National Native Title Tribunal

Registration test decision

Application name	Ngadjuri Nation #2
Name of applicant	Vincent Copely, Josie Agius, Quentin Agius and Vincent Branson
State/territory/region	South Australia
NNTT file no.	SC11/2
Federal Court of Australia file no.	SAD304/11
Date application made	21 November 2011

Name of delegate Carissa Kok

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

For the reasons attached, I am satisfied that each of the conditions contained in ss. 190B and C are met. I accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

Date of decision: 20 January 2012

Date of reasons: 10 February 2012

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Carissa Kok

Delegate of the Native Title Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cwlth) under an instrument of delegation dated 24 August 2011 and made pursuant to s. 99 of the Act.

Reasons for decision - Edited

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Introduction

This document sets out my reasons, as a delegate of the Native Title Registrar (the Registrar) for the decision to accept the application for registration pursuant to s. 190A of the Act.

Note: All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cwlth) 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.

Application overview

The Registrar of the Federal Court of Australia (the Court) gave a copy of the Ngadjuri Nation #2 claimant application (the application) to the Registrar on 22 November 2011 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.

Given that the claimant application was made on 21 November 2011 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

Therefore, in accordance with subsection 190A(6) I must accept the claim for registration if it satisfies all of the conditions in 190B and 190C of the Act. This is commonly referred to as the registration test.

On the day the application was made it was affected by future act notices in relation to the four tenements below given under s. 63 of the *Mining Act 1971* (SA). Accordingly, the relevant notice periods expired two months after these notices were given. I note my understanding that the notification day in relation to s. 63 notices is the day that the notice is signed by the proponent initiating the negotiations subject of the notice. This was confirmed by the Environment, Resources and Development Court with the Tribunal case manager for the application on 12 January 2012.

Tenement ID	Notification Date
EL3997	22/11/2011
EL3927	22/11/2011
EL4267	22/11/2011
EL4727	24/11/2011

I note that a preliminary assessment on a draft application was made on 21 October 2011 and was provided to the applicant on 22 October 2011.

Registration test

Section 190B sets out conditions that test particular merits of the claim for native title. Section 190C sets out conditions about 'procedural and other matters'. Included among the procedural conditions is a requirement that the application must contain certain specified information and

documents. In my reasons below I consider the s. 190C requirements first, in order to assess whether the application contains the information and documents required by s. 190C *before* turning to questions regarding the merit of that material for the purposes of s. 190B.

Pursuant to ss. 190A(6) and (6B), the claim in the application must be accepted for registration because it does satisfy all of the conditions in ss. 190B and 190C. A summary of the result for each condition is provided at Attachment A.

Information considered when making the decision

Subsection 190A(3) directs me to have regard to certain information when testing an application for registration; there is certain information that I must have regard to, but I may have regard to other information, as I consider appropriate.

I have had regard to the information contained in the following documents:

- SC11/2 Form 1 application and accompanying documents;
- Additional information provided by the applicant to the Registrar on 22 November 2011; and
- an overlap analysis and geospatial assessment of the application area undertaken by the Tribunal's Geospatial Services unit on 25 November 2011 (the geospatial assessment).

I have also had regard to the documents contained in the SC11/2 Ngadjuri Nation #2 case management/delegates files (reference 2011/02859). Where I have had particular regard to information in documents within that file, I have identified them in this statement of reasons. I have followed Court authority and have only considered the terms of the application itself in relation to the registration test conditions in s. 190C(2) and ss. 190B(2), (3) and (4)—*Attorney General of Northern Territory v Doepel* [2003] FCA 1384 *(Doepel)* at [16].

I have not considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss. 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK, without the prior written consent of the person who provided the Tribunal with that information, either in relation to this claimant application or any other claimant application or any other type of application, as required of me under the Act.

Also, I have not considered any information that may have been provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice'. Further, mediation is private as between the parties and is also generally confidential (see ss. 94K and 94L of the Act).

Procedural fairness steps

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] to [31]. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

On 22 November 2011, the applicant submitted additional information to the Registrar to be considered in the registration of the application.

On 25 November 2011, the Tribunal wrote to the State of South Australia (the State) to advise it that the registration test would be applied to the application and to provide the State the opportunity to make a submission in relation to the application.

On 30 November 2012, the Tribunal case manager for the application advised the applicant that the Tribunal would be seeking a written confidentiality undertaking from the State in relation to its use of the additional information submitted by the applicant, prior to providing a copy of that material to the State for any comments. On that same day, the applicant confirmed with the Tribunal case manager that the State is already in possession of this additional information as it was previously provided to the State in relation to the proceedings in SC10/2—Ngadjuri Nation #1—SAD147/10. Therefore, in this instance I have decided that the Tribunal would not be seeking the relevant confidentiality undertaking from the State.

On 1 December 2011, the Tribunal forwarded a copy of the applicant's additional information to the State and provided it with the opportunity to submit comments in relation to that material. In the same correspondence of 1 December 2011, the Tribunal confirmed that the additional information was being provided to the State for comment only on the confidential/without prejudice basis that with regard to the SC11/2—Ngadjuri Nation #2—SAD304/11 application, the State's use of the additional information would only pertain to the registration testing of the application or any review of the Registrar's registration decision.

As no adverse or further additional information was submitted in relation to the application, neither I nor other officers of the Tribunal were required to undertake any further steps in relation to procedural fairness obligations.

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.

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.

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]–[39].

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), as 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.

I consider below whether the application and accompanying affidavit/other documents meet the relevant requirements of ss. 61 and 62:

Native title claim group: s. 61(1)

> The application must be made by a person or persons authorised by all of 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 application contains all details and other information required by s. 61(1).

Section 190C(2) is framed in a way that 'directs attention to the contents of the application and the supporting affidavits'. Thus, I have confined my assessment of this requirement to the details and information contained in the application itself. I am not required to look beyond the application nor undertake any form of merit assessment of the material to determine if I am satisfied whether

'in reality' the native title claim group described is the correct native title claim group—*Doepel* at [35], [37] and [39].

Notwithstanding this, in accordance with the requirements of ss. 61 and 62, I do ensure that a claim 'on its face, is brought on behalf of all members of the native title claim group', and does not 'indicate that not all the persons in the native title claim group were included', or, that the claim group is 'in fact a sub-group of the native title claim group'. In my view, and as guided by *Doepel*, in such circumstances the requirements of s. 190C(2) under this subsection would not be met—at [35] and [36].

Schedule A and Attachment A provide information to describe membership of the native title claim group. (I consider the merits of this description at s. 190B(3) below). I have considered this information as well as the application overall and there is nothing on the face of the application that leads me to conclude that the description of the native title claim group does not include all of the persons in the group, or that it is a subgroup of the native title claim group. I am satisfied that the application complies with the requirements of s. 61(1) for the purpose of s. 190C(2).

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

> The application must state the name and address for service of the person who is, or persons who are, the applicant.

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

The names of persons who comprise the applicant are provided on page 2 of the application and their address for service appears on at Part B.

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

> The application must:
> (a) name the persons in the native title claim group, or
> (b) otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

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

Schedule A contains a description of the native title claim group and also refers to Attachment A which provides further information relating to that description.

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

> The application must be accompanied by an affidavit sworn by the applicant that:
> (i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and
> (ii) the applicant believes that none of the area covered by the application is also covered by an approved determination of native title, and
> (iii) the applicant believes all of the statements made in the application are true, and
> (iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and
> (v) setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it.

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

The application is accompanied by affidavits by each of the four persons comprising the applicant, which each contain the required statements under subparagraphs 62(1)(a)(i) to (v).

Application contains details required by s. 62(2): s. 62(1)(b)

> The application must contain the details specified in s. 62(2).

The application contains all details and other information required by s. 62(1)(b) as it does 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)

> The application must contain information, whether by physical description or otherwise, that enables the following boundaries to be identified:
> (i) the area covered by the application, and
> (ii) any areas within those boundaries that are not covered by the application.

The application contains all details and other information required by s. 62(2)(a).

Schedule B refers to Attachment B which contains an external boundary description of the application area. Schedule B also lists general areas that are excluded from within the external boundary of the application area.

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

> The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

The application contains all details and other information required by s. 62(2)(b).

Schedule C refers to Attachment C which is a map of the application area.

Searches: s. 62(2)(c)

> The application must contain the details and results of all searches carried out by or on behalf of the native title claim group to determine the existence of any non-native title rights and interests in relation to the land and waters in the area covered by the application.

The application contains all details and other information required by s. 62(2)(c).

At Schedule D, the applicant states that it has not undertaken any searches of the relevant kind.

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

> The application must contain a description of native title rights and interests claimed in relation to particular lands and 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.

The application contains all details and other information required by. 62(2)(d).

Schedule E refers to Attachment E which is a description of the native title rights and interests claimed in the application. The description does not consist merely of a statement that the native title rights and interests are all the rights and interests that may exist, or that have not been extinguished at law.

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

> The application must contain a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist, and in particular that:
> (1) the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (2) there exist traditional laws and customs that give rise to the claimed native title, and
> (3) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The application contains all details and other information required by s. 62(2)(e).

Schedule F refers to Attachment F which is a general description of the factual basis upon which the applicant asserts the claimed native title rights and interests exist. Attachments A and F1 to F8 also provide relevant information and some related general details are given at Schedule G.

Activities: s. 62(2)(f)

> If the native title claim group currently carries out any activities in relation to the area claimed, the application must contain details of those activities.

The application contains all details and other information required by s. 62(2)(f).

Schedule G refers to the information in Attachment F and also provides a list of some activities carried out by the claim group in relation to the application area.

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

> The application must contain details of any other applications to the High Court, Federal Court or a recognised state/territory body of which the applicant is aware, that have been made in relation to the whole or part of the area covered by the application and that seek a determination of native title or of compensation in relation to native title.

The application contains all details and other information required by s. 62(2)(g).

At Schedule H, the applicant states that it is not aware of any other such applications.

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

> The application must contain details of any notification under s. 24MD(6B)(c) of which the applicant is aware, that have been given and that relate to the whole or part of the area covered by the application.

The application contains all details and other information required by s. 62(2)(ga).

At Schedule HA, the applicant states that it is not aware of any such notifications.

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

> The application must contain details of any notices given under s. 29 (or under a corresponding provision of a law of a state or territory) of which the applicant is aware that relate to the whole or a part of the area covered by the application.

The application contains all details and other information required by s. 62(2)(h).

At Schedule I, the applicant gives details relating to one notice given under s. 63 of the *Mining Act 1971* (SA).

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.

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

A search of the application area against the Register of Native Title Claims (Register) shows that there were no overlapping applications on the Register when the application was made.

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.

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.

For the reasons set out below, I am satisfied that the requirements set out in s. 190C(4)(a) are met because the application has been certified by each representative Aboriginal/Torres Strait Islander body that could certify the application.

Mansfield J states in *Doepel* that the Registrar's function in assessing the limb of s. 190C(4)(a) is simply 'to be satisfied about the fact of certification by an appropriate representative body'—at [78]. In line with *Doepel*, my task at s. 190C(4) is not to inquire about the fact of authorisation but is limited to ensuring that:

- the certifying body has power under Part 11 to make the certification; and
- the certification complies with s. 203BE(4)—*Doepel* at [80] and [81].

Attachment R contains a certificate by South Australian Native Title Services Ltd (SANTS), made pursuant to s. 203BE and signed by its General Manager on 1 September 2011.

Section 190C(4)(a) states that an application must be certified by each Aboriginal/Torres Strait representative body (representative body) that could certify the application. In accordance with s. 203BE(1)(a), a representative body can certify an application for a determination of native title where that application relates to areas of land or waters wholly or partly within the area, for which the body is a representative body. I am satisfied that the application has been certified by all the representative bodies that could so certify, based on the following information:

- paragraph 1 of the certificate which states that SANTS is a company funded by the Australian Government to perform all the functions of a representative body in South Australia pursuant to s. 203FE; and
- the geospatial assessment which confirms that only one representative body area falls within the external boundary of the application, which is the area administered by SANTS.

I now consider whether that certification by SANTS contains the information required by Part 11, with specific regard to s. 203BE(4). It is not my role to examine matters relating to the basis on which the certification was provided, including the sufficiency or legitimacy of the reasons why the certifying bodies hold the opinions they do—*Doepel* at [80]; *Wakaman People #2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 at [32].

In accordance with s. 203BE(4), I am of the view that the certification provided at Attachment R must contain certain information and opinions. Section 203BE(4) is set out below:

> (4) A certification of an application for a determination of native title by a representative body must:
> (a) include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs (2)(a) and (b) have been met; and
> (b) briefly set out the body's reasons for being of that opinion; and
> (c) where applicable, briefly set out what the representative body has done to meet the requirements of subsection (3).

The requirements of ss. 203BE(2)(a) and (b) are:

> (2) A representative body must not certify under paragraph (1)(a) an application for a determination of native title unless it is of the opinion that:
> (a) all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it;
> (b) 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.

Satisfaction of s. 203BE(4)(a)

The certificate contains statements at paragraph 4 that the certifying body is of the opinion that the requirements of ss. 203BE(2)(a) and (b) have been met. I am thus satisfied that the certificate contains the information required by s. 203BE(4)(a).

Satisfaction of s. 203BE(4)(b)

The certificate at paragraph 5 sets out SANTS' reasons for being of the opinion that ss. 203BE(2)(a) and (b) have been met, as I summarise below.

Authorisation of the applicant—s. 203BE(2)(a)

- On 17 July 2011 at a community meeting in Rowland Flat, the group authorised the applicant to make the application and deal with matters arising in relation to it, in accordance with an agreed and adopted decision-making process.

All reasonable efforts made to describe/identify all persons in the native title claim group—s. 203BE(2)(b)

- SANTS has worked with the claim group for many years providing legal and anthropological assistance;
- SANTS directly and publically notified people who may hold native title in the region of the fact and purpose of the meeting. This occurred through detailed advertisements in local and regional newspapers, by sending copies of notices to relevant Aboriginal business and community organisations in the region and also by notifying individuals of the meeting and its purpose.

I am satisfied that the certificate briefly sets out the reasons as to why SANTS holds the opinion that the requirements of ss. 203BE(2)(a) and (b) have been met, such that I am satisfied that the requirements of s. 203BE(4)(b) are met.

Satisfaction of s. 203BE(4)(c)

While the certificate at paragraph 6 provides a statement that appears to relate to the requirements of this subsection, in my view, s. 203BE(4)(c) is not applicable in this case as the application does not overlap any other applications.

Conclusion

It is my view that SANTS is the only body that could provide the requisite certification, and that the certification satisfies the requirements of s. 203BE(4). The condition in s. 190C(4) is 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.

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

When considering this condition, I am confined to the information in the application—*Doepel* at [122].

Schedule B refers to Attachment B which is a written description of the external boundary of the application area. The external boundary is described by metes and bounds referencing abutting application areas, the boundary of the Barrier Highway, land parcels (pastoral leases) and coordinate points. The description specifically excludes from the application area, areas covered by five other referenced applications and was prepared by the Tribunal's Geospatial Services unit (Geospatial Services) on 21 July 2011.

Schedule B also contains information about general areas not covered by the application.

Schedule C refers to Attachment C which is a copy of a colour map, titled 'Ngadjuri #2'. The map was prepared by Geospatial Services on 30 June 2011 and includes:

- the application area depicted by bold blue outline against a topographic map image background;
- abutting applications labelled and coloured in accordance with the map legend;
- non-freehold tenure coloured in accordance with the map legend with selected pastoral lease names labelled;
- scale bar, north point, coordinate grid referencing GDA94 datum; and
- notes relating to the source, currency and datum of data used to prepare the map.

I have had regard to all of this information as well as the geospatial assessment on the application area. I note that this assessment found that the description and map are consistent and identify the application area with reasonable certainty. I have come to the same view, that the information and map are consistent and sufficiently identify the application area such that I am able to locate the area covered by the application on the Earth's surface.

Accordingly, I am satisfied that the application meets the requirements 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.

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

Mansfield J stated in *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. Section 190B(3) has two alternatives. Either the persons in the native title claim group are named in the application: subs 3(a). Or they are described sufficiently clearly so it can be ascertained whether any particular person is in that group: subs (3)(b). Although subs (3)(b) does not expressly refer to the application itself, as a matter of construction, particularly having regard to subs (3)(a), it is intended to do so—at [51].

It follows that the focus of s. 190B(3) is not 'upon the correctness of the description of the native title claim group, but upon its adequacy so that the members [sic] of any particular person in the identified native title claim group can be ascertained'—*Doepel* at [37].

In accordance with *Doepel*, I have confined my consideration to the information contained in the application—at [16].

Schedule A contains this description of the native title claim group:

> The individuals who comprise the Ngadjuri Nation #2 native title claim group are the biological descendants of the following apical ancestors:
>
> (1) Fanny Winnininnie, who was born at Winnininnie and her spouse Gudjari;
> (2) Richard (Dick) Warrior;
> (3) The un-named mother of Ned Edwards;
> (4) The un-named mother of the Armstrong siblings;
> (5) The un-named mother of Alice Morris;
> (6) The un-named mother of William John Miller and Amelia Miller;
> (7) Eliza McGrath, antecedent of the McGrath family.
>
> Refer to "Attachment A"

Attachment A contains a lengthy description and thus I have not reproduced it here. The description provides information relating to each of the above listed ancestors, including birth and death dates/periods during which they were born/died, where they were born/died, details about their children and grandchildren and family names associated with the ancestors.

As the application does not name the persons in the native title claim group, I must be satisfied that the requirements of s. 190B(3)(b) are met.

In *Ward v Registrar, National Native Title Tribunal* [1999] FCA 1732, Carr J stated that the test at s. 190B(3)(b) is whether the group is described sufficiently clearly so that it can be ascertained whether any particular person is in the group, i.e. by a set of rules or principles. However, this does not necessarily mean that any formula will be sufficient to meet the requirements of s. 190B(3)(b). It is for the Registrar to determine whether or not the description is sufficiently clear and the matter is largely one of degree with a substantial factual element—at [25] to [27].

In accordance with the 'rule' of the description at Schedule A, I understand that membership of the claim group comprises persons who are the biological descendants of any of the identified apical ancestors in Schedule A.

In my view, the description provides clear, external point of references for applying the rule. Each of the listed apical ancestors in Schedule A is identified by their name or children's name(s), as well as the identification of a named couple and the location of where one ancestor as born. The information at Attachment A also provides further relevant details to assist an inquiry into whether a person is a biological descendant of any of the identified apical ancestors.

The point that a factual inquiry may be required does not mean that the claim group has not been sufficiently described. I refer to the following observation by Carr J in *Western Australia v Native Title Registrar* [1999] FCA 1591 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. It is more likely to result from the effects of the passage of time and the movement of people from one place to another. The Act is clearly remedial in character and should be construed beneficially—at [67].

Accordingly, it is my view that with the assistance of further factual inquiry, the application provides sufficient details such that it would be possible to ascertain whether any particular person meets the 'rule' or criterion for membership of the group. In my view, the requirements of subparagraph 190B(3)(b) are satisfied such that the condition in s. 190B(3) is met.

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.

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

The test at s. 190B(4) is whether the claimed native title rights and interests are clear, easy to understand and have meaning—*Doepel* at [91], [92], [95], [98] to [101] and [123].

Schedule E provides this description of the claimed native title rights and interests:

(1) Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where section 23B and/or sections 47, 47A or 47B apply) members of the native title claim group claim the right to possess, occupy, use and enjoy the lands and waters covered by the application (the application area) as against the whole world, pursuant to their traditional laws and customs.

(2) Over areas where a claim to exclusive possession cannot be recognised, the nature and extent of the native title rights and interests claimed in relation to the application area are the non-exclusive rights to use and enjoy the land and waters in accordance with traditional laws and customs being:
   (a) the right to access and move about the Determination Area;
   (b) the right to hunt and fish on the land and waters of the Determination Area;
   (c) the right to gather and use the natural resources of the Determination Area such as food, medicinal plants, wild tobacco, timber, resin, ochre and feathers;
   (d) the right to share and exchange the subsistence and other traditional resources of the Determination Area;

(e) the right to use and trade the natural resources of the Determination Area;
(f) the right to live, to camp and, for the purpose of exercising the native title rights and interests, to erect shelters on the Determination Area;
(g) the right to cook on the Determination Area and to light fires for domestic purposes but not for the clearance of vegetation;
(h) the right to engage and participate in cultural activities on the Determination Area;
(i) the right to conduct ceremonies and hold meetings on the Determination Area;
(j) the right to teach on the Determination Area the physical and spiritual attributes of locations and sites within the Determination Area;
(k) the right to visit, maintain and protect sites and places of cultural and religious significance to Native Title Holders under their traditional laws and customs on the Determination Area; and
(l) the right to be accompanied on the Determination Area by those people who, though non native title holders, are:
  (i) spouses of native title holders; or
  (ii) people required by traditional law and custom for the performance of ceremonies or cultural activities on the Determination Area; or
  (iii) people who have rights in relation to the Determination Area according to the traditional laws and customs acknowledged by native title holders; or
  (iv) people required by native title holders to assist in, observe, or record traditional activities on the Determination Area.

(3) The rights described in paragraphs 2(b), (c), (d) and (e) are traditional rights exercised in order to satisfy personal, domestic or communal needs.
(4) The native title rights and interests are subject to:
  (a) the valid laws of the State of South Australia and the Commonwealth of Australia; and
  (b) the rights (past or present) conferred upon those persons pursuant to the laws of the Commonwealth and the laws of the State of South Australia;
  (c) the traditional laws and customs of the native title claim group.

In my view, the description contained in the application of the claimed native title rights and interests is clear and understandable. I am satisfied that the description is sufficient to allow the native title rights and interests claimed to be readily identified. The condition in s. 190B(4) is met.

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.

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).

I have considered each of the three assertions set out in the three paragraphs of s. 190B(5) in turn before reaching this decision.

In *Doepel*, Mansfield J stated that:

> Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the 'factual basis on which it is asserted' that the claimed native title rights and interests exist 'is sufficient to support the assertion.' That requires the Registrar to address the quality of the asserted factual basis for those 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. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not 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–at [17].

This approach to s. 190B(5) was approved by the Full Court in *Gudjala # 2 v Native Title Registrar* [2008] FCAFC 157 *(Gudjala FC)* at [83]. I also note the following comments by the Full Court in *Gudjala FC*, in relation to s. 190B(5):

> ...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 are 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. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim—at [92].

It is clearly not my function to adjudicate whether native title exists in relation to the application area or to require evidence from the native title claim group that 'proves directly or by inference the facts necessary to establish the claim'—*Gudjala FC* at [92].

I note that while the Full Court in *Gudjala FC* defined the general nature of the task and outlined the fundamental principles applicable to the test under s. 190B(5)—at [82] to [85] and [90] to [96], the decisions of Dowsett J in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007)* and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*) are also relevant to my consideration.

These two decisions discussed in detail each of the elements of the test at s. 190B(5)(a) to (c). In my view, the Full Court in *Gudjala FC* did not criticise the approach that Dowsett J took in relation to these elements in *Gudjala 2007*, including his assessment of what was required within the factual basis to support each of the assertions at s. 190B(5)—*Gudjala FC* at [90] to [96]. It is my view that Dowsett J took a consonant approach in *Gudjala 2009*.

Information considered

I have considered the following information from the application which in my view, relates to this condition:

- Schedule A and Attachment A—description of the native title claim group;
- Attachment F and Attachments F1 to F8—a general description of the factual basis; and

- the accompanying s. 62(1)(a) affidavits in which each of the persons comprising the applicant swears to the truth of all the statements made in the application.

I have also had regard to the additional information provided by the applicant to the Registrar on 22 November 2011 that comprised:

- an additional Attachment F that includes references to other parts of the additional information (draft statements) provided; and
- Attachments T1 to T10—10 draft statements made by members of the claim group.

I turn now to my consideration of each assertion set out in the three paragraphs of s. 190B(5).

Reasons for s. 190B(5)(a)

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(a).

I understand from comments by Dowsett J in *Gudjala 2007* that a sufficient factual basis for this assertion 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;
- there has been an association between the predecessors of the whole group over the period since sovereignty—at [52].

This analysis of what the factual basis materials must support was not criticised by the Full Court in *Gudjala FC*—see [69] and also at [96].

In my view, there is sufficient information before me that provides support for the applicant's assertion under subparagraph 190B(5)(a). I discuss below some key examples:

Attachment A to the application

Attachment A contains further detail in relation to each of the apical ancestors of the native title claim group that are listed in Schedule A. This information places the birth of each of the identified apical ancestors and/or their children, either:

- inside the application area;
- immediately outside the external boundary of the application area;
- outside the application area but inside the area claimed by the group's other application that abuts this application, SC10/2—Ngadjuri Nation—SAD147/10 (Ngadjuri Nation #1); or
- otherwise at nearby locations which while do not comprise the application area, are asserted elsewhere in the materials available as country traditionally belonging to the claim group.

The relevant details relating to birth localities of the apical ancestors and/or their children include birth years that occurred before or around/shortly after the time that South Australia was settled by Europeans; taking into account that South Australia was officially settled from 1836 (I discuss this further below).

The additional Attachment F submitted by the applicant to the Registrar (the additional Attachment F)

I note that the additional Attachment F only differs from the Attachment F filed together with the application by way of the inclusion of references to information contained elsewhere in the

additional information. These references relate to some examples of the exercise of the native title rights and interests claimed in the application, that appear within the draft statements by claim group members at Attachments T1 to T10. Thus, I only reference hereon in these reasons the additional Attachment F as it also contains all the information provided in Attachment F to the application.

The attachment provides historical/ethnographic details such as by **[Anthropologist 1 – name deleted]**, an anthropologist who is stated as having recorded the following further information relating to these two apical ancestors:

[Ancestor 1 – name deleted], born in 1825, is a prime ancestor for many claim group members and was buried at Orroroo. In Attachment C (map of the application area), Orroroo appears to sit on/partly on the northwest corner of the application area's boundary that is shared with the southwest corner of the Ngadjuri Nation #1 application area boundary. It is stated that **[Ancestor 1 – name deleted],** was in possession of country around Winnininnie and possibly Minburra prior to the time of European settlement in South Australia and that it would be 'reasonable to assume that her predecessors were also owners of that country prior to the arrival of Europeans in 1788'. **[Ancestor 1 – name deleted],** daughter, **[Ancestor 2 – name deleted]**, was born in 1845 either at Winnininnie Station or Yongala Station near Jamestown and Terowie and was buried at Yunta—the additional Attachment F at [2.3] and [2.4].

The unnamed mother of **[Ancestor 3 – name deleted]** was a Ngadjuri woman who born around 1820 and was in possession of country around Gladstone (around 30 kilometres west of the application area) prior to European settlement in the state. **[Ancestor 3 – name deleted]** was born around 1840 and was buried at Orroroo—the additional Attachment F at [2.5].

Some further historical and ethnographic accounts identify the Ngadjuri by a variety of tribal names and link the asserted group's predecessors to areas within the application area/its immediate surrounds. I discuss these statements in my consideration of the material below.

Attachments T9 and T10 submitted by the applicant to the Registrar

In my view, there is sufficient information to support the assertion in s. 190B(5)(a), contained in the draft statements by claim group members provided at Attachments T1 to T10. As all the relevant material is too abundant to reproduce here, I reference below some key examples.

The draft statement of **[Claimant 1 – name deleted]** provides information about him being born and raised on Ngadjuri country and being brought up knowing who 'the grandfathers were' and the boundaries of their country. Throughout his draft statement, **[Claimant 1 – name deleted]** describes his lifelong relationship with his country, recounting stories which are linked to significant sites on country about law and country and creation of country that were passed down to him—Attachment T9.

The draft statement of **[Claimant 2 – name deleted]** also gives details in relation to how he grew up learning from older family members about what areas his ancestors came from. **[Claimant 2 – name deleted]** talks about he and his family members travelled all over country, including naming places across the application area. **[Claimant 2 – name deleted]** describes how he uses and camps on country and how he actively looks after it by maintaining important sites. He continues to pass on the information he was taught by his uncles, to his son, nephews and

grandchildren about Ngadjuri 'business' in relation to country in general and special places located in the application area—Attachment T10.

I discuss the information from **[Claimant 1 – name deleted]** and **[Claimant 2 – name deleted]** further in my consideration of that material below.

My consideration

I note that South Australia became a legal entity on 19 February 1836. Thus, I understand from the information provided in Attachment A that each of the apical ancestors was, or very likely was, associated with the application area before, or around the time it was settled by Europeans.

I note that my reference to 'very likely' above takes into account:

- three of the eight identified ancestors (Gudjari, the unnamed mother of **[Ancestor 4 – name deleted]** and the unnamed mother of **[Ancestor 5 – name deleted]** and **[Ancestor 6 – name deleted]**) in relation to which only their children's and/or spouse's birthplaces/dates are provided in Attachment A; and
- that some births referenced in Attachment A occurred after 1836 and/or in localities that are outside the application area, albeit not far away and that are asserted to traditionally belong to the claim group (I discuss this further below).

For example, apical ancestor, **[Ancestor 7 – name deleted]** is described as being **[Ancestor 8 – name deleted]** father. **[Ancestor 8 – name deleted]** was born about 1880 at Spring Creek (near Melrose). This is the latest referenced birth date after 1836, but, in my view, I am able to infer from the information that it is possible his father, **[Ancestor 7 – name deleted]**, lived around the time that Europeans first settled the area. Melrose is also a location that I can see clearly from the map at Attachment C is situated about 40 kilometres west of the north-western border of the application area. Similarly, another apical ancestor, **[Ancestor 9 – name deleted]**, is said to be born around 1850. **[Ancestor 9 – name deleted]** had a son who was born around 1869 at Port Germain (Germein) which is situated about 50 kilometres west of the north-western border of the application area. I note that many areas west of the application area are referenced throughout the information available as being traditionally Ngadjuri country.

Notwithstanding some of the information at Attachment A, it otherwise also contains details that, in my view, link other identified apical ancestors to the application area around the time it was settled by Europeans. For instance, **[Ancestor 1 – name deleted],** who was born around 1825 at Winnininnie (a locality in the Ngadjuri Nation #1 application area but which is situated only about 5 kilometres from its shared border with the application before me), and the unnamed mother of the **[Ancestor 10 – name deleted]** who was born around 1840 in Canowie (that is located in the application area).

The information otherwise referenced in Attachment A identifies the apical ancestors with details that I consider either link them directly to the application area or to localities not far from the area; noting again, that information given elsewhere in the available material states that the group's traditional country stretches beyond what is claimed in the application.

Accordingly, I am of the view that the information in Attachment A gives details which support an association by predecessors of the claim group with the application area, before or around the time of European settlement in the area.

The additional Attachment F provides historical and ethnographic details that place Ngadjuri people in the application area since settlement in the area. Various records and accounts, such as by naturalists and anthropologists, state that Ngadjuri people (sometimes referenced by alternative tribal names) occupied and used certain areas. These records include details about Ngadjuri tribal boundaries and territories, as well as linking Ngadjuri language to the naming of towns located within Ngadjuri traditional territory.

The localities named in these records and accounts are places that I can see comprise the application area/its nearby surrounds, being 'the vast scrub country to the north-west of [the bend] of the Murray' [river], Canowie, Peterborough, 'the plains and open valleys of our north-east [of Adelaide] district and extend from about Angaston ...', Booboorowie, Orroroo, Jamestown, Gawler, Port Pirie, Crystal Brook, Hambley (Hamley) Bridge, Mount Lofty ranges, Gladstone, Mannahill, Burra, Robertstown, Yunta and Riverton. The localities of Carrieton and Waukaringa are also referenced and are situated in the Ngadjuri Nation #1 application area—the additional Attachment F at [3.2] to [3.8].

The details recorded by **[Anthropologist 1 – name deleted]** and provided in the additional Attachment F (referenced above) regarding **[Ancestor 1 – name deleted]**, her daughter **[Ancestor 2 – name deleted]**, **[Ancestor 3 – name deleted]** and his unnamed mother, in my view, link these specific early ancestors of the claim group to the application area/its immediate surrounds before and during the time of European settlement in the area.

The various records from the additional Attachment F make reference to Ngadjuri people as a whole entity, with regard to their traditional territory and tribal boundaries. As these records refer to or are dated over a period prior to South Australia being settled and up to 1940 (1820, 1825, 1840, 1845, 1847, 1874, 1886, 1889, 1931, 1937 and 1940), in my view, this supports the assertion that there has been an association between the predecessors of the whole group with the application area over the period since sovereignty (or at least, the time of European settlement)—*Gudjala 2007* at [52].

I note that the details provided in the draft statements by **[Claimant 1 – name deleted]** and **[Claimant 2 – name deleted]** (Attachments T9 and T10) contain information which supports the claim group and its predecessors' association with the application area in more recent times. For example, where the information provided in Attachment A and the additional Attachment F contains details to support the claim group's predecessors' association with country from settlement until around the 1940s, the draft statements are made by persons born in 1954 and 1965. Both statements give details relating to an association with country that has been passed down generationally to them by their elders. As such, I am able to infer that this type of information supports an association with the area from at least around the 1940s (if not earlier) to the present.

[Claimant 1 – name deleted] explains that he was born in 1965 in Hamley Bridge, which he was told by his mother, a Ngadjuri person, is in Ngadjuri country. He was brought up knowing what the Ngadjuri boundary was and about **[Ancestor 11 – name deleted]** and that it was 'all of his country'. **[Claimant 1 – name deleted]** recounts how he was taught about the many stories handed down to his mother by **[Ancestor 11 – name deleted]** (grandson of apical ancestor, **[Ancestor 1 – name deleted]**—see Attachment A at [2]). **[Claimant 1 – name deleted]** states that, '[t]he old GFs [Grandfathers] kept them [the mother of **[Claimant 1 – name deleted]**] and his

aunt, **[Ancestor 12 – name deleted]**] close to them. Growing up those two old men handed down a lot of stories to them those stories were connected to the country'—Attachment T9 at p. 70.

[Claimant 1 – name deleted] describes how, when he was younger, he went with his mother and aunt (**[Ancestor 12 – name deleted]**) to visit country and learn about law, culture and stories connecting them to country and was taught how they must look after the country. As an adult himself, **[Claimant 1 – name deleted]** takes young children camping on country to teach them the significance of the area. **[Claimant 1 – name deleted]** talks about the handing down of information about connection to country and the importance of this so that country continues to be looked after:

> … We are passing those stories on from word of mouth. Law stories … They are only meant to be told by word of mouth. Up to the next generation. Up to us to pick people … Strong enough in the mind to handle the stories … you got [sic] go back to the area and reinforce it before you go back to the next area. I have been to Yunta to do this. Into … Burra and Orroroo. Even those places where those old ladies took us but towns aren't there anymore. Like Faraway Hills area. I have talked to those young fellas about the stories for those places. I run a tourism business now to get money to look after sites on my country—Attachment T9 at pp. 71 to 72.

[Claimant 1 – name deleted] recounts various creation stories such as the 'eaglehawk and crow' story, a Ngadjuri story which **[Ancestor 11 – name deleted]** told his mother and aunt **[Ancestor 12 – name deleted]**, and which they passed down to him. The story is connected to special sites on country. Such creation stories bind the claim group to their country, including dreaming stories that translate into present day law and custom which direct people's association with country. **[Claimant 1 – name deleted]** describes how he feels responsible for country 'those old ladies left me those songs and stories [sic] I need to go there and heal the country and sing for country'—Attachment T9 at pp. 73 to 74.

In my view, the information given by **[Claimant 1 – name deleted]** supports his ongoing association with country, in accordance with his traditional laws and customs, and demonstrates how significant this relationship with country is to him and other members of the claim group. For instance, he states:

> To us the stories and those line [sic] how they travel all the country is special. That connection is our life. All those things have law. All have law to look after one another. It is about travelling country and keeping the spirit alive … It is only if you know those stories that you will see that—Attachment T9 at p. 74.

In my view, the information from **[Claimant 1 – name deleted]** provides support for the claim group and its predecessors' association with the application area. Many places are named throughout **[Claimant 1 – name deleted]** draft statement, which link him and his family to the application area. I note that there is also mention of localities that do not comprise the application area—I discuss this further below.

Similarly, I am of the view that the draft statement by **[Claimant 2 – name deleted]** (born in 1954) gives details which support an association with the application area. In summary, **[Claimant 2 – name deleted]** talks about travelling across country, including to the application area's far northeast, to Olary. He describes an ongoing association with country that he continues presently, by looking after country, relocating and managing/protecting special sites and through survey

work. **[Claimant 2 – name deleted]** references a range of localities that stretch across the application area, and explains that he was told by his 'people' that it was his country. As I have referenced above, **[Claimant 2 – name deleted]** explains how he uses country and teaches the younger generation the laws and customs of the claim group in relation to country that he himself was taught by his elders—Attachment T10 at [1] and [9] to [29].

As there are many places referenced in the available materials which I can identify as being located in the application area/its immediate surrounds, and, as I consider that such details are in relation to the claim group/their predecessors' association with their country, my view is that there is sufficient information to support the particular assertion in this subcondition. When I consider the range of factual materials available, I am able to identify the claim group's area of country, and can see that their association with the area stretches across the application area.

In considering all the available information, I am able to sufficiently build up a picture over time, linking the present day claim group members and their predecessors to the area claimed since it was first settled by Europeans. In my view, there is sufficient information to support the applicant's assertion under s. 190B(5)(a).

Reasons for s. 190B(5)(b)

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(b).

This subsection requires that I be satisfied that the material before me provides a sufficient factual basis for the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group and that these give rise to the claimed native title rights and interests.

In *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (*Yorta Yorta*) the High Court discussed the meaning of the term 'traditional' in the context of s. 223(1), which defines 'native title or native title rights and interests' to mean:

> ... the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
> (a) the rights and interests are possessed under the traditional laws acknowledged and the traditional customs observed by the Aboriginal peoples or Torres Strait Islanders ...

Yorta Yorta defines 'traditional' in the context of the phrase 'traditional laws and customs'. That is:

> A traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. But in the context of the *Native Title Act*, "traditional" carries with it two other elements in its meaning. First, it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are "traditional" laws and customs ... the reference to rights or interests in land or waters being possessed under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty ...– at [46] to [47].

Further, the High Court stated that:

> … "traditional" does not mean only that which is transferred by word of mouth from generation to generation, it reflects the fundamental nature of the native title rights and interests with which the Act deals as rights and interests rooted in pre-sovereignty traditional laws and customs—at [79].

In *Gudjala 2007,* Dowsett J characterised the requisite asserted facts to be provided in support of the assertion in s. 190B(5)(b) along the following lines:

- that the laws and customs currently observed must have their source in a pre–sovereignty society and have been observed since that time by a continuing society—at [63];
- that there existed at the time of European settlement a society of people living according to a system of identifiable laws and customs, having a normative content—at [65], [66] and [81];
- there is explanation of the link between the claim group described in the application and the area covered by the application, a process which may involve, in the case of a claim group defined using an apical ancestry model, 'identifying some link between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage'—at [66] and [81].

My understanding, in light of the statements from *Yorta Yorta*, is that the factual basis for s. 190B(5)(b) must include a description of how the laws and customs of the claim group are rooted in the laws and customs of a society that existed before the assertion of British sovereignty (or at least during settlement) in the application area. This approach appears to be supported by comments of the Full Court in *Gudjala FC* at [96].

The information in the additional Attachment F provides an overview of the claim group's traditional laws and customs, including setting out certain aspects of those laws and customs as they pertain specifically to Ngadjuri people. Some of this information has already been referenced in relation to s. 190B(5)(a), and the following information, in summary, is also provided in support of the requirements at s. 190B(5)(b):

The additional Attachment F

The Ngadjuri people are a distinct and identifiable society that also shares common kinship, social organisation and ritual practice with other groups in the region. Some characteristics of the shared laws and customs in the cultural region are the possession of matrilineal moiety divisions, patrilineal ceremonial totemism, a mythological tradition in which the heroes are called [traditional name] and the [traditional name] rite as the highest stage of initiation. This information was recorded by an anthropologist in the 1930s. Further details by that anthropologist are also given in relation to other shared laws and customs in the relevant region, including the inheritance of a totemic name and area of country with which the totem or 'ancestral hero' was associated, and a mythology that related to that ancestral hero's travels. There were also laws in place to protect and ensure the reproduction of various species of flora and fauna, and, particular ceremonies were also inherited that related to the survival of the species concerned—the additional Attachment F at [4.1] to [4.4].

Further information by another anthropologist is also contained in the additional Attachment F. These details relate to how members of the claim group today, in accordance with their specific laws and customs, acquire rights to particular country. The principle of descent still remains and is a reference point for the laws and customs of the group's normative society—for example, with

regard to kin-group identity and as a means of identification/association with specific localities or regions of country—the additional Attachment F at [4.4].

The applicant asserts that the claim group 'share traditional laws and customs pursuant to which they possess rights and interest in the application area by reason of their descent from ancestors connected with the area', by possessing knowledge of the area, having a parent or grandparent with a connection to the application, having knowledge and information passed down generationally and observing specific rules that govern access to certain locations in the application area. Some details pertaining to other laws and customs specific to the claim group are:

- a traditional system of communal title to country through connection with certain ancestral beings and stories; and
- recognition of a claim group member's connection to a particular area through their birth place and/or through their parent/grandparent's birth place on the application area—the additional Attachment F at [5.1] and [5.2].

Attachments T2 and T7 to T9 submitted by the applicant to the Registrar

The information given in the draft statements by claim group members at Attachments T1 to T10 provides more particularised details about the group's system of laws and customs. Such details further expound on the anthropological and historical information from the additional Attachment F. I refer to these summarised examples below of information that, in my view, supports the assertion under subparagraph s. 190B(5)(b).

Attachment T2

[Claimant 3 – name deleted] states in her draft statement that she is a Ngadjuri person through her grandfather **[Ancestor 11 – name deleted]** (the grandson of apical ancestor, **[Ancestor 1 – name deleted]**). **[Claimant 1 – name deleted]** talks about how her grandfather **[Ancestor 11 – name deleted]** would often tell stories to the children when she was young. **[Claimant 3 – name deleted]** states she is also Ngadjuri through her father, and that being a Ngadjuri person is different to being a member of another group because 'there is a different spirit on the country'. **[Claimant 3 – name deleted]** explains that being born on country is important but it only means something if you have Ngadjuri ancestors—Attachment T2.

Attachment T7

The draft statement by **[Claimant 5 – name deleted]**, born in 1948, contains details pertaining to certain laws and customs of the claim group that were handed down to her by her aunties. These include being told by her aunt **[Ancestor 13 – name deleted]** that her grandfather, **[Ancestor 11 – name deleted]**, was born in a particular creek next to a 300 year old gum tree. As such, that became his country and he travelled around a lot in that country. **[Claimant 5 – name deleted]**, recounts being told that her grandfather would tell her aunties why certain places on their country were significant. There are some sites that are significant women's sites including ones that cannot be spoken about.

[Claimant 5 – name deleted] talks about the laws and customs that must be acknowledged by claim group members and outsiders when entering Ngadjuri country. People travelling on to

country must advise the elders that they are doing so and explain what they are doing there. At the same time, while **[Claimant 5 – name deleted]** knows that it would be disrespectful to enter another group's country without their permission, she does not need to ask for the right to enter her own country—Attachment T7 at pp. 64 to 65.

However, she cannot visit certain places:

> I can go pretty much anywhere on the claim area but not to places that are special men's places. Every time I go onto country I am mindful where I go. There are men's places on the claim area and I have felt I shouldn't go to places and have known to stay back. This is a known thing that you feel straight away when you are close, you it and turn back.
>
> To go to these places you need to speak to a Ngadjuri man. This is the protocol. Same thing for men travelling to women's places—Attachment T7 at p. 65.

It is explained that such rules are based on respect for the ancestors of the claim group and the requirement that they must be acknowledged: '[t]he ancestors' spirits are still in the country and sometimes our spirits can infect [sic] and be in our life'. **[Claimant 5 – name deleted]** states that she believes people who don't request the appropriate permission to enter country and 'do the wrong things', will suffer the spirits taking revenge on them and 'bad things will happen'.

The draft statement also gives details about laws and customs relating to the claim group's kinship system. **[Claimant 5 – name deleted]** states that her aunties knew that their kinship system provided the rules for marriage and a process which directed them to marry/not marry certain people:

> They [**[Claimant 5 – name deleted]**'s aunties] knew all of this and we were told who we could and who we couldn't marry.
>
> I know about this and my line and who my kids can marry. The rule is that you have to marry outside your linkage ... It's just something you know, which relations are too close or which ones are far away enough to marry. This is important that each generation knows all of this—Attachment T7 at p. 65.

Attachment T8

This attachment provides statements taken from draft interviews conducted with claim group members in October 2012. **[Claimant 1 – name deleted]** states that once they 'have' (are given the authority/responsibility for holding) a particular story, it is up to them to pass on those stories to their sons. These stories are connected to their country. Members of the claim group will do ceremony at certain times of the year 'with the moon' and they will visit and sing for country. **[Claimant 1 – name deleted]** explains that he cannot pass the stories on to 'the young fellas' until they are ready. However, they travel over country with the younger people and must teach them about their connection to country as 'those old ladies' were told they had to by **[Ancestor 11 – name deleted]**. I infer that the women elders they refer to in turn handed down this instruction to **[Claimant 1 – name deleted]** and his kin.

[Claimant 2 – name deleted] describes dreaming stories, including what country the stories relate to/the direction that they travel. **[Claimant 2 – name deleted]** states that '[y]ou have to be particular about who you are going to hand these stories over to. Sickness can occur on you. Land is sacred in that form'. This information was passed down to **[Claimant 2 – name deleted]** by his

grandmother, uncles and other elders. **[Claimant 2 – name deleted]** recounts being told in Clare (in the application area) by his uncles about particular stories that they were 'frightened' to pass down. Such stories related to country boundaries and that one group could not cross into another's territory without permission. It appears to be implied that the ancestors of the claim group feared that not abiding by these rules would invoke the ghost people.

[Claimant 1 – name deleted] also talks about a system where the 'old ladies got the stories and ... passed them on to the head person in each family'. Regarding the relationship between a person's totem, their particular country and ceremony, **[Claimant 1 – name deleted]** describes that a man would be laid down and the details of his animal totem would be drawn on the man with ochre. 'White one for skeletal area, yellow one here and another one for intestines.' There are songlines and dances for specific areas and **[Claimant 1 – name deleted]** knows what the relevant ones are for a particular area. It would seem that this is entrenched in the group's system of law, '[y]ou talk about law. Animal has law. Person has law. You gotta look after one another and look after country.' **[Claimant 1 – name deleted]** states that he and other elders have a story for a particular special place where the 'snake came in but cant [sic] see where he came out. Need to close your eyes and run your hands over it. The snake is stuck in there'—Attachment T8 at p. 66 to 69.

Attachment T9

[Claimant 1 – name deleted] in his draft statement at this attachment provides details about marriage rules that were passed to him and that he passed down in turn to his children. **[Claimant 1 – name deleted]** describes how he married a woman 'old fella way', in the right way that coupled a northern person with a southern person. It is stated that there is law about everything on country and how the landscape relates to dreaming stories. **[Claimant 1 – name deleted]** explains how he took young children camping on country to teach them about sites significant to the claim group. For instance, he taught them about the importance of Orroroo where their grandfather (**[Ancestor 11 – name deleted]**) was born, as other claim group members have also referenced in their draft statements. It is described why it is important to acknowledge their ancestors'/elders' birthplaces. For instance, **[Ancestor 11 – name deleted]** being born at the creekbed near the big tree means that the area was his country and in turn that gives rights to his descendants to the same country. Where grandfather **[Ancestor 11 – name deleted]** was born is where his afterbirth lies and that is what gives **[Ancestor 11 – name deleted]** descendants their connection to the area. **[Claimant 1 – name deleted]** explains that this is the same principle of connection that his mother told him about regarding **[Ancestor 11 – name deleted]** mother and where her afterbirth lies—Attachment T9 at pp. 70 and 71.

In a statement similar to the assertions made in the draft statements by other claim group members at Attachments T1 to T10, **[Claimant 1 – name deleted]** makes clear how information describing the group's laws and customs, such as by way of stories, is handed down through generations of the group:

> We are passing down those stories on from word of mouth. Law stories. People ask me why I don't write those stories down. I said the same thing to my mothers. They would say it has been handed down this way [sic] we are handing them down to you ... They are only meant to be told by word of mouth. Up to the next generation. Up to us to pick people—Attachment T9 at p. 72.

[Claimant 1 – name deleted] states that these stories were handed down to them from **[Ancestors 12 and 13 – names deleted]** (his aunts), who themselves were handed down the stories from **[Ancestor 11 – name deleted]**. I note that I have already referenced the 'eaglehawk and crow' story above in relation to s. 190B(5)(a), but the story as described in its entirety by **[Claimant 1 – name deleted]** in his draft statement is also relevant in supporting the assertion under this subcondition. It would appear from the manner in which **[Claimant 1 – name deleted]** tells the stories that this story and other stories recounted by **[Claimant 1 – name deleted]**, describe creation stories that contain the basis for certain rules. It is these rules which direct how the claim group today still relate to country, with each other and to other groups— see Attachment T9 at pp. 72 to 74.

For example:

> ... Ngadjuri taught [name of other group] to make those round nets to put in the water to catch fish. [Name of other group] wasn't allowed out [sic] flat lands. They don't have knowledge of that country. When the snake came back out again in the ranges. When they had the fight with the lizard. Story for both countries. I won't talk in language to you about it. Have language going through my head when I am talking to you. Lizard attacked the snake for coming into country without permission. Came into [alternative name of other group] people's country. The lake at ... is where the snake settled before he came into the hummocks. Lizard watched him coming and then had a big fight for the longest time. Cos [sic] the fight went on for a long time all the lizards and snake people hid in all of the crevices cos [sic] they shook the ground. Went right down to [names of five different localities] all the way back to Adelaide. And then back up again. At Gawler too ... They upset the old people.
>
> ...
>
> Where you see the stars in the sky that are connect [sic] to land formations. There is [sic] carvings on rocks that is [sic] not the shape of star or cross but it explains how we follow stars from northern country to southern country. The emu story involves the stars. Chased by [traditional name] the dog. That is a Ngadjuri story for us got [sic] chased around that northern area of our country—see Attachment T9 at p. 74.

I note that, I have also in my reasons at s. 190B(5)(a), referenced another part of **[Claimant 1 – name deleted]** draft statement that relates to this subcondition. **[Claimant 1 – name deleted]** talks about how the stories and their lines and how 'they travel the country' is special. That connection is their life and everything has law. 'It is only if you know those stories that you will see that. The spirit is still in that country'—Attachment T9 at p. 74.

Lastly, **[Claimant 1 – name deleted]** provides some details relating to the significance of totems to the claim group, and demonstrates that this aspect of their laws and customs has also been handed down generationally. **[Ancestor 11 – name deleted]** had the rat totem. **[Ancestor 14 – name deleted]** had the bony brim one. Those girls [**[Claimant 1 – name deleted]** aunties who where **[Ancestor 11 – name deleted]** and **[Ancestor 14 – name deleted]** grandchildren] would have inherited those totems ... They took those totems and passed that on to us and who we could marry. Fish totem cannot marry a bird totem … when I am in Ngadjuri country my totem is the rat.' It is explained that you cannot eat the animal of your totem or marry a person with your same totem—see Attachment T9 at p. 75.

Attachment A to the application

I have also considered the information provided by this attachment which contains details about the apical ancestors of the native title claim group, as I have already discussed above.

My consideration

Based on all the material before me, I am of the view that there is sufficient information to support the claim group's assertion under s. 190B(5)(b).

In my view, the information contained in Attachment A and the additional Attachment F provides sufficient details in support of a normative society whose laws and customs tied them to the application area at the time of, and before European settlement in the area. Together with the information provided in the draft statements by claim group members, I am able to link the current day claim group to their pre-sovereign ancestors (or at least to their ancestors who lived around/just prior to settlement in the area).

For instance, many of the claim group members' draft statements give examples of laws and customs handed down to them via **[Ancestor 11 – name deleted]** who was born in 1873 at Orroroo (which borders the application area). **[Ancestor 11 – name deleted]** is described as the grandfather or great grandfather of living claim group members, and was the grandson of the apical ancestor, **[Ancestor 1 – name deleted]**, who was born around 1825. **[Ancestor 1 – name deleted]** is asserted to have been in possession of Winnininnie, an area inside the Ngadjuri Nation #1 application area and around five kilometres from the application area. Accordingly, when considering all the information before me, I understand that claim group members descended through this line (from **[Ancestor 1 – name deleted]**) are linked to an ancestor of the claim group who formed part of a society associated with the relevant area, and that existed in the area prior to South Australia becoming a legal entity in 1836.

As there is much information contained in the draft statements by claim group members that describes the generational handing down of information pertaining to the laws and customs of the group, there is sufficient detail, in my view, to support the assertion that the laws and customs of the present day group are rooted in the laws and customs belonging to a society that existed prior to European settlement in the area. For instance, some of the stories recounted in Attachments T1 to T10 describe creation stories and laws and customs related to ancestral/spiritual beings which are the basis for the system of rules still acknowledged and observed by the claim group today. Where such information is described to have been passed down through **[Ancestor 11 – name deleted]**, grandson of an apical ancestor who lived prior to settlement in the area, I consider that this information supports the assertion that the present laws and customs of the group are 'traditional' in the *Yorta Yorta* sense.

From the information available, I am able to infer that **[Ancestor 11 – name deleted]** himself would have been handed down the same information from his mother and grandmother, **[Ancestor 1 – name deleted]**, that he has passed on to his descendants. I note again **[Claimant 1 – name deleted]** statement about the principle of connection in relation to where your ancestors' afterbirth lies, which his mother told him about regarding **[Ancestor 11 – name deleted]** afterbirth, and that was the same in relation to **[Ancestor 11 – name deleted]** mother's afterbirth. That is, that the areas where these afterbirths 'lie' are rightfully the areas of country given to persons descended from **[Ancestor 11 – name deleted]** and his mother.

In my view, the information before me supports the assertion that the group's current laws and customs are rooted in the system of laws and customs, acknowledged and observed by a society that existed prior to settlement of the application area. Based on the available information, the laws and customs described pertain to a system that governed how the group's ancestors lived and their relationships with country, each other and with other groups. In my view, the details I have considered support the existence of a normative pre-sovereign society, including rules about how to marry (with regard to rules about coupling with the 'right' totem and to people from appropriate areas), entry to country (including into other groups' territories), responsibilities for looking after special sites and places, totemism and rights to country based on descent from ancestors associated with the area. To my mind, the material supports the notion that the group's laws stem from creation stories and story/song lines that relate to everything in their natural, social and spiritual worlds.

It would appear key in their system of laws and customs that the handing down of information must be done in the appropriate manner and that the right people must be identified to receive such information. I refer to the statements referenced above about elders considering that some young people were not ready yet to be given the authority to 'hold' particular special stories about country and that information would be passed on to the heads of families. I also refer to **[Claimant 2 – name deleted]**'s statement that '[y]ou have to be particular about who you are going to hand these stories over to. Sickness can occur on you. Land is sacred in that form' (Attachment 8 at p. 67). I note that an ongoing respect for deceased ancestors as well as ancestral/spirit beings also appears to be very important to the claim group and is a principle that has been generationally handed down to the current group.

In my view, what I am required to be satisfied of, is whether there is a sufficient factual basis to support that the claim group acknowledge and observe the laws and customs of their pre-sovereignty society. For the reasons above I am satisfied that this is the case such that s. 190B(5)(b) is met.

Reasons for s. 190B(5)(c)

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(c).

It is my view that the assertion in subparagraph (c) is also referrable to the second element of what is meant by the term 'traditional laws and customs' in *Yorta Yorta.* That is, that the native title claim group has continued to hold its native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way—*Yorta Yorta* at [47] and also at [87].

The decision in *Gudjala 2007* also 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 to the current claim group; and
- that there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement—at [82].

The Full Court in *Gudjala FC* at [96] appears to agree 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.

In my view, there is sufficient information before me which identifies that the society at the time of European settlement in the area was the Ngadjuri people and that the application area falls within the traditional territory of that society.

The information from the application and that submitted directly to the Registrar which I have referenced and discussed in my reasons above at ss. 190B(5)(a) and (b), provide many examples of how the claim group have continued to observe and acknowledge the traditional laws and customs of their society dating back, at least, to a time prior to settlement in the area.

I note that there are some references throughout the information that detail historical issues faced by (older) members of the claim group, such that some people avoided speaking in language or talking about traditional stories for fear of being taken away from their families (see, for example Attachment T7 at p. 64). However, there is also sufficient information available to support that notwithstanding this, a surviving society that observed and acknowledged the traditional laws and customs handed down to them, continued in a substantially uninterrupted way. For instance, where **[Claimant 5 – name deleted]** speaks of her mother being taken away such that she was unable to hand down information to her daughter, **[Claimant 5 – name deleted]** also explains that instead, she was taught about the claim group's system of laws and customs from her aunts and uncles—see also Attachment T7 at p. 64.

Accordingly, having regard to all of the available material, I am satisfied there is a sufficient factual basis for the assertion under subparagraph 190B(5)(c).

Conclusion

The condition in s. 190B(5) is **satisifed** because I consider that the factual basis is sufficient to support each of the three particular assertions in s. 190B(5), as set out in my reasons above.

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.

The application **satisfies** the condition of s. 190B(6). The claimed native title rights and interests that I consider that prima facie, can be established, are identified in my reasons below.

Registrar's task at section 190B(6)

I note the following comments by Mansfield J in *Doepel* in relation to the Registrar's consideration of the application at s. 190B(6):

> 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].

Following *Doepel*, it is my view that I must carefully examine the asserted factual basis provided for the assertion that the claimed native title rights and interests exist against each individual right and interest claimed in the application to determine if I consider, prima facie, that they:

- exist under traditional law and custom in relation to any of the land or waters under claim;
- are native title rights and interests *in relation to land or waters* (see chapeau to s. 223(1)); and
- have not been extinguished over the whole of the application area.

I elaborate below on these three points:

Right exists under traditional law and custom in relation to any of the land or waters under claim

It is my view that the definition of 'native title rights and interests' in s. 223(1) and relevant case law must guide my consideration of whether an individual right and interest can be established, prima facie. I refer to my discussion at s. 190B(5) above in relation to the authority provided by *Yorta Yorta* as to what it means for rights and interests to be possessed under the traditional laws acknowledged by, and the traditional customs observed by, the native title claim group.

It is not my role to resolve whether the asserted factual basis will be made out at trial. The task is to consider whether there is any probative factual material which supports the existence of each individual right and interest, noting that as long as some can be established, prima facie, the requirements of the section will be met. Only those rights and interests I consider can be established, prima facie, will be entered on the Register pursuant to s. 186(1)(g). An element of that task requires me to consider whether there is some material which supports the existence prima facie of the claimed rights and interests under the traditional laws and customs acknowledged by, and observed by, the native title claim group.

Right is a native title right and interest in relation to land or waters

It is my view that s. 190B(6) requires that I consider whether a claimed right can in fact amount to a 'native title right and interest' as defined in s. 223(1) and settled by case law, most notably *Western Australia v Ward* [2002] HCA 28 (*Ward HC*), that a 'native title right and interest' must be 'in relation to land or waters'. In my view, any rights that clearly fall outside the scope of the definition of 'native title rights and interests' in s. 223(1) cannot be established, prima facie.

Right has not been extinguished over the whole of the application area

I note there is now much settled law relating to extinguishment which, in my view, I do need to consider when examining each individual right. For example, if there is evidence that the application area is or was entirely covered by a pastoral lease, I could not (unless ss. 47–47B applies) consider exclusive rights and interests to be prima facie established, having regard to a number of definitive cases relating to the extinguishing effect of pastoral leases on exclusive native title, starting with *Ward HC.*

My consideration

With these principles in mind I will consider the native title rights and interests described in Schedule E. I note that I identify at the outset whether or not I consider that, prima facie, the claimed right or rights can be established. I have grouped together those rights where similar factual information is provided to support that they can be established, prima facie.

(1) Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where section 23B and/or sections 47, 47A or 47B apply) members of the native title claim group claim the right to possess, occupy, use and enjoy the lands and waters covered by the application (the application area) as against the whole world, pursuant to their traditional laws and customs.

Outcome: I consider this claimed right to be established, prima facie.

I use the term 'exclusive possession' when discussing this right, as the applicant has in Schedule E. *Ward HC* is authority that exclusive possession is potentially available to be established, prima facie, in relation to areas where there has been no prior extinguishment of native title or where extinguishment is to be disregarded under the provisions of the Act. I note that the applicant takes account of extinguishment issues by only claiming exclusive possession 'where it can be recognised', including where there has been no extinguishment or any extinguishment must be disregarded. *Ward HC* states that:

> [A] core concept of traditional law and custom [is] the right to be asked permission and to 'speak for country'. It is the rights under traditional law and custom to be asked permission and to 'speak for country' that are expressed in common law terms as a right to posses [sic], occupy, use and enjoy land to the exclusion of all others—at [88].

More recently, the Full Court in *Griffiths v Northern Territory* (2007) 243 ALR 7 (*Griffiths FC*) reviewed the case law about what was needed to prove the existence of exclusive native title in any given case and found that it was wrong for the trial judge to have approached the question of exclusivity with common law concepts of usufructuary or proprietary rights in mind:

> [T]he question whether the native title rights of a given native title claim group include the right to exclude others from the land the subject of their application does not depend upon any formal classification of such rights as usufructuary or proprietary. It depends rather on consideration of what the evidence discloses about their content under traditional law and custom. It is not a necessary condition of the existence of a right of exclusive use and occupation that the evidence discloses rights and interests that "rise significantly above the level of usufructuary rights"—at [71] (emphasis added).

Griffiths FC indicates at [127] that what is required to prove the exclusive rights is to show how, under traditional law and custom, being those laws and customs derived from a pre-sovereignty society and with a continued vitality since then, the group may 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'. The Full Court stressed at [127] that:

> [It is also] important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people.

I examined the information provided by the applicant in relation to the asserted factual basis for the claim in my reasons at s. 190B(5) and decided that a sufficient factual basis was provided for the assertion that the claimed native title rights and interests exist and for the particular assertions therein, including, pertinently to the inquiry at s. 190B(6), that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claim to native title rights and interests.

A review of that same material indicates to me that, prima facie, the right of exclusive possession is shown to exist under traditional law and custom over those areas where it has not been extinguished or where any extinguishment must be disregarded. I refer to the following information that in my view, supports, prima facie, the existence of this claimed right:

> Mining companies need to ask permission before they start mining because it is our connection and heritage interests in the land. It has a spiritual connection to us. Because of the stories that go through the country, the song lines, campsites, burial ground areas … I could take people to these places … Other Aboriginal people need to ask permission from us before they come on to our country. They should also ask before they hunt on our claim area—Attachment T1 (draft statement of **[Claimant 6 – name deleted]**) at p. 54.
>
> I don't have to ask anyone when I want to travel [in my country]. It's like being home … you don't need to ask to go to your own home … I'm often invited to do the Welcome-to-Country at different events … I welcome people to Ngadjuri country in Ngadjuri language—Attachment T2 (draft statement of **[Claimant 3 – name deleted]**) at p. 55.
>
> I don't need to ask permission to go on the country. We were first on that country before the white people came here and it is still ours—Attachment T3 (draft statement of **[Claimant 7 – name deleted]**) at p. 56.
>
> Aboriginal people always knew the boundaries of their country ... I know where my country is. That's the place I feel safe and at home on. If I want to visit, I don't need to ask any other Aboriginal person permission to go. I just go—Attachment T4 (draft statement of **[Claimant 8 – name deleted]**) at p. 57.
>
> In the 1980s the Burra Council [Burra is in the application area] wanted to turn a block of land into a Park at Redbanks ... They sought our authority as traditional owners of that area ... We talked about the boundaries of our people. We gave them permission to make it a Park ... —Attachment T5 (draft statement of **[Claimant 9 – name deleted]**) at [19].
>
> So before white people came, we roamed around these places and were the bosses for these areas ... When coming on to Ngadjuri land, you need to understand that it is our country, being respectful ... They should ask the Ngadjuri community. The right of proper way, we have to even ourselves, we need to acknowledge to our elders that we are travelling on to country and what we are doing there ... In the Aboriginal way it would be disrespectful to go onto another group's country without getting permission but on my country I'm free to go where I please ... It's about respect for the ancestors. You need to acknowledge them. Your linkage to country is important. The ancestors' spirits are still in the country and sometimes the spirits can infect and be in our life ... I believe that people who don't come and ask and do the wrong things, the spirits will take revenge on them and bad things will happen. I can go pretty much anywhere on the claim area but not to places that are special men's places ... To go to these places you need to speak to a Ngadjuri man. This is the protocol. Same thing for

men travelling to women's places. Other people don't belong on our country and they need to ask permission before they visit or use any resources of the claim area. When I travel on other group's country, I ask permission and I expect the same back. Ngadjuri people are the ones who have the right to speak for Ngadjuri country and most of all it's our elders, the senior people our culture tells us so—Attachment T7 (draft statement of **[Claimant 5 – name deleted]**) at pp. 64 to 65.

I don't think [name of other group 1] have connection to that area ... Before you would enter you would smoke so they knew you were coming. Then someone would meet them. They were only allowed to come in when they were invited. This is the way it should still be done. They should still follow the way with old law ... [name of other group 2] wasn't allowed out [sic] flat lands. They don't have knowledge of that country ...We hold the knowledge in our family. We know that other groups have ties with us. But when it comes to country they need to ask permission to come into country and ask permission to talk about stories. Same way if I went into [name of other group 1] country I would ask permission. Even though we had a Grandmother who was [name of other group 1] doesn't give us rights we would still ask. Can't just walk in that is disrespectful—Attachment T9 (draft statement of **[Claimant 1 – name deleted]**) at pp. 71 and 74.

On the basis of the information before me, I am satisfied that, prima facie, the right to exclusive possession can be established.

(2) Over areas where a claim to exclusive possession cannot be recognised, the nature and extent of the native title rights and interests claimed in relation to the application area are the non-exclusive rights to use and enjoy the land and waters in accordance with traditional laws and customs being:

(a) the right to access and move about the Determination Area;
(b) the right to hunt and fish on the land and waters of the Determination Area;
(c) the right to gather and use the natural resources of the Determination Area such as food, medicinal plants, wild tobacco, timber, resin, ochre and feathers;
~~(d) the right to share and exchange the subsistence and other traditional resources of the Determination Area;~~
~~(e) the right to use and trade the natural resources of the Determination Area;~~
(f) the right to live, to camp and, for the purpose of exercising the native title rights and interests, to erect shelters on the Determination Area;
(g) the right to cook on the Determination Area and to light fires for domestic purposes but not for the clearance of vegetation;

Outcome: I consider that all of these rights can be established, prima facie, except for the rights claimed at (2)(d) and (e).

In my view, there is sufficient information to support the possession of all these above rights and interests subject to (2)(d) and (e)—the additional Attachment F at [5.3.1] to [5.3.3] and [5.3.6] and the draft statements of **[Claimant 6 – name deleted]**, **[Claimant 7 – name deleted]**, **[Ancestor 13 – name deleted]**, **[Claimant 2 – name deleted]**, **[Claimant 5 – name deleted]** and **[Claimant 1 – name deleted]** at Attachments T1, T3, T6, T7, T9 and T10.

Regarding the rights claimed at (2)(d) and (e), I am of the view that these two rights cannot be established, prima facie. I have considered all of the available material and in my view, there is insufficient information before me to support the claim to the possession of these rights.

I note that I have been able to find one reference that relates to these two claimed rights at (2)(d) and (e). **[Claimant 2 – name deleted]** states '**[Ancestor 13 – name deleted]** was saying last time we were in Melrose that there was a hole in the mountain where Nukunu came through and met with Ngadjuri for trade and business'—Attachment T8 (draft interviews conducted in Melrose and Orroroo area on 19 and 20 October 2010) at p. 66. However that is the only reference within all the materials available, which in my view, relates to the possession of these two claimed rights.

I note also that in the additional Attachment F at 5.3.4 and 5.3.5, the applicant points to the draft statement by **[Claimant 6 – name deleted]** and makes a comment regarding '[p]ossum skins (Hossfield 1926: 296)'. I have had regard to **[Claimant 6 – name deleted]'s** statement (Attachment T1) and am of the view that there is nothing in his statement that describes the possession of rights in relation to sharing, exchange or trade. I note that there are statements pertaining to connections with other groups, but these are only referenced with regard to cultural or ceremonial interactions. I do not consider that there is sufficient detail specifically in relation to the possession of the two rights claimed at (2)(d) and (e) in **[Claimant 6 – name deleted]'s** statement or elsewhere in the information before me.

I have also had regard to Attachment F8, in which extracts from the publication by Hossfield (1926) are provided (as referenced by the applicant in the additional Attachment F in relation to 'possum skins'. Firstly, page 296 of this publication (referenced by the applicant as containing the relevant information) is not contained in Attachment F8, though I accept that this is likely a clerical oversight given that two pages, numbered 293 and 295 are provided. I note, however, that the sequential page numbers of the application itself, being pages 46 and 47 appear clearly on the extracted pages from Hossfield (1926), numbered 293 and 295. In any event, I did not request to consider the apparent missing page 296 of Hossfield (1926), because it does not appear to me that the available pages 293 and 295 seem to provide information that is specific to Ngadjuri people. The subheading on page 293 reads 'Information obtained from local residents', and is an account about Indigenous people and the way they lived in relation to areas in South Australia at the time the information was recorded. However, I am unable to determine from either of the available pages 293 or 295 whether or not the details describe the livelihoods and practices of early Ngadjuri people.

The rights claimed at (2)(d) and (e) are not established, prima facie, on the basis of the information before me and I have decided that they should not be entered on the Register.

I note that, pursuant to s. 190(3A):

> If:
>
> (a) the Registrar accepts for registration a claim made in an application under section 63 …; and
>
> (b) in accordance with this section, the Registrar includes in the Register details of the claim and a description of the nature and extent of the native title rights and interests concerned;
> and
>
> (c) afterwards, but before a native title determination in relation to the application … is made, the applicant provides to the Registrar further information relating to any native title rights and interests that were claimed in the application but whose details and description were not included in the Register; and

(d) the Registrar considers that, the information had been provided before that claim had been accepted for registration, the details and description would have been included in the Register;

the Registrar must amend the Register to include the details and description.

Accordingly, the applicant may wish to submit further information in support of the claim group's possession of the claimed rights at (2)(d) and (e), for the Registrar's consideration.

(h) the right to engage and participate in cultural activities on the Determination Area;
(i) the right to conduct ceremonies and hold meetings on the Determination Area;
(j) the right to teach on the Determination Area the physical and spiritual attributes of locations and sites within the Determination Area;
(k) the right to visit, maintain and protect sites and places of cultural and religious significance to Native Title Holders under their traditional laws and customs on the Determination Area; and

Outcome: I consider that all of these rights can be established, prima facie.

In my view, there is sufficient information to support the possession of all these above rights and interests—the additional Attachment F at [5.3.8] to [5.3.11] and the draft statements of **[Claimant 6 – name deleted]**, **[Claimant 3 – name deleted]**, **[Claimant 7 – name deleted]**, **[Claimant 4 – name deleted]**, **[Ancestor 13 – name deleted]**, **[Claimant 2 – name deleted]**, **[Claimant 5 – name deleted]** and **[Claimant 1 – name deleted]** at Attachments T1 to T3, T5 to T7, T9 and T10.

(l) the right to be accompanied on the Determination Area by those people who, though non native title holders, are:
  (i) spouses of native title holders; or
  (ii) people required by traditional law and custom for the performance of ceremonies or cultural activities on the Determination Area; or
  (iii) people who have rights in relation to the Determination Area according to the traditional laws and customs acknowledged by native title holders; or
  (iv) people required by native title holders to assist in, observe, or record traditional activities on the Determination Area.

Outcome: I consider that this right can be established, prima facie.

In my view, there is sufficient information to support the possession of this right—the draft statements of **[Claimant 6 – name deleted]** and **[Claimant 1 – name deleted]** at Attachments T1 and T10.

Conclusion

As I am satisfied that, prima facie, all but two of the claimed native title rights and interests can be established, the requirements of this section are met.

All of the rights claimed in Schedule E that, in my view, can be established, prima facie, should be entered on to the Register.

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.

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

I take the phrase 'traditional physical connection' to mean a physical connection in accordance with the particular traditional laws and customs relevant to the claim group. That is, a 'traditional' connection in the *Yorta Yorta* sense. I note also that the explanatory memorandum to the *Native Title Amendment Act 1998*, explains that the connection described in s. 190B(7) 'must amount to more than a transitory access or intermittent non-native title access'—at [29.19].

In my view, there is sufficient information before me, some which is referred to at my reasons under ss. 190B(5) and s. 190B(6), in support of the requisite traditional physical connection.

For instance, in his draft statement, **[Claimant 1 – name deleted]**, one of the persons who comprises the applicant, talks about rituals he has performed in relation to his physical interaction with country and that are in accordance with his traditional laws and customs:

> … those old ladies left me those songs and stories I need to go there and heal the country and sing for country.
>
> … It is up to us to teach those young fellas and do ceremony on country with those fellas and daughters. To go hunting and fishing and gathering with them and story telling.
>
> To us the stories those line [sic] how they travel all the country is special. That connection is our life. All those things have law. All have law to look after one another. It is about travelling country and keeping that spirit alive … It is only if you know those stories that you will see that.
>
> It is a harsh country with different surfaces. The banks in the softer sand is where the burials are done. If a person dies in that same area take them back to where they were born … Check to see how they died. Then that person would be buried in the soft ground. We would also place stones on top of the sand on top of the body. Put the heavy stone on top so the animals wouldn't dig the remains up then put sand over [sic] top … The tree that grows the seeds throw these seeds in to [sic] the fire to smoke the person. The heat would take the moisture out of the person.
>
> We smoked those old women's (**[Ancestor 13 and 14 – names deleted]**) bodies when they left us ... We used a certain type of leaves for the smoke. This is so the spirit persons can move on … When I go on country I will sing a song to protect myself. Going to a waterhole or to kill an animal I will sing a song. To give thanks. When I talk about these old people I will sing a song so I am not disrespecting them behind their backs.

> Sing a song so the snake won't come up. So he knows you [sic] there. Some place you throw a stone. To let them know you [sic] there. Throw it in a certain place on country so the spirits won't follow you and hurt you—Attachment T9 at pp. 74 –75 .

I note that in the paragraphs preceding this extract from Attachment T9, **[Claimant 1 – name deleted]**, gives information about Ngadjuri laws and customs by way of stories and song lines related to country, including that they were handed down to him. Thus, I understand the physical connection described by **[Claimant 1 – name deleted]** to be a 'traditional' connection in the sense that he explains how he exercises his relationship with country in accordance with those stories and song lines.

I note also, that the particular test at this condition requires me to 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* (or if it were relevant , the specific requirements of subsection 190B(7)(b)). Thus, I refer also to this example of relevant information provided by **[Claimant 2 – name deleted]** in his draft statement which references localities which I can see, from the map at Attachment C, sit either inside or along the external boundary of the application area:

> I go camping on country when I am looking after sites. I have the right to hunt on my country and when there is a need to kill as I am a Ngadjuri person on country. We have strong connection to peppermint gums and saltbush and redgums. The old man saltbush is significant down to Clare area even further up to Baratta and Bimbowrie [this locality is situated in the Ngadjuri Nation #1 application area].
>
> I take my nephews out on surveys. I explain to them country from a Ngadjuri point of view. Look at the land you can identify certain things. How to find water and food if you need to. Teach them about that sort of general stuff that I have been taught when I went camping with my uncles. Uncle **[named deleted]** also taught me. I try to hand it down to my sons and nephews and grandchildren up into country to show them special places like the old gum tree at Orroroo and places around Jamestown and Yunta. Explained that it was Ngadjuri country and that it goes further on. We would camp at places like Jamestown, Clare and Nuriootpa, Tanunda—Attachment T10 of the additional information at [25] and [27].

In my view, these men clearly belong to the native title claim group. They describe their connection with their country pursuant to their Ngadjuri laws and customs. **[Claimant 1 – name deleted]**, in particular, describes how their laws regulate their relationship with country and bind them to it. A part of their physical relationship with country entails a responsibility to look after and protect country. **[Claimant 1 – name deleted]** describes traditional rules for their country which direct how they should interact with it. Both men recount that such rules were passed down to them, and that they continue to pass them down to the younger generation.

On the basis of all the material before me, including information referenced at my consideration under ss. 190B(5) and (6), I am satisfied that members of the native title claim group currently have, or previously had, a traditional physical connection with the land and waters covered by the application. The condition in s. 190B(7) is met.

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.

The application **satisfies** the condition of s. 190B(8). I explain this in the reasons that follow by looking 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.

Reasons for s. 61A(1)

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).

Both the geospatial assessment and my own searches of the application area identify that there are no determinations of native title in relation to the application area.

Reasons for s. 61A(2)

Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act (PEPA), unless the circumstances described in subparagraph (4) apply.

In my view the application **does not** offend the provisions of s. 61A(2).

The application excludes all areas covered by a relevant PEPA—Schedule B at [(2)(a)(v)]. The applicant also claims the benefits of ss. 47 to 47B where applicable in the application area—Schedule B at [(3)].

Reasons for s. 61A(3)

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 (PNEPA) 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).

At Schedule E, the applicant makes a claim to native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others only over areas where such a claim can be recognised (such as areas where there has been no prior extinguishment of native title or where extinguishment is to be disregarded under ss. 23B and/or 47 to 47B).

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.

The application **satisfies** the condition of s. 190B(9), because it **meets** all of the three subconditions, as set out in the reasons below.

Reasons for s. 190B(9)(a):

The application **satisfies** the subcondition of s. 190B(9)(a).

Schedule Q confirms that no claim is made to ownership of minerals, petroleum or gas wholly owned by the Crown.

Reasons for s. 190B(9)(b)

The application **satisfies** the subcondition of s. 190B(9)(b).

Schedule P provides a statement to the effect that no claim is made to exclusive rights and interests over any offshore places. In any event, the application does not cover any such place.

Result for s. 190B(9)(c)

The application **satisfies** the subcondition of s. 190B(9)(c).

There is nothing before me to indicate that any of the native title rights and interests claimed have been otherwise extinguished.

[End of reasons]

Attachment A
Summary of registration test result

Application name	**Ngadjuri Nation #2**
NNTT file no.	**SC11/2**
Federal Court of Australia file no.	**SAD304/11**
Date of registration test decision	**20 January 2012**

Section 190C conditions

Test condition	**Subcondition/requirement**		**Result**
s. 190C(2)			**Aggregate result:** **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)		**Aggregate result:** **Met**
		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**

Test condition	Subcondition/requirement		Result
		s. 62(2)(ga)	Met
		s. 62(2)(h)	Met
s. 190C(3)			Met
s. 190C(4)			Overall result: Met
	s. 190C(4)(a)		190C(4)(b)
	s. 190C(4)(b)		N/A

Section 190B conditions

Test condition	Subcondition/requirement	Result
s. 190B(2)		Met
s. 190B(3)		Overall result: Met
	s. 190B(3)(a)	N/A
	s. 190B(3)(b)	Met
s. 190B(4)		Met
s. 190B(5)		Aggregate result: Met
	re s. 190B(5)(a)	Met
	re s. 190B(5)(b)	Met
	re s. 190B(5)(c)	Met
s. 190B(6)		Met
s. 190B(7)(a) or (b)		Met
s. 190B(8)		Aggregate result: Met
	re s. 61A(1)	Met

Test condition	Subcondition/requirement	Result
	re ss. 61A(2) and (4)	**Met**
	re ss. 61A(3) and (4)	**Met**
s. 190B(9)		**Aggregate result:** **Met**
	re s. 190B(9)(a)	**Met**
	re s. 190B(9)(b)	**Met**
	re s. 190B(9)(c)	**Met**

[End of document]