description prepared by National Native Title Tribunal (22 September 2015). It contains a list of reserves and UCL portions described as either "portion of" or the "whole of" the listed parcel.

Schedule B lists general exclusions.

Map
Schedule C refers to Attachment C and states the external boundary is labelled "Yawuru Community".

Attachment C contains a map prepared by the National Native Title Tribunal (2/10/2015) titled "Native Title Determination Application – Yawuru Community" that includes:
"Yawuru Community" shown as a dark blue outline;
Land Tenure coloured and labelled with Lot on Plan identifiers;
Scalebar, northpoint, coordinate grid; and
Notes relating to the source, currency and datum of data used to prepare the map.

Assessment
The description and map are consistent and identify the application area with reasonable certainty.

[47] Having regard to the identification of the claim area at Schedule B's Part a), Attachment B and the map at Schedule C, I am satisfied that the application area has been described such that the location of it on the earth's surface can be identified with reasonable certainty.

[48] The specific exclusions to the area of the application are clearly identified at Schedule B's Part (C). Nicholson J in *Daniel for the Ngaluma People & Monadee for the Injibandi People v Western Australia* [1999] FCA 686 (*Daniel*) was satisfied that a generic description of internal excluded areas such as that contained in this application met s 62(2)(a)(ii), if the applicant is not in possession of the facts relating to extinguishment to more particularly delineate the internal excluded areas. In *Strickland v Native Title Registrar* (1999) 168 ALR 242; [1999] FCA 1530 at [51][52] (*Strickland*), Justice French agreed with the decision in *Daniel* in the context of the Registrar's assessment of a generic description of internal excluded areas against the requirements of s 190B(2). I am of the view that the generic description of the internal excluded areas is sufficient for the purposes of s 190B(2).

[49] I therefore agree with the geospatial report and am satisfied that the information and the map required by s 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 areas of the land or waters.

[50] The application **satisfies** the condition of s 190B(2).

Subsection 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.

[51] Schedule A sets out a description of the persons in the native title claim group which is said to be '[i]n accordance with the description of the Yawuru Community in WCD 2006/001 (the Rubibi Determination)'.

[52] The description has four 'pathways' and includes what appear to be certain rules or principles which operate under Yawuru traditional laws and customs to regulate self-identification and acceptance of members of the native title claim group.

[53] Pursuant to subsection 190B(3)(b) I must be satisfied that the description is sufficiently clear so that it can be ascertained whether any particular person is in the native title claim group.

[54] In considering the operation of s 190B(3)(b) in *Doepel*, Mansfield J stated that the section's focus is not upon the correctness of the description, but upon its adequacy so that the members of any particular person in the identified native title claim group can be ascertained—at [37].

[55] Further, Carr J in State of *Western Australia v Native Title Registrar* (1999) 95 FCR 93 found, in the way native title claim groups were described, that 'it may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently'—at [67].

[56] I am of the view that the native title claim group is described sufficiently clearly to enable identification of any particular person in that group, in some instances with some factual inquiry, and am therefore satisfied that the native title claim group has been sufficiently described.

[57] The application **satisfies** the condition of s 190B(3).

Subsection 190B(4)
Native title rights and interests identifiable

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

[58] Section 62(2)(d) provides that the application must contain:

a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

[59] The description of the claimed rights is found in Schedule E.

[60] In *Doepel*, Mansfield J agreed with the Registrar that s 190B(4) requires a finding as to 'whether the claimed native title rights and interests are understandable and have meaning'—at [99]. I am of the view that the description in Schedule E is sufficient to allow the native title rights and interests claimed to be readily identified. The claimed rights have been clearly and comprehensively described in a way that does not infringe s 62(2)(d). Further, the description is meaningful and understandable, having regard to the definition of the expression 'native title rights and interests' in s 223.

[61] Whether I consider that the claimed rights can be established prima facie is the task at s 190B(6), discussed below.

[62] The application **satisfies** the condition of s 190B(4).

Subsection 190B(5)
Factual basis for claimed native title

> 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; and
> (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 interest;, and
> (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[63] Following Mansfield J at [17] of *Doepel*, I understand that my assessment is to 'address the quality of the asserted factual basis for [the] claimed rights and interests … but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests' and that it 'is not for the Registrar to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts'. This was endorsed by the Full Federal Court in *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317; [2008] FCAFC 157 (*Gudjala 2008*) at [83].

[64] The application sets out the factual basis in Schedule F which also refers to the following attachments:

- Attachment F: General description of native title rights and interests claimed;
- Attachment F1: History of Rubibi litigation;
- Attachment F2: List of Rubibi judgments;
- Attachment F3: Rubibi determination map; and
- Attachment F4: Yawuru cultural management plan (extracts).

[65] In addition, the applicant provided the following factual basis material directly to the Registrar:

- Affidavit of Deponent 1, affirmed 4 November 2015;
- Affidavit of Deponent 2, affirmed 9 November 2015;
- Affidavit of Deponent 3, affirmed 9 November 2015;
- Affidavit of Deponent 4, affirmed 9 November 2015 and
- Affidavit of Deponent 5, affirmed 11 November 2015.

[66] I consider each of the three assertions set out in the three paragraphs of s 190B(5) in turn in my reasons below.

Reasons for s 190B(5)(a)

[67] The assertion in s 190B(5)(a) relates to the association of the native title claim group and that of their predecessors with the area covered by the application.

General principles

[68] I understand from comments by Dowsett J in *Gudjala 2007* that a sufficient factual basis for the assertion in s 190B(5)(a) needs to address that:

- the claim group as a whole presently has an association with the area, although it is not a requirement that all members must have such an association at all times; and
- there has been an association between the predecessors of the whole group over the period since sovereignty—at [52].

Applicant's material

[69] Attachments F, Deponent 5's affidavit and KLC's certification (Attachment R) give the following background information in relation to the claim area:

- The claim is over part of the Kimberley De-Grey Stock Route (Reserve 9697) and a number of government water reserves.
- The stock route is a strip of land approximately 1.6 m wide. Each of the water reserves is a 1.6 x 1.6 square.
- The claim area is wholly located within the boundaries of the Roebuck Plains pastoral lease but does not form part of the pastoral lease.
- The Roebuck Plains pastoral lease was the subject of *the Rubibi # 16* native title claim, WC97/102. Following the hearing of lay and expert evidence, the Federal Court determined in *Sebastian v State of Western Australia (No 7)* [2006] FCA 459, WCD 2006/001 ('Rubibi Determination') that the claimants, the Yawuru Community, hold exclusive native title rights and interests over the pastoral lease area. This application is brought on behalf of the same claimants.
- At the time of the determination, the Roebuck Plains pastoral lease was held by the Indigenous Land Corporation. A deed of grant to Nyamba Buru Yawuru Ltd was signed in

September 2014 and the transfer of the pastoral lease to Nyamba Buru Yawuru Ltd was settled in March 2015.

[70] I note that some of the deponents of the above affidavits note that it is not clear to them why the application area was not part of the *Rubibi # 16* claim over Roebuck Plains. Attachment F explains that the exclusion of the claim area from the Rubibi Determination appears to be the result of the way a number of Rubibi claims were combined[3] into the determined claim rather than result of a deliberate decision.

[71] I note that the applicant, referring me to paragraph [9] in *Ward v Western Australia* [2006] FCA 1848, submits that it is appropriate that the delegate take into account evidence given and findings made in other proceedings where such evidence and findings are relevant to the current application, particularly where the application is made by the same community of native title holders and the application area is wholly surrounded by the earlier determination. I agree with this submission, noting that the way in which an administrative decision maker can have regard to the findings of a Court was addressed in the decision of *Cadbury Uk Ltd v Registrar of Trade Marks (Cadbury)* [2008] FCA 1126. In that instance, Finklestein J indicated that a Tribunal was entitled to have regard to the findings of a judge, but that it would fall into error if it took the approach that it could not disagree with such findings (at [18] and [19]).

[72] Given this relationship between the claim area and the Rubibi Determination area, the applicant submits in Attachment F that the factual basis for the claim for native title and interests over the claim area is the same factual basis underpinning the Rubibi Determination. The applicant further states that this application, in addition to the Rubibi Determination, relies on the Yawuru Cultural Management Plan (YCMP) as well as the findings of fact made in the following determination and judgments:

- *Rubibi Community v State of Western Australia* [2001] FCA 607 (Kunin Determination)
- *Rubibi Community v State of Western Australia (No 5)* [2005] FCA 1025 (*Rubibi No 5*)
- *Rubibi Community v State of Western Australia (No 6)* [2006] FCA 82, FCA 2007 (*Rubibi No 6*)
- *The State of Western Australia v Sebastian* [2008] FCAFC 65 (Rubibi Appeal Decision)

[73] Attachments F, extensively referring to the Rubibi Determination, states the following about the association of the claimants with the claim area:

- Merkel J, in the Rubibi Determination, found that the Yawuru Community has maintained its association with the determined area in accordance with the group's traditional laws and customs since the time of sovereignty. During the course of the Rubibi litigation (the history

[3] The Rubibi Determination determined the combination application WAD6006/1998 which was a combination of WAD6001/98 (Yawuru), WAD6006/98 (Rubibi # 1), WAD6010/98 (Rubibi # 2), WAD6011/98 (Rubibi # 3), WAD6012/98 (Rubibi # 4), WAD 6013/98 (Rubibi # 5), WAD 6042/98 (Rubibi # 8), WAD 6218/98 (Rubibi # 16) and WAD223/2004 (Rubibi # 17).

of which is set out in Attachment F1) there was uncontested evidence given by Yawuru witnesses that certain areas within this claim area are part of Yawuru country. Only a small number of particular locations are mentioned in the judgments. Two of these that are cited in *Rubibi No 5* are located within this application area: Lake Eda (which is located within Reserve 1505) and Cockle Well (which is in Reserve 723).

- The YCMP goes into some detail about the relationship between the Yawuru Community and its country, including the application area, with respect to its use both historically and contemporarily. In particular part 4 of the plan sets out the proposed management strategy for wetlands which include the water reserves subject to this application.

[74] Further, each of the deponent's affidavits provided to the Registrar directly contains information that supports the assertion that members of the claim group have and their ancestors had an association with the claim area and areas in its vicinity. Each deponent provides evidence in relation to the individual reserves included in the claim area, including their, their family and the wider Yawuru Community's use of the area, its significance to the Yawuru people or their family and their knowledge of the historical use of the area by their predecessors. There is also information on flora and fauna found in the claim area.

[75] In my view, the material before me supports an association of the apical ancestors of the claimants with the claim area at the time of sovereignty. Further, the factual basis material contains information about the association of current members of the claim group with the claim area. The material also supports the assertion of a continuity or history of association.

[76] On the basis of the above, I am **satisfied** that the requirements of s 190B(5)(a) are met.

Reasons for s 190B(5)(b)

[77] For this requirement, the factual basis must identify the relevant pre-sovereignty society and the persons who acknowledged the laws and customs of that society. Where a native title claim group is defined in reference to an apical ancestor model, the factual basis must also explain the link between those persons (the ancestors) and the relevant society. The factual basis must contain a sufficient explanation of how laws and customs can be said to be traditional as well as details sufficient to support the assertion that there has been continuous acknowledgement and observance— see, for instance, *Gudjala [2007]* at [63], [65], [66]; *Gudjala [2009]* at [36], [37], [40].

[78] Attachment F and the additional factual basis material state that the pre-sovereignty society is that of the Yawuru Community and note that Merkel J's finding in *Rubibi No 5* in relation to the existence of traditional laws and customs in areas surrounding the claim area is also relevant to this application. Attachment F includes the following extract from the judgment:

> '[t]he source of the Yawuru community's traditional laws and customs, is the southern tradition, as laid down in the Bugarrigarra. The holding, passing on and receiving of the Yawuru community's traditional knowledge and 'law' has been as laid down in the southern

> tradition. The southern tradition formed part of the traditional laws and customs of the Yawuru community at sovereignty and is still acknowledged and accepted by the Yawuru community as governing all aspects of the traditional life of the community. My findings concerning the role in the Yawuru community of the traditional laws and customs relating to rai, the Yawuru language, 'skin', kinship and malinyanu laws and customs, traditional stories, name traditions, hunting and bush foods, 'looking after country' and 'speaking for country', 'increase sites' and permission requirements, when considered cumulatively, demonstrate that the present Yawuru community still acknowledges and observes the traditional laws and customs which, since sovereignty, have constituted the normative system under which the native title rights and interests in issue are being claimed.'

[79] Attachment F and Attachment F4 elaborate on the above. In summary, they state that:

- In Yawuru country, the Bugarrigarra, the world creating epoch and time when creative beings traversed the country, laid down three traditions of law which guide the Yawuru Community's customary practice: the northern tradition (associated with the northern parts of Yawuru country), the southern (associated with the southern parts) and the third tradition which arises in Broome and travels east toward the desert and Uluru in Central Australia.
- The southern tradition is the relevant tradition for the claim area. It has formed part of the traditional laws and customs of the Yawuru Community at sovereignty and is still acknowledged and accepted by the Yawuru Community as governing all aspects of the traditional life of the community. The Yawuru Community still acknowledges and observes the traditional laws and customs, which, since sovereignty, have constituted the normative system under which the native title rights and interests are being claimed.
- Although the present practice of the traditional laws and customs has changed in significant respects from the practice of those laws and customs at sovereignty, the changes are of a kind contemplated by those laws and customs and the changes have not resulted in the laws and customs no longer being properly characterised as 'traditional'. The laws and customs have been transmitted from generation to generation and as such have a continuous existence and vitality since sovereignty.

[80] Some of the deponents in their affidavit speak about their connection to the claim area and trace back their descent line to one of the apical ancestors listed in Schedule A. For example Deponent 4's great grandmother is Person 1. He speaks about Person 1's daughter being taken from the beach at Placename (which I note is located in Yawuru country) and taken to Placename mission when she was small. The deponents also speak about their activities in the claim area and wider Yawuru country and explain how they have been taught by their predecessors about the traditional laws and customs of the group and give examples of their contemporary observance and acknowledgement of these laws and customs.

[81] In my view, the factual basis material does sufficiently address the requirements of s 190B(5)(b). It identifies the pre-sovereignty society and provides some facts in support of the existence of this society in Yawuru country which includes the claim area. It also links an identified ancestor with Yawuru country, thus allowing the favourable inference that the person formed part of the relevant society. The material also outlines facts that provide some explanation

of how laws and customs of the current claim group are said to be traditional. Of significant weight, in my consideration, is the fact that the claim area is located within the Rubibi Determination area and that, following a contested hearing of a large amount of evidence, the court found native title to exist in the areas surrounding the application area.

[82] On the basis of the above, I am satisfied that the requirements of s 190B(5)(b) are met.

Reasons for s 190B(5)(c)

[83] Section 190B(5)(c) requires me to be satisfied that the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the claimed native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way. This is the second element to the meaning of 'traditional' when it is used to describe the traditional laws and customs acknowledged and observed by Indigenous peoples as giving rise to claimed native title rights and interests: see *Yorta Yorta*—at [47] and [87].

[84] Dowsett J at [82] *in Gudjala 2007* indicates that this particular assertion may require the following kinds of information:

- that there was a society that existed at sovereignty that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed on to the current claim group;
- that there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least to European settlement.

[85] The Full Court in *Gudjala FC* at [96] agreed that the factual basis must identify the existence of an Indigenous society observing identifiable laws and customs at the time of European settlement in the application area.

[86] The factual basis in support of this assertion is provided in Attachment F which refers to Merkel J's findings in *Rubibi No 5* which are said to also be applicable to the claim area, being that that 'the present Yawuru community […] is a recognisable body of persons who are likely to be descendants […] of members of the Yawuru community at the time of colonial contact, and therefore at the time of sovereignty' - at [366]; and that 'allowing for the evolution of traditional laws and customs, the Yawuru community at the time of sovereignty acknowledged and observed a body of traditional laws and customs which have normative content and which have continued in existence to the present time. Those laws and customs have plainly been transmitted from generation to generation, find their origins in the pre-sovereignty norms and, notwithstanding their evolution over time, have had a continuous existence and vitality since sovereignty'- at [369].

[87] In addition, the affidavits in support of the application provide examples of the continued observance in relation, for example, to hunting and protocols on visiting country and avoiding of places.

[88] Having considered the material I am satisfied that the factual basis provided is sufficient to support an assertion that the members of the claim group and their predecessors have continued to hold native title in accordance with the traditional laws and customs.

[89] On the basis of the above, I am satisfied that the requirements of s 190B(5)(c) are met.

Conclusion

[90] The application **satisfies** the condition of s 190B(5) because the factual basis provided is sufficient to support each of the particularised assertions in s 190B(5).

Subsection 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.

[91] To meet the requirements of s 190B(6) only one of the native title rights and interests claimed needs to be established prima facie. Only established rights will be entered on the Register—see s 186(1)(g) and the note to s 190B(6).

[92] In relation to the consideration of an application under s 190B(6), I note Mansfield J's comment in *Doepel*:

> Section 190B(6) requires some measure of the material available in support of the claim—at [126].
>
> On the other hand, s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed. It does not itself require some weighing of that factual assertion. That is the task required by s 190B(6)—at [127].
> Section 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed—at [132].

[93] The definition of 'native title rights and interests' in s 223(1) guides my consideration of whether, prima facie, an individual right and interest can be established. In particular I take account of the interpretation of this section in:

- *Yorta Yorta* (see s 190B(5) above) in relation to what it means for rights and interests to be possessed under the traditional laws acknowledged and the traditional customs observed by the native title claim group; and
- The High Court's decision in *Western Australia v Ward* (2002) 213 CLR 1 [2002] HCA 28 (*Ward HC*) that a 'native title right and interest' must be 'in relation to land or waters'.

[94] I also need to consider the case law relating to extinguishment when examining the rights and interests claimed. Rights that clearly fall prima facie outside the scope of the definition of 'native title rights and interests' in s 223(1) cannot be established.

[95] In my consideration of the individual rights and interests claimed:

- I take into account information contained in the application on activities conducted by the members of the claim group. While current activities by claimants in the claim area which are said to be in exercise of the claimed native title rights and interests are not determinative of the existence of a right and interest, they can be supportive of it; and
- I have grouped together rights which appear to be of a similar character and therefore rely on the same evidentiary material or rights which require consideration of the same law as to whether they can be established.

Consideration

Exclusive rights and interests

[96] Schedule E states the following under the heading 'Native title where traditional rights are wholly recognisable':

> In every part of the claim area (if any) where there has been no extinguishment to any extent of native title or where any extinguishment is required to be disregarded, and which is not subject to the public right to navigate or the public right to fish: The native title rights and interests claimed are the rights and interests possessed under traditional law and customs. Those native title rights and interests are properly interpreted as, and the native title right recognised by the common law of Australia is, the right of possession, occupation, use and enjoyment of land and waters as against all others.

[97] *Ward HC* is authority that the 'exclusive' rights can potentially be established prima facie in relation to areas where there has been no previous extinguishment of native title or where extinguishment is to be disregarded because of the Act.

[98] The Full Court in *Griffiths v Northern Territory* (2007) 243 ALR 7 indicates that the question of exclusivity depends upon the ability of the native title holders to effectively exclude from their country people not of their community, including by way of 'spiritual sanction visited upon unauthorised entry' and as the 'gatekeepers for the purpose of preventing harm and avoiding injury to country'—at [127].

[99] I understand from Attachment B, which lists the parcels subject to this application, that some of the claimed areas are Unallocated Crown Land.

[100] Attachment F notes that the native title determination over Roebuck Plains Pastoral Lease, which surrounds this claim area, recognised exclusive native title by the operation of s 47.

Attachment F also quotes Merkel J's findings in *Rubibi No 5* that '… there can be little doubt that there was a traditional requirement for permission to be sought by strangers to country for the reasons given by Patrick Dodson. I accept that the modern form of that requirement, as explained by Patrick, remains sourced in, and is a variant of, that traditional requirement'. Further, Attachment F quotes Merkel J's conclusion in *Rubibi No 6* that he was satisfied 'that, generally, the evidence supports the inference contended for by the Yawuru claimants of exclusive possession and occupation of the Yawuru claim area … where there has been no extinguishment…'.

[101] Deponent 5 in his affidavit in support of the application states that under Yawuru traditional laws and customs 'Yawuru people have the right to be on and use Yawuru country and we do not need to seek permission from anyone outside our own community to do so'. Some of the other deponents of the affidavits make similar statements. For example, Deponent 4 speaks about the importance of getting permission to be on country and that Yawuru people should be consulted with before anything happens on Yawuru country. Similarly Deponent 3 notes that he would expect strangers to ask a Yawuru person before hunting on Yawuru country and Deponent 2 states that one has to ask permission before one goes on someone else's country.

[102] In my view the material before establishes that, prima facie, the claim group members have a right under their traditional laws and customs to effectively exclude from their country people not of their community.

Non-exclusive rights and interests

[103] I now consider the remaining rights and interests claimed which are set out in Schedule E under the heading 'Native title where traditional rights are partially recognisable'. Given that I am satisfied that the factual basis material establishes a right to exclusive possession held by the claim group, I am similarly of the view that the factual basis material establishes the existence of the non-exclusive rights and interests claimed. These rights are inherently linked to, and in my opinion can be considered an element of, the exclusive right to possession. Below I provide a summary of information that has been provided by the applicant to successfully establish the prima facie existence of these rights. I have grouped rights that are related and rely on similar evidence and note that my reasons should be considered in conjunction with, and in addition to, my reasons and the material outlined at s. 190B(5) above.

a) the right to live in the land and waters

[104] The applicant in Attachment F sets out anthropological evidence as cited in *Rubibi No 5*, noting that Merkel J made a finding of fact that the Yawuru Community has a right to live in the area defined by the 'Yawuru linguistic boundary'.

b) the right to access, move about and use the land and waters

[105] Attachment F cites evidence given by members of the Yawuru Community in *Rubibi No 5* to the effect that they do not need any permission to access Yawuru country, noting that Merkel J found that the Yawuru Community has a right to access, move about and use the land and waters in the area of the Yawuru linguistic boundary.

c) the right to hunt and gather in the application area

e) the right to access and take the resources of the land and waters

[106] Attachment F cites evidence given by members of the Yawuru Community in *Rubibi No 5* in relation to the right to hunt and gather in the application area, noting that Merkel J made a finding of fact that the Yawuru Community has such a right in the area of the Yawuru linguistic boundary. His Honour cites evidence that the right to hunt and use the resources of the land flows from the Bugarrigarra and also finds that the existence of the right to access and take the resources of the land and waters is supported by the evidence and one of the native title rights of the Yawuru Community.

d) the right to engage in spiritual and cultural activities on the land and waters

[107] Attachment F notes that Merkel J in *Rubibi No 6* made a finding of fact that the Yawuru Community has a right to engage in spiritual and cultural activities in the area of the Yawuru linguistic boundary, which includes the claim area.

f) the right to care for, maintain and protect the land and waters of the application area, including places of spiritual or cultural significance

[108] Attachment F cites evidence given by members of the Yawuru Community in *Rubibi No* 5 and His Honour's conclusion that there is 'extensive evidence… that establishes a commitment, based on traditional law and custom, by members of the Yawuru community to 'protect country' and to 'look after their country'. There is also an acknowledgement of the right, particularly of senior Yawuru 'law men' and 'law women', to 'speak for country''.

[109] I note, in addition to the above, that the affidavits in support of the factual basis contain further information about the exercise of the claimed rights and interests by the deponents, their family or ancestors.

[110] On the basis of the above information, I am of the view that the application **satisfies** the condition of s 190B(6).

Subsection 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 be expected to currently 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.

[111] Under s 190B(7), I must be satisfied that at least one member of the native title claim group currently has, or previously had, a traditional physical connection with any part of the land or waters covered by the application. I take 'traditional physical connection' to mean a physical connection in accordance with the particular laws and customs relevant to the claim group, being 'traditional' in the sense discussed in *Yorta Yorta*.

[112] Sufficient material is provided in the application and additional material regarding the traditional physical connection, current and past, of members of the native title claim group. For example, some members of the claim continue to access the claim area and surrounding areas, following protocols prescribed by traditional laws and customs for a variety of reasons such as hunting, fishing, camping, looking after country – see for example Deponent 2's affidavit.

[113] I am therefore satisfied that at least one member of that group currently has a traditional physical connection with parts of the application area.

[114] The application **satisfies** the condition of s 190B(7).

Subsection 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.

Section 61A provides:

(1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.
(2) If:
(a) a previous exclusive possession act (see s 23B) was done in relation to an area; and
(b) either:
    (i) the act was an act attributable to the Commonwealth; or
    (ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23E in relation to the act;

a claimant application must not be made that covers any of the area.

(3) If:
(a) a previous non-exclusive possession act (see s 23F) was done in relation to an area; and
(b) either:

(i) the act was an act attributable to the Commonwealth, or
(ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23I in relation to the act;

a claimant application must not be made in which any of the native title rights and interests claimed confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.

(4) However, subsection (2) or (3) does not apply to an application if:

(a) the only previous exclusive possession act or previous non-exclusive possession act concerned was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made; and

(b) the application states that section 47, 47A or 47B, as the case may be, applies to it.

[115] In the reasons below, I look at each part of s 61A against what is contained in the application and accompanying documents and in any other information before me as to whether the application should not have been made.

Section 61A(1)

[116] Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title. In my view the application does not offend the provisions of s. 61A(1) because the geospatial report dated 17 November 2015 reveals that there are no approved determinations of native title over the application area.

Section 61A(2)

[117] Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply. In my view the application does not offend the provisions of s 61A(2) because Schedule B, Parts b)(3) and (4) exclude from the application area any areas covered by previous exclusive possession acts.

Section 61A(3)

[118] Section 61A(3) provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done, unless the circumstances described in s 61A(4) apply. In my view, the application does not offend the provisions of s 61A(3) because Schedule E acknowledges that a claim to exclusive possession is not made over areas where such a claim cannot be recognised.

Conclusion

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

Subsection 190B(9)
No extinguishment etc. of claimed native title

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

(a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory; or

(b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application; 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, 47A or 47B.

[120] I consider each of the subconditions of s 190B(9) in my reasons below.

Section 190B(9)(a)

[121] The application at Schedules E and Q state that no ownership of minerals, petroleum or gas wholly owned by the Crown is claimed.

Section 190B(9)(b)

[122] The application at Schedule P states that no offshore places comprise part of the application area.

Section 190B(9)(c)

[123] There is no information in the application or otherwise to indicate that any native title rights and/or interests in the application area have been extinguished.

Conclusion

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

[End of reasons]

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Edarrbur (Rubibi # 18)
NNTT file no.	WC2015/005
Federal Court of Australia file no.	WAD655/2015

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.

Section 186(1): Mandatory information

Application filed/lodged with: Federal Court of Australia

Date application filed/lodged: 11 November 2015

Date application entered on Register: 3 December 2015

Applicant:

As per Schedule entry

Applicant's address for service:

As per Schedule entry

Area covered by application:

As per Schedule entry

Persons claiming to hold native title:

As per Schedule entry

Registered native title rights and interests:

As per Schedule entry

[End of document]