

# Registration test decision

Application name	Robe River Kurrama People
Name of applicant	Neil Finlay, Gloria Lockyer, Mark Lockyer, Jack Alexander
NNTT file no.	WC2016/002
Federal Court of Australia file no.	WAD370/2016
Date application made	15 August 2016

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).

For the reasons attached, I do not accept this claim for registration pursuant to s 190A of the *Native Title Act 1993* (Cth).

For the purposes of s 190D(3), my opinion is that the claim does not satisfy all of the conditions in s 190B.

**Date of decision:** 8 September 2016

---

Lisa Jowett

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 20 November 2015 and made pursuant to s 99 of the Act.

# Reasons for decision

## *Introduction*

[1] The Registrar of the Federal Court of Australia (the Court) gave a copy of the Robe River Kurrama People native title determination application (WAD370/2016) to the Native Title Registrar (the Registrar) on 18 August 2016 pursuant to s 63 of the Act<sup>1</sup>. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A: see subsection 190A(1).

[2] Sections 190A(1A), (6), (6A) and (6B) set out the decisions available to the Registrar under s 190A. Subsection 190A(1A) provides for exemption from the registration test for certain amended applications and s 190A(6A) provides that the Registrar must accept a claim (in an amended application) when it meets certain conditions. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (which deals mainly with the merits of the claim) and s 190C (which deals with procedural and other matters). Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B and 190C.

[3] Given that the claimant application was made on 15 August 2016 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply. I have reached the view that the claim in the application must not be accepted for registration and this document sets out my reasons, as the delegate of the Registrar, for my decision not to accept the claim for registration pursuant to s 190A of the Act.

## **Application overview and background**

[4] The area covered by the application falls wholly within the Kuruma Marthudunera (combined) application (WAD6090/1998). The claim area falls south of Karratha in north Western Australia. The claim in the application is made on behalf of the same native title claim group as described in the Kuruma Marthudunera (combined) application.

## **Information considered when making the decision**

[5] Section 190A(3) sets out the information to which the Registrar must have regard in considering a claim under s 190A and provides that the Registrar 'may have regard to such other information as he or she considers appropriate'. Attachment B of these reasons lists all of the information and documents that I have considered in reaching my decision.

---

<sup>1</sup> All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cth) which I shall call 'the Act', as in force on the day this decision is made, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

*Subsection 190A(3)(a): Application and other documents provided by the applicant*

[6] As required by s 190A(3)(a), I have had regard to information in the application. The applicant provided no additional material for the purposes of my consideration.

*Subsection 190A(3)(b): Searches conducted by the Registrar of State/Commonwealth interest registers*

[7] I note that there is no information before me of the kind identified in s 190A(3)(b).

*Subsection 190A(3)(c): Information supplied by Commonwealth/State*

[8] The State of Western Australia has not provided any submissions in relation to the application of the registration test.

*Section 190A(3): other information to which Registrar considers it appropriate to have regard*

[9] I have considered information contained in an overlap analysis and geospatial assessment by the Tribunal's Geospatial Services dated 29 August 2016 (the geospatial report).

## *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

[10] In assessing the Robe River Kurrama application against s 190B(2), I am required to be satisfied that the information provided by the applicant for the purposes of ss 62(2)(a) and 62(2)(b) is sufficient for the particular land and waters, over which native title rights and interests are claimed, to be identified with reasonable certainty. In reaching the required level of satisfaction, it is to the terms of the application itself that I am to direct my attention—*Attorney General of Northern Territory v Doepel (2003) 133 FCR 112 (Doepel)* at [16] and [122].

*Description of the area covered by the application*

[11] Schedule B of the application refers to Attachment B which contains an external boundary description prepared by Yamatji Marlpa Aboriginal Corporation (YMAC), dated 29 July 2016. The area covered by the application is described by metes and bounds, referencing native title determination and application boundaries, pastoral lease boundaries and geographic coordinates to six decimal places.

[12] Attachment B also specifically excludes the Pannawonica townsite boundary, (General Lease LGE N105619) and Lot 57 DP107521 and that part of the Closed Road that falls within that lot. It also includes a statement that the application does not include any area subject to the following native title determinations and determination applications:

- Native Title Determination WAD6017/1996 Ngarluma/Yindjibarndi (WCD2005/001)
- Native Title Determination WAD6007/2001, WAD126/2005 Puutu Kunti Kurrama People and Pinikura People #1 and #2 (WCD2015/003);
- Native Title Determination Application WAD127/1997 Yaburara & Mardudhunera people (WC1996/089)

[13] Schedule B provides a list of general exclusions to further describe those areas within the external boundary not covered by the application.

[14] Schedule C refers to Attachment C which is a colour map also prepared by YMAC, titled 'Kuruma Marthudunera: Part B WAD6090/1998, WC1999/012', dated 15 August 2016. The map includes the application area depicted by a bold dark blue outline; the Yaburara & Mardudhunera People NTDA depicted by a pink hachure; two abutting determinations depicted by a black hachure; colour coded land tenure and parcel IDs; scalebar, northpoint, coordinate grid and locality map; and notes relating to the source, currency and datum of data used to prepare the map.

#### *Consideration*

[15] The map is consistent with the technical description at Attachment B. Together, these two attachments provide information in relation to the external boundaries of the area covered by the application which allows me to be reasonably certain of the location of those boundaries on the surface of the earth. Further, the geospatial report makes the assessment that the description and the map are consistent such that the area covered by the application is readily identifiable.

[16] The general and specific exclusion statements used to describe areas not covered by the application are, in my view, sufficient to offer an objective mechanism by which to identify areas that may fall within the categories described and therefore excluded from the area covered by the application.

[17] I am satisfied that the external boundary is identifiable and, that together with the exclusions that serve to identify the internal boundaries, it can be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

[18] 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.

[19] Schedule A of the application does not name the persons in the native title claim group but contains a description of that group, being the basis for its composition. It is therefore necessary to consider whether the application satisfies the requirements of s 190B(3)(b). I note the comments

of Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112; (2003) 203 ALR 385; [2003] FCA 1384 (*Doepel*) that the focus of s 190B(3)(b) is:

- whether the application enables the reliable identification of persons in the native title claim group—at [51]; and is
- not on ‘the correctness of the description . . . but upon its adequacy so that the members [sic] of any particular person in the identified native title claim group can be ascertained’—at [37].

[20] Carr J in *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93 (*Western Australia v Native Title Registrar*) was of the view 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].

[21] The description of the native title claim group at Schedule A is as follows:

The persons who comprise the Robe River Kurrama people’s native title claim group are Aboriginal people who:

- A. are descended from, in accordance with traditional laws acknowledged and traditional customs observed by the Robe River Kurrama People, one or more of the following apical ancestors:
  1. Tumbler
  2. Minnie
  3. Rosie
  4. Bobby Marawarru
  5. Ruby Woolhouse
  6. Johnson Alec
  7. Algy Patterson
- B. recognise themselves as, and are recognised by a substantial number of the other persons referred to in (A) above as a member of the Robe River Kurrama claim group; and
- C. have rights and interests in, and a connection with, the land and waters in the determination area, in accordance with the traditional laws acknowledged and the traditional customs observed by the Robe River Kurrama People.

[22] In my view, the description of the native title claim group is capable of being readily understood and is sufficiently clear such that it can be ascertained whether any particular person is in that group. I understand that membership of the native title claim group is regulated by biological descent from the persons listed 1 through 7. The paragraphs at B and C of the description provide qualifications about this regulation.

[23] It may be that some factual inquiry is required to establish a person’s descent from any of the named ancestors, but that would not mean that the group has not been sufficiently described for the purposes of this condition for registration.

[24] 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.

[25] Section 190B(4) requires the Registrar to be satisfied that the description of the claimed native title rights and interests contained in the application is sufficient to allow the rights and interests to be identified—*Doepel* at [92]. In *Doepel*, Mansfield J refers to the Registrar's consideration.

The Registrar referred to s. 223(1) and to the decision in *Ward*. He recognised that some claimed rights and interests may not be native title rights and interests as defined. He identified the test of identifiability as being whether the claimed native title rights and interests are understandable and have meaning. There is no criticism of him in that regard—at [99].

[26] On this basis, for a description to be sufficient to allow the claimed native title rights and interests to be readily identified, it must describe what is claimed in a clear and easily understood manner. Schedule E of the application contains the description, as required by s 62(2)(d), of native title rights and interests claimed in relation to the area covered by the application:

#### Subject to laws and customs

The native title rights and interests claimed in this Application are subject to and exercisable in accordance with:

1. The common law and the laws of the State of Western Australia and the Commonwealth of Australia;
2. Valid interests conferred pursuant to the laws of the State of Western Australia and the Commonwealth; and
3. The body of traditional laws and customs of the Aboriginal society under which rights and interests are possessed and by which the native title claim group have a connection to the land and waters the subject of this Application.

#### Rights in Area A

In relation to Area A, the Applicant claims the following native title rights and interests pertaining to exclusive possession:

1. The right to possession, occupation, use and enjoyment of that area as against the whole world.

#### Rights in Area A

The Applicant claims the following native title rights and interests in relation to:

- Area A if the claim to exclusive possession cannot be recognised;
  2. The right to access and to take resources (other than minerals, petroleum and gas) in the area for any purpose;
  3. The right to access the area, to remain on or within the area and use the area for any purpose including to live, camp and erect shelters upon or within the area;
  4. The right to speak for and make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong;
  5. The right to invite and permit others to have access to and participate in or carry out activities in the area; and

6. The right to visit, care for and maintain places and objects of significance within the area and protect and have them protected from harm;

[27] The application lists a number of definitions, including one for 'Area B' (defined as 'the land and waters within the Application area that is not included in Area A'). The above description does not include any reference to Area B and concludes at 6. with a semi-colon. In my view, the description of the claimed native title rights and interests may not be complete.

[28] From the description as it appears at Schedule E, I understand that the application claims in respect of Area A possession, occupation, use and enjoyment to the exclusion of all others only in those areas where it can be recognised, and claims the listed non-exclusive rights 1. through 6. where the exclusive right cannot be recognised. However, given the possible incomplete nature of the description, I am of the view that the native title rights and interests claimed cannot be 'properly understood'. I am therefore not satisfied that the description contained in the application is sufficient to allow the native title rights and interests to be readily identified.

[29] The application does not satisfy 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

[30] For the application to meet this condition, the Registrar must be satisfied that a sufficient factual basis is provided to support the assertion that the claimed native title rights and interests exist. The material needs to support the particular assertions in paragraphs (a) to (c) of s 190B(5) – as quoted above.

[31] I note in particular that the registration test involves an administrative decision—it is not a trial or hearing of a determination of native title pursuant to s 225. It is not the task of the delegate to make findings about whether or not the claimed native title rights and interests exist. Nor is it the role of the delegate to reach definitive conclusions about complex anthropological issues pertaining to the applicant's relationship with their country, as that is a judicial enquiry.

[32] However, the asserted factual basis should provide more than restatements of the claim:

... it would not be sufficient for an applicant to assert that the claim group's relevant laws and customs are traditional because they are derived from the laws and customs of a pre-sovereignty society, from which the claim group also claims to be descended, without any factual details concerning that pre-sovereignty society and its laws and customs relating to

land and waters. Such an assertion would merely restate the claim. There must be at least an outline of the facts of the case—*Gudjala #2 v Native Title Registrar* [2009] FCA 1572 at [29].

[33] The Registrar’s consideration of the quality of the factual basis for the claim made in an application is guided by principles outlined in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; (2002) 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*):

- traditional laws and customs are ones that a society passes on from one generation to another;
- laws and customs arise out of, and go to define, a particular society, that is a body of persons united in, and by, its acknowledgement and observance of a body of laws and customs;
- traditional laws or customs are derived from a normative system that existed before sovereignty;
- rights and interests are rooted in pre-sovereignty traditional laws and customs; and
- it must be shown that the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout the period since sovereignty was asserted as a body united by its acknowledgement and observance of the laws and customs.

[34] Later Court decisions have supported these principles as guiding the Registrar’s consideration of the factual basis of a native title determination application: *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*)—at [26]; *Full Court in Gudjala # 2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) and *Gudjala #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*).

#### *Information in the application*

[35] Schedule F of the draft application provides a generalised description of the factual basis for the claimed native title rights and interests. Schedule G provides a list of activities undertaken by the native title claim group. No additional information has been provided by the applicant for the purposes of the factual basis consideration.

[36] The general descriptions at Schedules F and G are sufficient to meet the procedural requirement of s 62(2)(e) but are not in sufficient detail to meet any of the particular requirements of this merit condition. In my view, the information is not sufficient for me to be satisfied that there is a sufficient factual basis to support the asserted existence of the native title claim group’s traditional laws and customs in relation to the area covered by the claim and that these give rise to the native title rights and interests claimed in the application.

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

[37] The factual basis does not provide information relating to the identity of the native title claim group, the predecessors of the group and the nature of the association with the area. Beyond very general assertions the application does not show the history of the association that the members of the claim group have, and that their predecessors had, with the application



area—see *Gudjala 2007* at [51]. The information in the application does not demonstrate that a link exists between the current claim group and its predecessors’ and their association with the application area— see *Gudjala 2007* at [66].

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

[38] This subsection requires that the delegate be satisfied that the factual material is sufficient to support the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group. These will be the traditional laws and customs that give rise to the native title rights and interests claimed in the application. The information in the application does not demonstrate:

- that the laws and customs currently observed by the claim group have their source in a pre-sovereignty society and have been observed since that time by a continuing society;
- the identification of a society of people living according to a system of identifiable laws and customs, having a normative content, which existed at the time of sovereignty; and
- the link between the claim group described in the application and the area covered by the application, ‘identifying some link between the apical ancestors and any society existing at sovereignty’ (*Gudjala FC* at [63] to [66], [71], [72] and [96]) .

[39] The statements at Schedule F also do not provide sufficient factual details about the traditional laws and customs acknowledged and observed by the pre-sovereignty society from which the native title claim group claims descent. It is not sufficient to make a general statement that the society existed or that traditional laws and customs are acknowledged and observed by the claim group. The general assertions do not allow me to be satisfied that there was, at the time of first contact, ‘an Indigenous society in the claim area observing identifiable laws and customs’ — *Gudjala FC* at [96].

[40] The factual material should provide information about the normative society which operated in relation to the claim area at the time sovereignty was asserted. It should identify the particular society (of which the identified ancestors were a part), that is the body of persons united in, and by, its acknowledgement and observance of a body of laws and customs—*Yorta Yorta* at [49]. An native title determination application should provide factual details about the society of the native title claim group and its links back to the society of its predecessors. In doing so the factual basis should address how it is asserted that the claimed rights and interests are ‘rooted in pre-sovereignty laws and customs’. The general assertions at Schedule F do not, in my view, demonstrate a connection between the apical ancestors and a pre-existing society and its laws and customs relating to land and waters; there is no explanation as to how current laws and customs of the claim group can be traditional—*Gudjala 2009* at [54].

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

[41] This subsection requires the Registrar to be satisfied that there is sufficient factual basis to support the assertion that the native title claim group continues to hold native title in accordance

with its traditional laws and customs. Without a factual basis that identifies the pre-sovereignty society or a factual basis for the connection between that society and the group's currently asserted laws and customs, there is no factual basis to support the assertion that the society and its laws and customs have continued substantially uninterrupted since sovereignty.

[42] Schedule F of the application does not provide any information to support the assertion that the native title claim group continues to hold native title in relation to the claim area. The general assertions provide no information about the exercise of rights and interests by the claim group that may illustrate the practices that have been passed down to members of the claim group by their elders and predecessors. The application does not demonstrate the native title claim group's continuing acknowledgement and observance of its traditional laws and customs since sovereignty (or European settlement) to the present time.

## **Conclusion**

[43] The application therefore does not satisfy the condition of s 190B(5) because the factual basis provided is not 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.

[44] My conclusion above at s 190B(5)(b) is that the factual basis is not sufficient to support the assertion that there exists traditional laws and customs that give rise to the claimed native title. It follows, in my view, that the application cannot therefore satisfy the prima facie requirement of this condition. I note that my view is consistent with the approach taken by Dowsett J in *Gudjala 2007* and *Gudjala 2009*—at [87] and [82] respectively. That is, where the factual basis is not sufficient to support the assertions at s 190B(5)(b), it is unnecessary for the Registrar to proceed to consider whether any of the claimed rights and interests may be prima facie established.

[45] In addition, I note my view in relation to the condition at s 190B(4) that the claimed native title rights and interests were not readily identifiable. Further, the rights described at Schedule E are not evidenced in any supporting material in the application. Given these particular deficiencies in the material before me, I am of the view that I am unable to conduct an assessment whether or not the rights can be established prima facie.

[46] The application does not satisfy 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.

[47] This condition requires that there be evidentiary material capable of satisfying the Registrar of particular fact(s), specifically that at least one member of the claim group ‘has or previously had a traditional physical connection’ with any part of the application area.

[48] In my view, where an application which fails to satisfy the requirements for a sufficient factual basis under s 190B(5), it will likewise fail this condition due to the requirement for material showing a ‘traditional’ physical connection to the application area—*Gudjala 2007* and *Gudjala 2009*.

[49] The application does not satisfy this condition as a result of my conclusions above at s 190B(5). Further, with only the general assertions referred to above, I do not consider that there is sufficiently detailed information in the application which demonstrates either a previous or current physical relationship by any member of the claim group with the particular land or waters covered by the application.

[50] The application does not satisfy 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 s61A (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.

[51] 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)*

[52] 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. The geospatial report dated 29 August 2016 and a search that I have made of the Tribunal's geospatial databases on the day of my decision confirms that there are no approved determinations of native title over the area covered by the application.

#### *Section 61A(2)*

[53] 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. Schedule B at paragraph 2 provides the relevant statements excluding from the area covered by the application any area where a previous exclusive possession act was done.

#### *Section 61A(3)*

[54] 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. Schedule B at paragraphs 3 and 4 provides the relevant statements.

### **Conclusion**

[55] 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.

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

*Section 190B(9)(a)*

[57] The application does not provide any explicit statement that a claim is not made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory. However, there is nothing in the application that discloses or suggests that such a claim is made.

*Section 190B(9)(b)*

[58] The application does not provide any explicit statement that exclusive possession is not claimed in relation to any offshore place. However, there is nothing in the application that discloses or suggests that such a claim is made. In any event the area covered by application does not include any offshore place.

*Section 190B(9)(c)*

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

## **Conclusion**

[60] 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)

## *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.

[61] 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.

[62] In reaching my decision for the condition in s 190C(2), I understand that 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)— *Doepel* at [16] and also at [35] to [39]. In other words, does the application contain the prescribed details and other information?

[63] 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 things 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

[64] 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)**

[65] 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'. The Registrar must consider 'whether the application sets out the native title claim group in the terms required by s 61'—*Doepel* at [36]. Specifically:

If the description of the native title claim group were 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 relevant requirement of s 190C(2) would not be met and the Registrar should not accept the claim for registration—*Doepel* at [36].

[66] In my view, there is nothing on the face of the current application that suggests that it is not brought on behalf of all members of the native title claim group.

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

**Name and address for service: s 61(3)**

[68] Part B of the application states on page 13 the name and address for service of the persons who are the applicant.

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

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

[70] Schedule A provides a description of the persons who comprise the native title claim group.

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

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

[72] Each of the 4 persons who comprise the applicant have signed an affidavit swearing or affirming, in full, to all the statements required of this section.

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

**Details required by s 62(1)(b)**

[74] 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)*

[75] Attachment B provides a metes and bounds description of the geographical external boundaries of the area covered by the application, referencing geographic coordinate points. Schedule B provides a list of general exclusion statements for those areas not covered by the application.

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

[76] Schedule C refers to Attachment C being a map showing the external boundaries of the area covered by the application.

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

[77] Schedule D provides the statement that no searches have been undertaken by the applicant in relation to the land and waters covered by the application.

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

[78] Schedule E provides a description of the native title rights and interests claimed in relation to the area covered by the application. The description appears to be incomplete, however, in my view it is sufficient to meet this procedural condition.

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

[79] Schedule F provides a general description of the factual basis for the claim made in the application.

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

[80] Schedule G lists a number of activities the native title claim group currently carries out in relation to the area covered by the application.

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

[81] Schedule H refers to 1 application, *Kuruma Marthudunera (combined) WAD6090/1998*, that also seeks a determination of native title in relation to the area covered by this application

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

[82] Schedule HA refers to Attachment I which is a list of future act notices issued in relation to the area covered by this application. The list includes notices issued between 2007 and 2016 in accordance with s 24MD(6B)(c).

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

[83] Schedule H refers to Attachment I which is a list of future act notices issued in relation to the area covered by this application. The list includes notices issued between 1995 and 2016 in accordance with s 29.

*Conclusion*

[84] The application contains the details specified in ss 62(2)(a) to (h), and therefore does contain 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.

[85] The requirement that the Registrar be satisfied in the terms set out in s 190C(3) is only triggered if there is a previously registered claim in relation to the area covered by the application before me, as described in ss 190C(3)(a), (b) and (c)—*Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652 (*Strickland FC*) at [9]. Section 190C(3) relates to ensuring there are no common native title claim group members between the application currently being considered for registration ('the current application') and any overlapping 'previous application' that is a registered application when the current application was made.



[86] The application identifies at Schedule H the Kuruma Marthudunera (combined) application (WAD6090/1998) (KM claim) to have made in relation to the area covered by this application. Schedule O does not provide any information as to whether there may be members in common between this application and the KM claim. A letter from the representative for the applicant (YMAC) dated 19 August 2016 confirms that the RRK claim overlaps Part B of the KM claim and that the persons who comprise the Robe River Kurrama native title claim group are the same persons who comprise the group for the KM claim.

[87] The Tribunal's geospatial report confirms that the area of the Robe River Kurrama application (the current application) is overlapped by the KM claim. My search against the Tribunal's Register of Native Title Claims (the Register) confirms that the application is currently on the Register, its entry made on 14 June 1999 as a result of consideration under s 190A. The KM claimant applicant is therefore a previous application that overlaps the area covered by the current application in the sense discussed in s 190C(3)(a) to (c).

[88] Given that the native title claim groups are described in the same way for both the current and previous applications, it is clear that the groups have claimants in common.

[89] The application does not satisfy 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.

Under s 190C(5), if the application has not been certified as mentioned in s 190C(4)(a), the Registrar cannot be satisfied that the condition in s 190C(4) has been satisfied unless the application:

- (a) includes a statement to the effect that the requirement in s 190C(4)(b) above has been met, and
- (b) briefly sets out the grounds on which the Registrar should consider that the requirement in s 190C(4)(b) above has been met.

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

[91] The application provides no information at Schedule R to identify whether the application has been certified by the relevant body, or that the applicant has been authorised by the native title claim group to make and deal with the application.

[92] The affidavits of the four persons comprising the applicant made in accordance with the requirements of s 62(1)(a) provide some information in relation to the decision to authorise an

applicant for the purposes of making and dealing with this application. In the absence of a certificate purporting to certify the making of the application, my consideration is, in my view limited to assessing whether the information in the application meets the requirements of s 190C(4)(b).

*Section 190C(5)*

[93] For the purposes of s 190C(5)(a), the application must contain a statement to the effect that the requirement set out in paragraph 190C(4)(b) has been met. Schedule R of the application contains no such information. The affidavit of each person comprising the application does make the relevant statements, however the native title claim group is referred to as 'the proposed Robe River Kurrama native title claim group' which, in my view, make the required statements provisional. The requirement is clearly for the statements to be made in the application, and as they do not appear, I am not satisfied that this condition is met.

*Section 190C(4)(b)*

[94] This condition requires that I be satisfied that the applicant is a member of the native title claim group and is authorised by all the other persons in that group to make the application and deal with matters arising in relation to it. Each person comprising the applicant, deposes to this in their affidavit sworn in accordance with the requirements of s 62(1)(a). This first limb of the condition is therefore met.

[95] Section 251B defines the term 'authorise' and provides that an applicant's authority from the rest of the native title claim group to make an application must be given in one of two ways. The alternative processes are defined in the sub paragraphs 251B(a) and (b):

- in accordance with any traditional process mandated for authorising 'things of this kind' (i.e. authorising an applicant to make a native title determination application), where one exists; or
- where there is no such process, in accordance with a decision-making process agreed to and adopted by native title claim group.

[96] The Court has considered in various instances what may be required to satisfy the Registrar that an applicant has been authorised by all the persons in the native title claim group in accordance with s 251B(b). It is well settled in law, that the word 'all' in the context of authorisation pursuant to s 251B, has 'a more limited meaning than it might otherwise have.' In *Lawson v Minister for Land and Water Conservation* (NSW) [2002] FCA 1517 (*Lawson*), Stone J held in relation to s 251B(b) that it is not necessary for each and every member of the native title claim group to authorise the making of an application. Rather '[i]t is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process' — *Lawson* at [25].

[97] Each affidavit includes the same information in respect of the authorisation of the applicant to make and deal with the application. The extent of this information is summarized below:

- that the native title claim group has no process of decision-making process mandated by its traditional laws and customs for the purposes of making and dealing with a native title determination application;
- the native title claim group has agreed to and adopted a decision-making process whereby such decisions are made by consensus, or in the absence of such consensus, a 50% majority of Robe River Kurrama people present at a meeting to which all members of the group have been invited;
- in relation to authorising the applicant for the purpose of making the Robe River Kurrama People native title determination application, community meetings were organised by the legal representative for the group, YMAC, notices of the meeting were published in newspapers circulating in the Pilbara region and all members of the group were invited to attend by posting those notices to members whose contact details are held on YMAC databases;
- the community meeting at which the application is purported to have been authorised was held on 10 March 2016 and attendance was consistent with previous community meetings.

[98] In my view, there is not sufficient detail provided in the application or the affidavits to support the conclusion that the applicant has been authorised in the terms required of s 190C(4)(b). The affidavit of each person comprising the applicant provides sufficient detail for the purposes of meeting the requirements of s 62(1)(a) but does not elicit the kind of detail required to meet the authorisation condition.

[99] In my view there is not sufficient information in the application to make a considered assessment about such matters as:

- whether attendees at the community meeting were sufficiently representative of all of the persons in the native title claim group,
- what distribution the notice of the community meeting covered,
- how and where the meeting was convened,
- what kind of resolutions were put to the group and whether decisions were made by consensus or majority.

[100] Without such detail, I am not able to come to a view about whether the requirements for authorization in accordance with s 190C(4)(b) have been met.

[101] For the reasons set out above, I am not satisfied that the requirements set out in either ss 190C(4)(a) or (b) are met.

## [End of reasons] Summary of registration test result

<b>Application name</b>	<b>Robe River Kurrama People</b>
<b>NNTT file no.</b>	<b>WC2016/002</b>
<b>Federal Court of Australia file no.</b>	<b>WAD370/2016</b>
<b>Date of registration test decision</b>	<b>8 September 2016</b>

#### Section 190B conditions

<b>Test condition</b>	<b>Subcondition/requirement</b>	<b>Result</b>
s 190B(2)		met
s 190B(3)		<b>Overall result:</b> met
	s 190B(3)(a)	N/A
	s 190B(3)(b)	met
s 190B(4)		not met
s 190B(5)		<b>Aggregate result:</b> not met
	re s 190B(5)(a)	not met
	re s 190B(5)(b)	not met
	re s 190B(5)(c)	not met
s 190B(6)		not met
s 190B(7)(a) or (b)		not met
s 190B(8)		<b>Aggregate result:</b> met
	re s 61A(1)	met
	re ss 61A(2) and (4)	met
	re ss 61A(3) and (4)	met
s 190B(9)		<b>Aggregate result:</b> met
	re s 190B(9)(a)	met
	re s 190B(9)(b)	met
	re s 190B(9)(c)	met

#### Section 190C conditions

<b>Test condition</b>	<b>Subcondition/requirement</b>	<b>Result</b>
s 190C(2)		<b>Aggregate result:</b> met
	re s 61(1)	met
	re s 61(3)	met
	re s 61(4)	met
	re s 62(1)(a)	met
	re s 62(1)(b)	<b>Aggregate result:</b> met

Test condition	Subcondition/requirement	Result
	s 62(2)(a)	met
	s 62(2)(b)	met
	s 62(2)(c)	met
	s 62(2)(d)	met
	s 62(2)(e)	met
	s 62(2)(f)	met
	s 62(2)(g)	met
	s 62(2)(ga)	met
	s 62(2)(h)	met
s 190C(3)		not met
s 190C(4)		<b>Overall result:</b> not met
	s 190C(4)(a)	not met
	s 190C(4)(b)	not met

[End of document]