National Native Title Tribunal

Registration test decision

Application name	Narungga Nation
Name of applicant	Tauto Sansbury, John Buckskin, Kay Lawrence, Naomi Hicks
State/territory/region	South Australia
NNTT file no.	SC2013/002
Federal Court of Australia file no.	SAD62/2013
Date application made	25 March 2013
Date of decision	**8 May 2013**
Name of delegate	Heidi Evans

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 reasons: 10 May 2013

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Heidi Evans

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 12 October 2012 and made pursuant to s. 99 of the Act.

Reasons for decision

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Introduction

This document sets out my reasons, as the Registrar's delegate, 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 Narungga Nation claimant application to the Native Title Registrar (the Registrar) on 26 March 2013 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 25 March 2013 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.

At the request of the applicant's representative, a preliminary assessment for the proposed draft application, being assistance pursuant to s. 78, was prepared by a delegate of the Native Title Registrar and provided on 19 March 2013.

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 am also guided by the case law (arising from judgments in the courts) relevant to the application of the registration test. Among issues covered by such case law is the issue that some conditions of the test do not allow me to consider anything other than what is contained in the application while other conditions allow me to consider wider material.

I have listed below all of the information and documents that I have considered in reaching my decision:

- SC2013/002—Narungga Nation—SAD62/2013 native title determination application ;;
- additional material comprising of a 349-page report, entitled 'A Study on the Contemporary Cultural and Social Importance of Fishing for Narungga People', by [NAME REMOVED](dated 13 September 2007);
- geospatial assessment and overlap analysis dated 2 April 2013 (GeoTrack: 2013/0571);
- letters dated 28 March 2013 from the case manager to the State of South Australia (the State), and the relevant representative body, South Australian Native Title Services (SANTS), pursuant to ss. 66(2) and 66(2A);
- confidentiality agreements from the case manager to the State, dated 3 April 2013, setting out the terms to be imposed by the Tribunal regarding the State's use of additional material provided by the applicant;
- email from the State to the case manager dated 11 April 2013, confirming that the State does not wish to view or make comment on the additional material provided;
- file note from the case manager dated 2 May 2013, advising of a telephone conversation with the State of the same date, in which the State requested that the delegate's attention be drawn to the decision of the Full Court of the South Australian Supreme Court in *Dietman v Karpany & Anor* [2012] SASCFC 53;
- email from the State to the case manager dated 7 May 2013, confirming that the State would not be making any further comments on the application.

I note, as per above, that the State sought to bring to my attention the decision of the Full Court of the South Australian Supreme Court in *Dietman v Karpany & Anor* [2012] SASCFC 53 (*Dietman*). In brief, this case involved the conviction of two Narungga men under the *Fisheries Management Act 2007* (SA), for possessing undersized abalone pursuant to certain prohibitions set out in that legislation. On appeal, overturning the Magistrate's decision that the charges against the men be dismissed at trial, the Full Court of the Supreme Court subsequently found that the Fisheries Act of 1971 had extinguished all native title rights to fish in the State of South Australia.

Subsection (c) of s. 190A(3) provides that 'to the extent that it is reasonably practicable to do so in the circumstances', I am required to have regard to any information supplied by the State that, 'in the Registrar's opinion, is relevant to whether any one or more of the conditions set out in section 190B or 190C are satisfied'. Having been alerted to the decision during the course of applying the conditions of the registration test to the application, and noting that the decision has direct implications for the particular native title claim group on whose behalf the application before me has been made, regarding their ability to exercise the particular native title rights and interests subject of the application, I have considered that it is reasonably practicable in the circumstances that I have regard to the decision.

In light of the issues dealt with in *Dietman*, namely the extinguishment of the native title right to fish, it is my view that the condition of registration to which the decision may be relevant is primarily s. 190B(6). In forming this view, I have also considered the case law authorities regarding the role of the Registrar's delegate at each of the conditions of the test, as set out in my reasons below.

Consequently, I have addressed the implications of the decision in *Dietman* in my reasons below at s. 190B(6).

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 also ss. 94K and 94L).

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 set out below.

On 28 March 2013, the Tribunal's case manager with carriage of the application wrote to the State pursuant to s. 66(2), providing the State with a copy of the application and an opportunity to comment on the application.

Also on 28 March 2013, the case manager wrote to the relevant representative body for the area covered by the application, being South Australian Native Title Services (SANTS), pursuant to s. 66(2A). I note that SANTS is also the legal representative for the applicant.

Following the filing of the application in the Federal Court on 25 March 2013, the applicant submitted directly to the Registrar, for her consideration in applying the conditions of the registration test to the application, additional material. Consequently, I caused the case manager to write to the applicant (letter dated 3 April 2013), acknowledging receipt of the material, and advising that, in accordance with the requirements of procedural fairness, a copy of that material would be provided to the State for their comment. The applicant was also advised that confidentiality conditions would be imposed upon the State regarding their use of the material to be provided.

On 3 April 2013, the case manager wrote to the State, advising that additional material had been provided in relation to the registration testing of the application, and requesting that the State sign the attached confidentiality conditions in order that they might be provided with a copy of that material and an opportunity to comment.

On 11 April 2013, the State emailed the case manager for the application, advising that the State did not wish to view the material. That same day, the case manager informed the applicant in this regard.

On 2 May 2013, the case manager spoke with a representative for the State, who advised that they wished the delegate's attention to be drawn to the decision of the Full Court of the South Australian Supreme Court in Dietman v Karpany & Anor [2012] SASCFC 53.

On 7 May 2013, the State emailed the case manager confirming that they did not wish to provide any further comments on the application.

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)— *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (*Doepel*) at [16] and also at [35]–[39]. In other words, does the application contain the prescribed details and other information?

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.

Turning to each of the particular parts of ss. 61 and 62 which require the application to contain details/other information or to be accompanied by an affidavit or other documents:

Native title claim group: s. 61(1)

> 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).

In undertaking the task at s. 61(1) for the purposes of s. 190C(2), I note that it is only where, on the face of the application itself, the description of the native title claim group indicates that it does not include all of the persons comprising the group, or that it is in fact a sub-group of the native

title claim group, that the application may not meet the condition – *Doepel* at [36]. In addition to this, I note that the task does not require me to undertake any form of merit assessment of the material, such that I could determine the correctness of the group described.

Having turned my mind to the description of the native title claim group at Schedule A of the application, there is, in my view, nothing before me indicating that not all of the persons in the group have been included in the description, or that the group described is in fact a subgroup of the actual native title claim group.

For that reason, I am satisfied that this requirement is met.

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 the persons comprising the applicant appear on page 2 of the form 1. The address for service of the applicant appears at Part B of the application.

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).

The task of the Registrar's delegate at s. 61(4) for the purposes of s. 190C(2) does not, in my view, require or permit me to be satisfied of the correctness of the information in the application naming or describing the native title claim group. I am limited to ensuring that the information required by s. 61(4) is contained in the application – *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 (*Wakaman*) at [34].

A description of the native title claim group is contained in Schedule A of the application.

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).

Four affidavits sworn by each of the persons comprising the applicant accompany the application. Each of the affidavits is signed by the deponent, dated, and competently witnessed. The affidavits all contain the same five paragraphs, and it is my view that these paragraphs contain the statements prescribed by s. 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).

The application 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).

A written description of the area covered by the application appears as Attachment B to Schedule B. Attachment B is entitled 'Narungga Nation #1 Native Title Claim: External boundary description'. It is dated 22 May 2012 and has been prepared by the Tribunal's Geospatial Services division.

Those areas falling within the external boundary described that are not covered by the application are listed as general exclusion clauses at Schedule B.

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).

A map showing the external boundary of the application area is contained within Attachment C to Schedule C.

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).

Schedule D of the application states that the applicant has not undertaken any searches of this nature.

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).

A description of the native title rights and interests claimed by the applicant in relation to the land and waters of the application area appears at Schedule E.

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:

(i) the native title claim group have, and the predecessors of those persons had, an association with the area, and

(ii) there exist traditional laws and customs that give rise to the claimed native title, and

(iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

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

Schedule F of the application refers to Attachment F. Attachment F is an untitled report which contains a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist.

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 of the application contains a list of the activities undertaken currently by members of the native title claim group in relation to the land and waters of 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).

Schedule H of the application provides that the applicant is unaware of any other applications that have been made in relation to the whole or part of the application area.

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).

The application states at Schedule HA that the applicant does not have any knowledge regarding notices of this nature.

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).

Schedule I provides that the applicant does not have any knowledge of any such notices.

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).

It is my understanding of the task of the Registrar's delegate at s. 190C(3), that the requirement that I be satisfied that there are no common members between the native title claim group for the current application and the native title claim group for another application, only arises where another application meets all of the criteria of a 'previous application', as set out in subparagraphs (a) to (c) – *Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

Subparagraph (a) provides that the other application must cover the whole or part of the area covered by the current application. Schedule H of the application provides that the applicant is not aware of any such overlapping applications. This fact is confirmed by the geospatial assessment and overlap analysis (geospatial assessment) prepared by the Tribunal's Geospatial Services division, dated 2 April 2013 (GeoTrack: 2013/0571), which provides that no applications as per the Register of Native Title Claims and the Schedule of Applications – Federal Court fall within the external boundary of the current application as at 2 April 2013.

Since this time, I have also had reference to overlap information available through the Tribunal's iSpatial database, which confirms that the situation is unchanged since the time the geospatial assessment was settled.

On this basis, I understand that there are no other applications overlapping the whole or part of the current application. The first criteria of a 'previous application' at subparagraph (a) is,

therefore, not met and for this reason, I have not considered the remaining criteria of the condition at s. 190C(3) any further.

The application meets the requirements of s. 190C(3).

Subsection 190C(4) Authorisation/certification

> Under s. 190C(4) the Registrar/delegate must be satisfied that either:
> (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
> (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
>
> Note: The word ***authorise*** is defined in section 251B.
>
> Under s. 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

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.

Regarding the requirement of s. 190C(4), Mansfield J in *Doepel* held that:

> Section 190C(4) indicates clearly the different nature of the conditions imposed upon the Registrar ... The contrast between the requirements of subs (4)(a) and (4)(b) is dramatic. In the case of subs (4)(a), the Registrar is to be satisfied about the fact of certification by an appropriate representative body. In the case of subs (4)(b), the Registrar is required to be satisfied of the fact of authorisation by all members of the native title claim group – at [78].

Consequently, it is my understanding that the task at s. 190C(4)(a) requires that I consider only whether the certification has been given by an appropriate representative body, and, whether it complies with the requirements of a valid certification set out in s. 203BE(4).

The certificate contained at Attachment R, dated 7 March 2013, is provided by South Australian Native Title Services Ltd (SANTS), and signed by the Chief Executive Officer of SANTS on the representative body's behalf.

The geospatial assessment provides that the application area falls entirely within the area for which SANTS carries out the functions of a representative body. Having considered the information maintained by the Tribunal regarding such bodies across Australia, it is my understanding that whilst there is no recognised body for the Greater South Australia area,

SANTS is funded under s. 203FE(1) to carry out the functions of a representative body for the area.

As to whether funding is provided to SANTS specifically for the purpose of certifying native title determination applications, the certificate at Attachment R provides the following:

> South Australian Native Title Services Ltd ("SANTS") is a company incorporated under the *Corporations Act* 2001 and funded by the Australian Government to perform all the functions of a representative body in South Australia pursuant to the *Native Title Act* 1993 section 203FE.

On this basis, and having before me no contradictory information, I am satisfied that SANTS is a body funded pursuant to s. 203FE(1) to carry out all the functions of a representative body, including the function of certification of native title determination applications.

Regarding the second limb of the test at s. 190C(4)(a), s. 203BE(4) sets out the requirements of a valid certification. It provides:

> (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).

Having considered the content of the certification document at Attachment R of the application, I am satisfied that paragraph [3] of that document contains a statement in the form required by subsection (a) of s. 203BE(4) above. Paragraph [3] provides that 'SANTS is of the opinion that the requirements of section 203BE(2)(a) and (b) have been met, namely that:

(a) all the persons in the native title claim groups have authorised the applicant to make the application and to deal with matter [*sic*] arising in relation to it.

(b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all other persons in the native title claim group.'

Following this statement, the certificate sets out various information relating to the description of the claim group, and the process carried out in relation to the authorisation of the native title claim. This information includes that:

> SANTS has worked closely with the Narungga Nation claimants for many years;
>
> The claim group description is the product of extensive genealogical and anthropological research;
>
> SANTS notified details of the proposed authorisation meeting publicly in the Yorke Peninsula Country Times and the Koori Mail, and personally through notices mailed to all listed members of the claim group;
>
> At a meeting in Point Pearce on 15 December 2012, using a decision-making process agreed to and adopted by the Nurungga Nation claim group, the group authorised the named persons to jointly be the applicant, and to make the application.

Noting the use of the word 'briefly' in subsection (b) of section 203BE(4) above, it is my view that the information provided by the representative body is sufficient for the purposes of that

subsection. As required by ss. 203BE(2)(a) and (b), the information contained in the certification addresses both the adequacy of the description of the native title claim group, and the way in which the persons comprising that group undertook to authorise the applicant to make the application. Consequently, I consider that this requirement is met.

Regarding subsection (c) of section 203BE(4) above, I note that the certificate is silent. While s. 203BE(4) sets out the requirements of a valid certification, and subsection (c) is clearly included as one of those requirements, it is my view that the failure of SANTS to address the provision is not fatal to the validity of the certification.

Subsection (c) refers to s. 203BE(3), which provides that:

> (3) If the land or waters covered by the application are wholly or partly covered by one or more applications (including proposed applications) of which the representative body is aware, the representative body must make all reasonable efforts to:
>
> (a) achieve agreement, relating to native title over the land or waters, between the persons in respect of whom the applications are, or would be, made; and
>
> (b) minimise the number of applications covering the land or waters.
>
> However a failure by the representative body to comply with this subsection does not invalidate any certification of the application by the representative body.

It is my understanding of the wording of subsection (c), providing that '*where applicable*' [emphasis added], the representative body is to set out what it has done to meet the requirements of s. 203BE(3), that it is only where there is such an overlapping claim that this requirement is of relevance. This is further supported, in my view, in the wording of s. 203BE(3), which refers only to those overlapping applications 'of which the representative body is aware'.

I note that the applicant is representated by the certifying representative body, namely, SANTS. Schedule H of the application states that the applicant is not aware of any other applications overlapping any part of the Narungga Nation application area.

Flowing from this, it is my understanding that the representative body is not aware of any overlapping applications, and, therefore, that the representative body has not considered the requirement of s. 203BE(4)(c) applicable such that it was a matter that must be addressed within the certification at Attachment R.

I am, therefore, satisfied that the certification meets the requirements of s. 203BE(4).

Being satisfied that SANTS is an appropriate representative body able to certify, and that the certification document at Attachment R meets the requirements of a valid certification, I am satisfied that the condition at s. 190C(4)(a) 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).

I note that the wording of the condition at s. 190B(2) directs the focus of my consideration to the map and written description of the application area contained in the application pursuant to ss. 62(2)(a) and (b). It is my view, therefore, that the requirements of this condition of the registration test are to be met by the information contained in the application – *Doepel* at [16].

Schedule B of the application refers to Attachment B as containing a description of the external boundaries of the application area. Attachment B is entitled 'Narungga Nation #1 Native Title Claim – External Boundary Description', dated 22 May 2012, and it contains a metes and bounds description of the external boundary, prepared by the Tribunal's Geospatial Services division. The description references the High Water Mark, Native Title Determination Application boundaries and coordinate points (referenced to GDA94).

Schedule B describes those areas within the external boundary of the application area not covered by the application by way of general exclusion clauses. It is my understanding of the case law dealing with the condition at s. 190B(2), that the use of general exclusion clauses to describe those areas within the external boundary not covered by the application, is not fatal to the application meeting the requirement – see *Strickland* at [50] to [55]; *Strickland FC* at [2000] FCA 652 at [23] and [26].

In addition to this, Schedule B specifically excludes all land and waters subject to Native Title Determination Applications:

- SC2000/001—Kaurna Peoples Native Title Claim—SAD6001/00 - as accepted for registration 22 August 2001.
- SC1998/005—Nukunu Native Title Claim—SAD6012/98 – as accepted for registration 17 January 2000.

Schedule C refers to Attachment C as containing a map of the external boundary of the application area. Attachment C is entitled 'Map of boundaries covered by the Application' and contains an A3 monochrome map prepared by the Tribunal's Geospatial Services division, dated 22 May 2012. The map includes:

- the application area depicted by a bold dark outline;
- abutting native title determination application shown and labelled;
- topographic background;
- scalebar, northpoint, coordinate grid and location diagram; and

- notes relating to the source, currency and datum of data used to prepare the map.

The geospatial assessment concludes that the map and description are consistent and identify the application area with reasonable certainty. Having had regard to the information contained in Attachments B and C to Schedules B and C, and having nothing before me indicating any source of uncertainty regarding the area covered by the application, I have formed the view that I agree with this assessment.

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).

In undertaking the task at s. 190B(3), it is my understanding that it is to the naming or description of the native title claim group contained in the application as required by s. 61(4), to which I am to turn my mind in assessing whether the condition is met – *Doepel* at [16]. Schedule A of the application contains a description of the native title claim group, rather than naming the persons in the group. Consequently, it is s. 190B(3)(b) that provides the appropriate test at this condition of the registration test.

In *Doepel*, Mansfield J held that the focus of the condition was 'not upon the correctness of the description of the native title claim group, but upon its adequacy so that the members of any particular person in the identified native title claim group can be ascertained' – at [37]. His Honour also provided that '[t]he focus of s 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group' – at [51]. This approach was upheld by Kiefel J in *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 (*Wakaman*) – at [34].

The description of the native title claim group appears at Schedule A as follows:

> The Native Title Claimants are those Aboriginal people who:
>
> (a) Are biological descendants of the following ancestors:
>
> (i) a 'full-blooded Narungga woman of the Wallaroo area', married to Charlie Angie (China);
>
> (ii) King Tommy and a 'full-blooded woman named Mary' ('Queen Mary', married to King Tommy);
>
> (iii) Ben Simms (of Wallaroo)
>
> (iv) Maria ('Aboriginal Narungga of Wallaroo, married to white jailer, surname 'Hughes', at Wallaroo);
>
> (v) S(t)ansbury 'Narungga woman of Moonta';

(vi) Annie Radford; or

(b) Are accepted by those listed at (a) as being adopted into the Narungga community under traditional law and custom, because of any of the following reasons:

(i) Birth in the claim area;

(ii) Having a long-term physical connection with the claim area;

(iii) Having a parent or grandparent born or buried in the claim area.

Schedule A also refers to Attachment A. Attachment A is a brief report containing information relating to each of the apical ancestors listed in Schedule A. Such information includes the place and date of birth, place of residence, names and dates of children born to, marriages, and family names associated with, each individual ancestor.

From a consideration of the description at Schedule A, it is my understanding that those persons comprising the native title claim group can be identified by way of the application of the two criteria, or two rules, at (a) and (b) of that description.

Carr J, in *Western Australia v Native Title Registrar* [1999] FCA 1591 (*WA v NTR*), dealt with a claim group description of a similar nature, involving the application of three criteria in order to identify those persons comprising the members of the group. His Honour referred to this method of describing the claim group as the 'Three Rules' and regarding this method, he stated:

> The question is whether the application of the Three Rules describes the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is in that group. In my view it does. The starting point is a particular person. It is then necessary to ask whether that particular person, as a matter of fact, sits within one or other of the three descriptions in the Three Rules. I think that the native title claim group is described sufficiently clearly. In some cases the application of the Three Rules may be easy. In other cases it may be more difficult ... 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 ... The Act is clearly remedial in character and should be construed beneficially – at [67].

The description considered by Carr J in *WA v NTR*, similarly to the description before me, included a rule regarding the biological descendants of named apical ancestors, and a rule regarding those adopted by the named ancestors and their biological descendants. I note that Carr J accepted the description before him despite the abscence of any explanation or qualification regarding the way in which adoption was understood by the claim group, that is, whether adoption was according to traditional laws and customs, or according to Australian law, or otherwise.

The rule regarding adoption in the application before me does, however, provide this clarity, stating that adoption as understood by the Narungga Nation claim group, is in accordance with traditional law and custom, and can occur through three different methods (set out above).

While it is clear that the application of the two rules will necessarily require some factual inquiry in ascertaining the members of the group, in my view, this does not prevent the application from meeting the requirement of 'sufficient clarity' regarding the claim group description, as prescribed by s. 190B(3)(b).

The application satisfies the condition.

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).

It is my understanding of the task of the Registrar's delegate at s. 190B(4), that I am restricted in my consideration to the information contained in the application, that is, that information prescribed by s. 62(2)(d), namely a 'description of the native title rights and interests claimed in relation to particular land and waters'.

This description appears at Schedule E. In *Doepel*, speaking specifically to the requirements of s. 190B(4), Mansfield J found 'the test of identifiability [to be] whether the claimed native title rights and interests are understandable and have meaning'. In being rights that are 'understandable', Mansfield J held that the rights and interests should be able to be understood with reference to the definition of 'native title rights and interests' at s. 223(1). His Honour held that it was 'open to the Registrar to read the contents of Schedule E together [including any stated qualifications], so that properly understood there was no inherent or explicit contradiction' – at [123].

Schedule E sets out a list of 13 rights and interests claimed by the native title claim group. Paragraph [1] of that list is a claim to a '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'. It is my view that such a broad claim does not offend the condition at s. 190B(4) – see *Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*) at [60].

I note that the list of native title rights and interests at Schedule E is followed at paragraphs [3] and [4] by a number of qualifications, including that some of the rights listed are 'traditional rights exercised in order to satisfy personal, domestic or communal needs', and that the rights and interests claimed are subject to the valid laws of the State and the Commonwealth, the rights conferred upon persons pursuant to those laws, and the traditional laws and customs of the native title claim group.

Having turned my mind to the contents of Schedule E, it is my view that the rights and interests claimed, when read together with the qualifications stated at paragraphs [3] and [4], are easily understandable and have meaning. There is no inherent or explicit contradiction within that description such that I am prevented from reaching the required level of satisfaction at s. 190B(4), that the description is sufficient to allow the native title rights and interests claimed to be readily identified.

The application satisfies this condition.

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), as set out in my reasons below.

It is my understanding of the task of the Registrar's delegate at s. 190B(5), that there is a correlation that exists between the information required to be contained within the application pursuant to s. 62(2)(e), and the requirements of s. 190B(5), such that an application which 'fully and comprehensively' addresses all of the matters in s. 62, may 'provide sufficient information to enable the Registrar to be satisfied about all matters referred to in s. 190B' – *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala 2008*) at [90] to [92]. Where an application fails to 'fully and comprehensively' furnish the information required by s. 62, I note that the power given to the Registrar by s. 190A(3), allowing her to have regard to information provided separately by the applicant where the factual basis contained in the application is insufficient, means the application may nonetheless meet the requirements of s. 190B(5) – *Gudjala 2008* at [90].

While I am not limited in my consideration at s. 190B(5) to the information contained in the application, I note that I am not obliged or required to 'search out' additional material to supplement the applicant's factual basis in support of the claim – *Martin* at [23].

I note that my consideration at s. 190B(5) is limited to whether the asserted facts, assuming they are true, can support the claimed conclusions, and that I am not permitted to assess the strength of the evidence in support of the asserted facts, as in a hearing – *Doepel* at [17]. In assuming the asserted facts are true, it is my understanding that I am able to rely on the statements contained within the s. 62(1)(a) affidavits that the applicant believes that all of the statements made in the application are true – *Gudjala 2008* at [91] to [92].

Section 62(2)(e) requires only a 'general description' of the factual basis. Despite this, in order for the application and accompanying material to satisfy the requirements of s. 190B(5), the Full Court in *Gudjala 2008* held that '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' – at [92]. Similarly, I understand that the factual basis must possess a certain level of particularity to the claim, such that the information contained in the factual basis has relevance to the particular native title claimed by the particular group over the particular land and waters of the application area – see for example *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [39].

In *Gudjala 2007*, in a part of his judgement not criticised on appeal by the Full Federal Court, Dowsett J found that the factual basis was required to address certain questions prescribed by s. 190B, and gave considerable guidance as to the nature and content of those matters. These I have discussed in relation to each of the three assertions at s. 190B(5) in further detail below. Similarly, regarding the task at s. 190B(5), Mansfield J in *Doepel*, concluded that the Registrar was to focus primarily upon the requirements of the condition, and that that was the way in which the Act 'directs [her] attention' – at [132]. His Honour indicated that the Registrar's approach to the task was to involve a 'careful and detailed analysis of the particular information available to address, and make findings about, the particular matters to which s. 190B(5) refers' – at [130].

The applicant's factual basis material consists of a referenced 11-page report labelled 'Attachment F' to Schedule F, which sets out information relating to each of the three assertions in subsections (a), (b) and (c) of s. 190B(5). Certain historical and ethnographic information relating to the named apical ancestors in Schedule A is set out in a further referenced 3-page report labelled 'Attachment A'. In addition to this, following the application being filed in the Court, the applicant submitted directly to the Registrar for the Registrar's consideration of the claim against the conditions of the registration test, a 349-page report titled, 'A Study on the Contemporary Cultural and Social Importance of Fishing for the Narungga People', by[NAME REMOVED], dated 13 September 2007 (the fishing report).

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

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).

The task at s. 190B(5)(a)

In reaching the required level of satisfaction regarding that assertion, that is, that the factual basis is sufficient to support an assertion that the native title claim group have, and their predecessors had, an association with the area covered by the application, it is my understanding that the material must speak to an association of those persons with the entire area claimed, and must contain information with geographical particularity to the land and waters subject of the application – *Martin* at [26]. Broad statements that fail to link the association to the specific area covered by the application, or that fail to particularise the kind of association, be it spiritual or physical, are, in my view, unlikely to satisfy the requirements of the condition – *Martin* at [25] to [26].

In *Gudjala 2007*, Dowsett J held that the factual basis may need to address the following matters for it to be sufficient to meet the requirements of s. 190B(5)(a):

- 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;
- that there has been an association between the predecessors of the whole group and the area over the period since sovereignty – at [52].

The applicant's factual basis material – s. 190B(5)(a)

I have set out below the factual basis that I have considered relevant for the purposes of the assertion at s. 190B(5)(a).

Attachment A to Schedule A provides that all of the apical ancestors named in the description of the native title claim group, are predecessors of the claimants known to be associated with, having been born on and having lived on, the application area. Point Pearce and Wallaroo are specific locations on the Yorke Peninsula referred to in this regard and I note that both these locations are within the application area. Attachment A also details the birth dates and names of subsequent descendants of each of those apical ancestors, and the Narungga family names associated with that ancestor. The information provides, in relation to all of the apical ancestors, that a majority of the descendants of those persons lived on the application area.

Attachment F to Schedule F provides that there is a correlation between the identity of members of the claim group as Narungga people, and the land and waters of the application area, such that persons can be considered adopted into the group according to Narungga traditional law and custom by way of being born in the area, having a long-term physical connection with the claim area, and/or having a parent or grandparent born or buried in the claim area.

Attachment F also provides that at the time of first European contact in the area, the Narungga were recorded as inhabiting locations across the application area. Having had regard to mapping information contained in the Tribunal's iSpatial database, I note that the places named all fall within the application area and are spread across the entirety of the Yorke Peninsula in South Australia. With regards to specific dates, Attachment F refers to King Tommy, spoken of in historical records as being born in 1826 and ruling the Narungga People until his death in 1886. His territory is described as consisting of the entire length and breadth of the Yorke Peninsula, as far north as Wallaroo or Port Broughton and as far south as Marion Bay, and including areas beyond the coastline, such as Wauraltee Island. It is my understanding that this description correlates with the external boundaries of the application area.

Regarding an association of the claimants' predecessors, Attachment F includes historical information asserting that traditionally, the Narungga people lived as four totem groups, spread out over different parts of the application area: one in the north, one in the south, one in the east and one in the west.

The factual basis material contained in the fishing report, provided as additional material by the applicant, is extensive, and contains considerable detail of the lifestyles and practices of both the contemporary and traditional Narungga societies. I note that the bulk of the information contained in the fishing report is taken from interviews with claimants, many of whom were elderly (one claimant was 94 years of age), and, consequently, it includes numerous statements by those claimants pertaining to their knowledge of the matters set out below. In the interests of brevity, I have attempted to summarise the information from the report I have considered relevant for the purposes of the assertion at s. 190B(5)(a), and to which I have had regard in forming a view as to whether the requirements of that condition are met.

The fishing report contains the following information regarding an association between the members of the native title claim group and their predecessors with the lands and waters of the application area:

- many Nurrunga people live on the Yorke Peninsula, particularly at Point Pearce, Point Victoria, Maitland and Moonta, however many Narungga people have also moved to other regional centres such as Adelaide – fishing report at p. 28;
- 'Narungga country', broadly speaking, is the Yorke Peninsula of South Australia – at p. 30;
- the 'Narungga Nation' also includes those Aboriginal families who have had a long-term connection with Narungga country – at p. 28;
- Narungga people living outside of Yorke Peninsula regularly return to Narungga country, and a primary reason for such visits is to enjoy what the Narungga people see as their cultural right, that is, to have access to (including to catch and cook) fresh fish from the waters of the application area. The exercise of this right is 'believed to be important for the well-being of past, present and future generations of Narungga people' – at p. 29;
- elderly claimants spent considerable amounts of time with their parents, grandparents and other Narungga families, at well-known fishing spots specifically named and located by the claimants. Huts and shacks were constructed by claimants' predecessors at certain locations along the coastline, to enable families to camp overnight and during holiday periods to fish, and these are still used by claimants today – at pp. 264 to 266;
- claimants were taught, and possess considerable knowledge of, various aspects of the land and waters of Narungga country, including where certain natural resources could be gathered from, how the tides ran, where the best fishing spots were for different species, how to fish using different methods, and stories of their predecessors carrying out these activities on the application area – see for example at pp. 82 to 83, pp. 179 to 182, and pp. 290 to 295;
- claimants were also taught, and possess considerable knowledge of, significant sites across the application area, including knowledge of the Dreamings associated with the creation and formation of different parts of the Peninsula. Significant sites include those that were once places of trade, ceremonial places, including initiation sites, and burial places – see for example at pp. 184 to 186, p. 188 and p. 199;
- many of the official names of places located on the Yorke Peninsula derive from the Narungga language, and as well as this, the Nurungga people have maintained use of their own language names for certain sites, despite those places being renamed at settlement or since – see for example at p. 194 and pp. 202 to 203;
- claimants also have knowledge of the experiences of the Narungga people at and throughout various times in history, for example the claimants' predecessors are spoken of as referring to the sites where early sealers and whalers in the area killed the animals, as 'sad places' – at p. 193. Reference to the reliance of Narungga people on fish as a primary source of sustenance during the depression in the 1920s and 1930s is also included within statements by claimants in the fishing report – at pp. 161 to 162;
- the access of the Narungga people to Narungga country has been dictated to some extent by various government policies and legislation. In particular, the forced removal of claimants' predecessors to the mission at Point Pearce means cultural activities, including fishing, largely centred around that area whilst those policies remained in place – at pp. 306 to 307;

- considerable archaeological remains have been found at sites throughout the application area, including evidence of campsites, shellfish remains, and human skeletal fragments, and have been dated as early as the 1400s – at p. 219;
- claimants express some understanding of certain families being associated with, and having responsibility for specific areas, or specific fishing spots, within the application area – at p. 262.

My consideration – s. 190B(5)(a)

Having considered the material placed before me by the applicant, for the reasons discussed below, I have formed the view that the factual basis is sufficient to support the assertion at s. 190B(5)(a), that the members of the native title claim group have, and their predecessors had, an association with the land and waters of the application area.

I note that the material is extensive, and speaks in considerable detail of the thorough knowledge of the claimants, many of whom are elderly, regarding various sites and places across the application area. Numerous locations are referred to, including the Narungga names given to those places, and it is my view that together these locations cover the entirety of the application area, such that I can be satisfied that the factual basis contains the requisite geographical particularity, and is sufficient to support an assertion of an association with the entire area covered by the application. In reaching this view, I have also had regard to information contained in the Tribunal's iSpatial database, and the map at Attachment C to Schedule C, confirming that all place names referred to fall within the external boundaries of the application area.

From the material, I consider that there is sufficient support for an assertion regarding a physical association held both by the claimants, and their predecessors, with the application area. Historical records referred to provide that at first European contact, Narungga people were found to inhabit the Yorke Peninsula. Attachment A provides that a majority of the descendants of the apical ancestors named at Schedule A continued to inhabit the application area. Further, I note that a considerable number of the claimants continue to live on the Yorke Peninsula, and that those that do not, regularly return to the area, to fish and camp and spend time with other Narungga people on country.

I am also satisfied that the factual basis material is sufficient to support an assertion of a spiritual association of the claimants and their predecessors with the application area. Stories and statements made by claimants throughout the fishing report indicate that they have a strong understanding of the formation of the landscape of the application area as being brought about by certain 'Dreaming' events that happened to their ancestors. It is my understanding that these stories indicate that there is a strong underlying spirituality in the connection of the claimants and their predecessors with their country. Claimants state that these stories were passed down to them by their parents and grandparents, indicating that the claimants' predecessors also possessed this spiritual understanding of, and association with, their country. This is further supported by the fact that historical sources are shown to have documented the same Dreaming stories as those recited by the claimants.

The material provides that those claimants who do not currently live on the application area frequently return to the area, largely to enjoy the cultural right understood as being possessed by the Narungga people, to eat fresh fish from the Yorke Peninsula. As the material states, the exercise of this right is seen as being 'important for the well-being of past, present and future generations of Narungga people' – fishing report at p. 29. I understand these statements to indicate that the claimants gain some physical and/or spiritual health or benefit from returning to their country and sharing in its resources, which in my view, goes to supporting a spiritual association of the claimants with that country.

Regarding whether the factual basis material speaks to an association between the claim group as a whole, and the application area, it is my view that it does so, and that it is sufficient to support an assertion of such an association. The bulk of the information contained in the fishing report is comprised of statements made by claimants during interviews with the report author. I note that interviews were conducted with a significant number of claimants across a broad range of Narungga family names (listed in Attachment A), and that the claimants interviewed ranged in age from 30 to 94. Each of those persons, in their statements and stories, speaks of other Narungga persons, such as Elders, immediate and extended family members, and other families and friends with whom they and their predecessors spent time. Family names associated with each of the apical ancestors are included amongst the list of interviewees in the fishing report at page 24. Based on this material, it is my view that the factual basis is sufficient to support an assertion that the claim group as a whole presently has an association with the application area, as did the predecessors of the whole of the group.

Finally, for the following reasons, I consider that the factual basis is sufficient to support an assertion of an association between the predecessors of the whole group and the area over the period since sovereignty. I accept that the date of sovereingty is 1788. Historical sources referred to within Attachment F are noted as stating that the Narungga people were found to inhabit the application area at the time of first European contact. The factual basis material before me does not assert a particular date at which the settlement of, or first European contact in, the Yorke Peninsula occurred, however, noting the relative distance between the Peninsula and the prominent centre of settlement for South Australia, namely Adelaide, I infer that first European contact in the area of the application is likely to have taken place some time after 1788, likely to have been in the following 20 to 30 years. Attachments A and F assert that King Tommy, a Narungga apical ancestor who ruled over the Narungga people over a period of 50 or so years, was born in the area in 1826. From this information, I consider that it is open to me to infer that King Tommy, one of the Narungga apical ancestors, was present in the application area around the time of, or soon after, first European contact.

Throughout the material, claimants express their extensive and detailed knowledge of the lifestyles and practices of specific predecessors on the land and waters of the application area. This includes knowledge of predecessors back two or three generations. Further to this, claimants share their knowledge of King Tommy and his territory as consisting of the land and waters of the application area. On the basis of this information, I am of the view that the factual basis is sufficient to allow me to infer that the current physical association between the Narungga people and the application area has continued over a substantial period of time prior to this, including back to the Narungga apical ancestors, occupying the application area at around the time of first

European contact. This continuing physical association is further supported, in my view, by information within the factual basis pertaining to archaeological remains evidencing human occupation of the Yorke Peninsula, dated as early as the 1400s.

In light of the above discussion, I have formed the view expressed above, that the factual basis is sufficient to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the application area.

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).

The task at s. 190B(5)(b)

Noting the use of the term 'native title rights and interests' at s. 190B(5)(b), it is my view that the assertion is to be understood in light of the definition of that term set out at s. 223(1). Further to this, the use of similar terminology in both s. 223(1)(a) and s. 190B(5)(b), in my view, requires that my assessment at this condition of the registration test be undertaken with regards to the leading authority in relation to s. 223(1), namely *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (*Yorta Yorta*).

In *Yorta Yorta*, the High Court held that the term 'traditional laws and customs' could be understood as comprising two distinct elements: firstly, that the origins of the content of the laws and customs are found in the normative rules of the Aboriginal society that existed before sovereignty, and; secondly, that the system under which those laws and customs are possessed is one that has had a 'continuous existence and vitality since sovereignty' – at [47].

Following *Yorta Yorta*, the *Gudjala* decisions of 2007 and 2009 (*Gudjala People 2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*)) considered the requirements of the assertion at s. 190B(5)(b) in some detail. The principles enunciated in these decisions, therefore, I understand as providing considerable guidance to the Registrar's task at s. 190B(5)(b).

Dowsett J spoke to the need for the factual basis to address the following matters in being sufficient for the purposes of the assertion at s. 190B(5)(b):

- that the laws and customs currently observed have their source in a pre-sovereignty society and have been observed since that time by a continuing society – *Gudjala 2007* at [63];
- that there existed at the time of European settlement in the area, a society of people living according to a system of identifiable laws and customs, having a normative content – *Gudjala 2007* at [65] and [66];
- identification of the persons who acknowledged and observed the laws and customs of the pre-sovereignty society – *Gudjala 2009* at [37];
- an explanation of the link between the claim group described in the application and the area covered by the application, which may involve 'identifying some link between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage' – *Gudjala 2007* at [66] and [81];
- where descent from named ancestors is the basis of membership to the group, demonstration of the relationship between those ancestors and the pre-sovereignty society – *Gudjala 2009* at [40];

- an explanation of how the current laws and customs can be said to be 'traditional', being more than a mere assertion that they are – *Gudjala 2009* at [52] to [53], [55] and [74];
- details of the claim group's acknowledgement and observance of those traditional laws and customs pertaining to the claim area – *Gudjala 2009* at [74].

The applicant's factual basis material – s. 190B(5)(b)

Attachment F provides that early historical and ethnographic accounts identify the Narungga people as living in the area at the time of European contact by a variety of tribal names, and describe Narungga territory as consistent with the application area – at [3.1]. Various sources discussed in Attachment F and in the fishing report (sources dating back to 1904) assert that traditional Narungga society was a 'distinct and identifiable society', divided into four 'totem' groups, each associated with a different region across the Yorke Peninsula - north, south, east and west – see Attachment F at [3.4] and [4.1] to [4.2], and fishing report at p. 212. The factual basis further provides that traditionally, men and women of the same totem group were allowed to marry, however blood relations were not – see fishing report at pp. 214 to 217. Blood-relations in accordance with traditional Narungga laws and customs are described in the sources referred to as extending only to first cousins, and that cousins were considered equivalent to brothers and sisters. The information provides that children adopted into Narungga families were also considered to be equal in status to biological children of the adopting parents – at [4.3].

Historical sources named within Attachment F provide that the Narungga society spoke their own distinct language, and this vocabulary was documented by early researchers in the area, such as Tindale in 1936. Referring again to ethnographic sources and research, Attachment F asserts that the Narungga were a society with communal values, and that strict rules regarding the redistribution of meat applied so as to ensure no one went hungry – at [4.4] to [4.5]. A record of observations made by an early white settler in the area in 1850 is referred to in demonstration of these strong communal values underlying Narungga culture – at [7.5.2].

In addition to this, Attachment F sets out certain laws and customs regarding the identity of individual claimants as Narungga. Paragraph [1.2] provides that:

> The Narungga native title claimants identify themselves as Narungga people because:
>
> They are a biological descendant of those Aboriginal persons listed who are listed at 2.1; or
>
> They are accepted by those listed at (a) as being adopted into the Narungga community under traditional law and custom because of the following reasons:
>
> Birth in the claim area;
>
> Having a long-term physical connection with the claim area;
>
> Having a parent or grandparent born or buried in the claim area.

Attachment A includes factual material pertaining to the adoption of certain descendants of the named apical ancestors by other Narungga families—at [3.3], while the fishing report includes

statements by claimants indicating that these laws and customs continue to operate presently amongst the members of the claim group – see for example fishing report at p. 174.

Attachment A also sets out various information regarding those apical ancestors named in Schedule A. The birth dates of those persons are asserted as being between the 1820s and the 1880s. All of the persons are asserted as being associated with locations within the application area, and this is indicated as being one of the prime justifications for their inclusion in the claim group description – see Attachment F at [2.2].

Attachments A and F provide particular information in relation to King Tommy, a Narungga apical ancestor. The material asserts that King Tommy was born in 1826, and was known as ruler of the entire Narungga group until his death in 1886. He is stated as being 'the highest Narungga with authority over Narungga country'. His territory is asserted as extending as far south as Marion Bay, covering the Yorke Peninsula from east to west, and as far north as Port Broughton. The material states that during King Tommy's time, sources indicate that Narungga persons married as far north as Wallaroo – see Attachment A at [3.1] and Attachment F at [3.3].

The fishing report provided directly to the Registrar as additional material also contains information regarding the laws and customs of the Narungga. Claimants speak of the practices and customs upheld by their 'old people', or 'ancestors' in the every day lives of those persons. An example of this is where a claimant states in reference to a particular site on the application area, that 'the old fellas used to camp there all the time', and another claimant describes 'how the 'old people' would camp on Wardang Island and that places like Hungry Bay were the 'old people's fishing places' – at p. 244.

Another claimant makes the following statement regarding that same location:

> So when we go down from the south and we move west along Wardang Island we come to a point called Hungry Bay. And Hungry Bay is a – some sections of it is renowned by our community. I suspect that it was also involved in a ceremony from boy to manhood when they would cross from Goose Island – from Rocky Island – and then they would have to light their fire – then they would have to show their prowess in catching fish... – at p. 244.

And another claimant states:

> Now, with our ancestors, they used to make parts of the branches off the tree, walk out to Greenie [Green Island], if they needed to cross the island, drag the branches with them, go from one island and keep walking while the tide was out. Then they had a channel to cross off from, part way off from Greenie to Wardang Island. You had strong men each side of the channel and strong men to help cart the old ladies and old men over to Wardang Island. And by having the strong men up each end of it, two or three strong men up each end of the channel, they were facing opposite end to each other and they would wave their branches so to distract the sharks from coming to take the, take them. And that's how they crossed to Wardang Island – at p. 198.

In accordance with claimants' stories of their ancestors camping at certain spots, the material also contains information pertaining to numerous archaeological sites noted as containing evidence of food scraps (primarily comprising fish and crustacea remains), evidence of camp fires and cooking activities, evidence of man-made rock fish traps along the shore of the application area,

and evidence of quarries for the extraction of quartz and ochre for ceremonial purposes – see pp. 218 to 219 of the fishing report, and Attachment F at [7.2.1] and [7.4.4].

In addition to information pertaining to the traditional Narungga society, the factual basis also speaks in some detail to the system of laws and customs acknowledged and observed by the claimants today. Regarding these contemporary laws and customs, the fishing report provides that claimants continue to observe totemic rules and restrictions, and maintain an acknowledgement of the four territorial groups within the wider Narungga group – at p. 213. As one claimant states:

> ...See, we're Nurungga on the whole Peninsula, same as other people on their territory. This was our country, like, say England's a country, Scotland's a country, Wales and all that, you know, but they're all great Britain, with the rest. So, the Peninsula was our country, see. But some groups lived, here, and some lived there, some were – for instance, some may be wombat people, some might be seagull people, some might be other kind of people. Some might know more about what their people were – if you were seagull people, you would know more about seagulls than anyone else, see? That kind of thing. And some people could marry into other people in the groups, some couldn't – it was very – well, you might call it very complicated – it was all about where you came from, who you were, and who they were, and all that. Mum knows, the women know about that. You have to ask her. But there's more to know before you know anything about that – it goes on and on, it's too much to know if you haven't been brought up that way – you have your rules, like first cousins can't marry, that sort of stuff? Well, ours were very strict, and went into a lot more than that – it was all about making sure that our blood relations didn't get too close, you know – but it was more than that, because it was about our stuff all about what they call our culture, and that's not what I'm talking about... – at p. 214.

The Dreaming stories associated with certain locations across the application area are asserted as being another key aspect of Narungga laws and customs, and one that is maintained by the claimants today – at p. 184. An example of this is the following statement by a claimant, who explains that she was told the story by her two grandfathers sitting in the scrub teaching her:

> ...They were told by their grandfathers. That was the story at Daly's Head of the old man who went to see those tribes down there because those tribes was greedy... All those rocks down there was the people that lived in that land all those years go – they was the greedy tribe – that's the Daly Head area. All those fire places that the old people used after the sea came in – you could see their bobbin in the water. I showed this to a mob when we were doing work for Innes [National Park] – that story – and one fella went out there the next day when the tide was in and he come up and told me he said 'That's true that story you told' I said 'Of course it's true!'... – at p. 192.

The tradition of giving and sharing fish caught by the Narungga people amongst the community is discussed in some detail in the material, and suggested as being a fundamental aspect of Narungga laws and customs – see for example p. 47 of the fishing report. In the same way, the material indicates that practices involving giving fish away and sharing one's catch of fish with family and other persons within the group, are practices that were carried out by the claimants' predecessors and ancestors, and passed down through the generations to the claimants today such that they consider these inherent rules operating within Narungga culture today – see for example Attachment F at [7.5.1] to [7.5.3].

As one claimant states in relation to a practice of giving away the first butterfish that a Narungga person catches:

> You've got to give it away. That's always been the rule – you'll never have any luck in butterfishing if you don't give it away. You can't eat it you've got to give it away – at p. 47.

And another states:

> ...We believe that our kids have to give their first butterfish away. When they catch a butterfish they got to give it away to someone – doesn't matter who, preferably a favourite uncle or aunty or favourite person. That's a proud thing to do. When we tell them this they say 'I'm not giving my fish away!' We say 'You've got to give it away.' It's the tradition – at p. 47.

The factual basis information also indicates the importance of teaching the next generation as an aspect of Narungga laws and customs. This is discussed in the fishing report where claimants speak of the way in which they were taught fishing techniques and good fishing spots on the coast by their predecessors, and how they continue to pass this knowledge onto their grandchildren. As one claimant states:

> So in almost every decade as I was growing up I was enmeshed and mentored by these old men and women... There are several sites I spear fished with these men and spear fished with my father and now have spear fished with my sons – who in an English way are my nephews – my brother-in-law [NAME REMOVED], my nephews [NAMES REMOVED] and [NAME REMOVED] and [NAME REMOVED] – my girls [NAMES REMOVED] ... vast amounts of time was spent on the coast reaping the knowledge in which I have learnt about these fishing areas – at p. 181.

In this way, the factual basis material indicates the presence of significant persons or elders within Narungga society, at each generation, who are upheld by the rest of the community as persons with particular knowledge, expertise and/or authority. The fishing report explains this concept in further detail when it sets out information pertaining to Narungga individuals in recent history who were regarded as 'prominent fisherpeople' for various parts of the Yorke Peninsula – at pp. 162 to 179. Where the fishing report lists these prominent fisherpeople, those persons acknowledged as Narungga Elders have been specifically identified, at the request of the members of the group as a mark of respect – at p. 162. In the report, claimants discuss the way in which their status as Elders allows them a right to 'demand' a share of fish caught by the younger people in their kin networks, and that these younger persons are consequently obliged to fulfil their obligations in this way – at p. 161.

My consideration – s. 190B(5)(b)

From material of the nature discussed above, I have formed the view that the factual basis is sufficient to support an assertion of a Narungga society, inhabiting the application area at the time of European settlement, bound by the common acknowledgment and observance of specific laws and customs. In reaching this view, I have considered that certain historical sources referred to in the factual basis material clearly identify the Indigenous persons inhabiting the area of the Yorke Peninsula at the time of European settlement as the Narungga, a group with a distinct language, which was recorded as being divided across the Peninsula in four territorial and totem-based sub-groups.

I have already set out above, in my reasons at s. 190B(5)(a), the basis upon which I have inferred European contact in the area to have taken place circa the 1820s. In the same way, having regard to the factual basis material contained at Attachment A pertaining to each of the apical ancestors used to describe the claim group, I consider that the material is sufficient to support an assertion of a link between those apical persons and the Narungga society described in the material, namely that the Narungga apical persons were born into that society at approximately the time at which European settlement in the area was taking place, or shortly after that time.

As set out above, the historical sources referred to in the material, in my view, contain considerable detail regarding the laws and customs observed by the Narungga society occupying the application area at the time of European settlement. From that material, I understand the system of laws and customs acknowledged and observed by those persons to be one underpinned by strong communal values, demonstrated in information pertaining to adherence to strict rules governing the sharing of food amongst Narungga persons. Similarly, rules and practices governing the adoption of Narungga children by other Narungga families, and the treatment of cousins as equivalent to brothers and sisters, in accordance with Narungga laws and customs, in my view, further supports the material's assertion regarding these shared communal values. Additionally, the historical sources referred to indicate that marriage was primarily limited to being as between Narungga persons, rather than inter-marriage with other tribes. The material asserts that strict rules were also in place regarding the way in which totem/territorial groups could marry. I consider that the material of this nature supports the communal values inherent in the asserted Narungga traditional laws and customs.

The material also supports, in my view, a system of traditional Narungga laws and customs involving authority structures or hierarchies. King Tommy, one of the named Narungga apical ancestors, is described within historical sources referenced in the material, as being the 'leader' of all of the Narungga for a period of approximately 40 to 50 years, until 1886. The material asserts that he had territorial rights over all of the Yorke Peninsula, as far north as Port Broughton. In my view, this indicates that the system asserted at European contact involved certain persons within Narungga society holding marked positions of authority and influence within the group.

Finally, I note that the material before me speaks to archaeological evidence gathered from numerous sites on the Yorke Peninsula, indicating that the inhabitants of the area, dating as far back as the 1400s, used the area for camping, cooking, ceremonies, gathering natural resources and for burial purposes. In my view, these activities are consistent with the Narungga laws and customs, and Narungga culture, set out in the remaining material. I understand, therefore, that the factual basis supports an assertion that the system of laws and customs set out in the various historical sources, as described by early settlers in the area, is considerably similar, if not the same, system that has been maintained by the indigenous inhabitants of the area since a significant period prior to sovereignty.

I now turn to consider the extent to which the system of laws and customs asserted as being acknowledged and observed by the claimants today, can be said to be 'traditional', that is, a system whose content is derived from the laws and customs acknowledged and observed by a Narungga pre-sovereignty society.

I have set out above the relevant factual basis material pertaining to contemporary Narungga laws and customs as explained by members of the claim group. The laws and customs described as currently acknowledged and observed include those governing the sharing or giving away of food, especially fish, amongst claimants, particularly where those claimants are elderly, or do not live on the application area. Laws and customs regarding the four territorial or totem sub-groups of the Narungga and the way in which these divisions dictate the marriage patterns and blood-relations of the claimants are also explained. Rules and practices regarding passing on knowledge to younger generations, whilst on country, including knowledge of the Dreaming stories for Narungga country, are also set out as a crucial aspect of Narungga laws and customs upheld today. In addition to this, in the same way that King Tommy is asserted as being a prominent leader of the Narungga at around the time of European settlement in the area, the material asserts the presence of prominent elders or 'fisherpeople', being persons with considerable cultural and environmental knowledge, within the members of the claim group, and amongst their predecessors.

Noting that the material asserts these same elements as being a part of the system of laws and customs observed by the Narungga society at European settlement, it is therefore my understanding of the material that the asserted system of laws and customs observed by the claimants today is, in fact, relatively unchanged from the one described in various historical sources referred to in the material.

This view I consider to be further supported by the considerably high level of detail provided by claimants regarding the way in which their predecessors acknowledged and observed Narungga laws and customs. This is evident in statements by claimants pertaining to the specific practices undertaken by their predecessors in their everyday lives, such as initiation rites, corroborees, and fishing methods. Claimants speak in such detail of their predecessors back two or three generations, and refer to these persons by name. I note that one claimant speaks in particular of her knowledge of the territory held by King Tommy, a Narungga apical ancestor – Attachment F at [3.3]. In addition to this, in their statements within the fishing report claimants frequently refer to the 'old people', 'old fellas', and 'the ancestors', which I consider to be an assertion by the claimants of their comprehensive understanding of the lifestyles and habits of Narungga persons back to the named apical ancestors. They assert this to be knowledge that they were taught by their predecessors.

In the same way, claimants possess a clear understanding of Narungga cultural practices that have either been lost, or that have been modified due to the introduction of modern technologies, or where historical events have interrupted the continued practice of a particular aspect of culture. An example of this is where a claimant explains that young boys undertaking to swim across a 'shark-infested' channel to Wardang Island with a firestick in their hair as an initiation rite has not taken place since the early 1800s (fishing report at p. 199 - see excerpt below in my reasons at s. 190B(6)).

Claimants frequently explain throughout the material the way in which they were passed this knowledge during time spent with their parents and grandparents out on country, and the importance they place on continuing to pass this knowledge onto their own children and grandchildren. In my view, the material speaks in considerable detail of the significant amounts

of time spent by claimants today camping out on the application area (aside from residing in townships on the application area) with their children and grandchildren, teaching them all aspects of Narungga law and custom. An example of this material is where the fishing report speaks of the shacks owned by and associated with particular Narungga families, constructed by the claimants' predecessors at numerous locations along the coastline of the Peninsula to facilitate their being able to stay overnight at those places – at pp. 264 to 266. Consequently, I consider that the system of laws and customs acknowledged and observed by the claimants today, is a system that has been passed down to them by their predecessors, across the generations, back to the Narungga apical ancestors, and that this system is relatively unchanged from the one recorded by early settlers in the area of the Narungga society at the time of European contact.

In addition to this, noting my finding at s. 190B(5)(a), and the detailed knowledge held by the claimants of the application area and the way in which the claimants' predecessors maintained their lifestyles and habits in accordance with Narungga laws and customs on the application area, I am of the view that the material is sufficient to support an assertion that the Narungga system of laws and customs is one pertaining to the particular land and waters of the application area.

In light of the above discussion I have, therefore, formed the view that the material is sufficient to support an assertion that the laws and customs acknowledged and observed by the Narungga native title claim group today, can be said to be traditional laws and customs. Consequently, I consider that the factual basis is sufficient to support an assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests.

The application meets the requirements of s. 190B(5)(b).

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).

The task at s. 190B(5)(c)

Having regards to the wording of the assertion at s. 190B(5)(c) and the reference to 'those traditional laws and customs', it is my understanding that subsection (c) is directly related to the assertion at subsection (b), such that where the factual basis is unable to meet the requirements of s. 190B(5)(b), the factual basis will also be found to be unable to meet the requirements of s. 190B(5)(c) – *Martin* at [29].

It is my view of the assertion at s. 190B(5)(c) that it can be equated with the second element of the meaning to be applied to the term 'traditional laws and customs' identified by the High Court in *Yorta Yorta*, that is, that the acknowledgement and observance by the native title claim group of their traditional laws and customs has continued in a substantially uninterrupted way since sovereignty – *Yorta Yorta* at [87]. In the same way, the High Court held that the system of laws and customs asserted within the factual basis material must be shown to be one that has had 'a continuous existence and vitality since sovereignty' – at [47].

In addition to this, regarding the requirements of the assertion at s. 190B(5)(c), Dowsett J in *Gudjala 2007* suggested that the factual basis may need to address 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;
- 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].

My consideration – s. 190B(5)(c)

For the reasons set out as follows, I have formed the view that the factual basis is sufficient to support the assertion at s. 190B(5)(c), that the native title claim group have continued to hold the native title in accordance with the traditional laws and customs subject of my consideration at s. 190B(5)(b) above. I note that I have already set out in detail in my reasons for that condition above, the basis upon which I consider the material before me sufficient to support an assertion of a system of *traditional* Narungga laws and customs, that is, a system whose content is derived from the laws and customs acknowledged and observed by a pre-sovereignty Narungga society.

Firstly, the material speaks in detail of the traditional pattern of teaching regarding the Narungga laws and customs, and how knowledge of those laws and customs passes to the younger generations. The pattern of teaching explained within the material includes that the claimants were told stories by their grandparents whilst out on country, and learned by example, watching and copying their elders. It is clear from the material, in my view, that Narungga grandparents and Elders had a particular position of authority to teach, and were considered the appropriate persons to pass cultural knowledge onto young Narungga children. This is reflected in the following statement by a claimant:

> So in almost every decade as I was growing up I was enmeshed and mentored by these old men and women... There are several sites I spear fished with these men and spear fished with my father and now have spear fished with my sons – who in an English way are my nephews – my brother in law [NAME REMOVED], my nephews [NAMES REMOVED] – my girls [NAMES REMOVED]... vast amounts of time was spent on the coast reaping the knowledge in which I have learnt about these fishing areas – at p. 181.

It is my understanding of the material that the result of that pattern of teaching is that claimants possess a considerably thorough and comprehensive knowledge of Narungga laws and customs, and more than that, possess specific knowledge regarding the ways in which their predecessors, including their ancestors, practised those laws and customs on the lands and waters of the application area.

Secondly, based on the information contained in the material, it is my view that Narungga laws and customs, and Narungga culture has influenced not only the indigenous inhabitants of the application area, but to an extent, has also influenced the non-indigenous population. This is seen in the fact that Point Pearce Public School now teaches Narungga children aspects of fishing culture and technique as part of the school curriculum, and the fact that placenames across the

Yorke Peninsula are taken from the Narungga language, such as Tiddy Widdy Beach and Muloowurtie Point – see fishing report at p. 179 and p. 184. I understand, therefore, that Narungga laws and customs and Narungga culture have maintained a strong presence in the landscape and in the communities present on the Peninsula throughout European history in the area. This, in my view, supports an assertion regarding a system of laws and customs that has had a 'continuous existence and vitality' – *Yorta Yorta* at [47].

Thirdly, in further support of the above, I consider the material to assert that the younger generation of Narungga native title claimants continue to be heavily influenced by, and display strong markings of, Narungga culture in their everyday lives. This, in my view, can be seen in the way teenage Narungga claimants enthusiastically and pro-actively involve themselves in learning Narungga cultural knowledge, in particular, knowledge relating to fishing and the harvesting of marine species. All of the elderly claimants interviewed within the report provide statements regarding the way in which they currently take their grandchildren camping and fishing, sharing stories with them of their predecessors and the methods and techniques used by the 'old people'. The following statement is an example:

> I still go there [to the shack inherited from [NAME REMOVED]] and take my grannies [grandchildren] down to pick pennywinkles and go butterfishing. I know it's supposed to be periwinkles, but we call them pennywinkles. I take my grandson over there [NAME REMOVED], he's fifteen, he comes out fishing with me a lot. Now he's taking me to the drops for fishing...Last night he asked me 'Papa I'm thinking about the drop out from the jetty over Wardang [Island] – what do you call it?' I go over weekends – I was laying in bed one morning and got up and looked around for him and couldn't see him, he was out on the reef himself with the harpoon... – at p. 181.

Within the fishing report, another elderly claimant speaks of her son and how upon gaining knowledge of Narungga country and marine aspects of Narungga culture, he decided to work as a scuba diver revegetating the seabed. She also tells that her grandson is studying marine biology – at p. 182. This information, in my view, indicates that Narungga laws and customs and Narungga culture, as practised by the Narungga ancestors on that country, continues to influence young claimants today and is an inherent part of their identity. In my view, this subsequently supports an assertion of the continued acknowledgement and observance of those laws and customs.

Finally, the material speaks to the maintenance within Narungga society, across the generations back to the Narungga ancestors, of authority structures and hierarchies within the group, which, in my view, supports an assertion of the continuity of the observance and acknowledgement of traditional laws and customs. As discussed above, King Tommy is described within the material as the 'leader' of all of the Narungga, and various predecessors of the claimants back two or three generations are described as 'prominent' persons, or Elders. In my reasons at s. 190B(5)(b), I have set out the material indicating that Elders within the group today have a special position of authority regarding the maintenance and passing on of Narungga cultural knowledge, and knowledge regarding Narungga laws and customs, and that with this position, comes certain rights and powers – see for example fishing report at p. 161. The information also suggests that these structures continue to be taught to the younger generations of claimants – see for example fishing report at p. 47. The material of this nature, in my view, indicates that these structures continue to influence the behaviour and obligations of the members of the native title claim group

today, and that they form a central aspect of the system of Narungga traditional laws and customs. Flowing from this, I consider that the information supports an assertion of a system of laws and customs that has continued substantially uninterrupted since at least European settlement.

I note that the material does address the extent to which historical events have impacted Narungga traditional laws and customs. This includes information pertaining to the way in which the practise of laws and customs became restricted geographically to the areas surrounding Point Pearce, due to the forced removal of indigenous persons to the Point Pearce Mission – fishing report at pp. 306 to 307. The material also speaks of the way in which fishing practices had to be modified upon the introduction of the regulatory framework and the requirement for fishing licences – fishing report at p. 302. Despite these events, I am of the view that nothing in the material suggests or indicates that the system of traditional Narungga laws and customs was 'interrupted' such that the nature and substance of that system was significantly affected. Conversely, the material suggests that claimants have maintained a strong understanding of their cultural rights to have access to fresh fish caught on the Yorke Peninsula, that they frequently exercise this right, and that it is considered an inherent aspect of the Narungga identity – fishing report at p. 29 and pp. 160 to 162.

In light of the above discussion, I have, therefore, formed the view that the factual basis is sufficient to support an assertion that the native title claim group have continued to hold the native title rights and interests subject of the application in accordance with the Narungga traditional laws and customs.

The application meets the requirements of s. 190B(5)(c).

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 can be prima facie established are identified in my reasons below.

The task at s. 190B(6)

With regards to the wording of the provision at s. 190B(6), I note that even where I do not consider that all of the rights and interests claimed in the application can be, prima facie, established, this alone will not prove fatal to the ability of the application to satisfy the condition – *Doepel* at [16]. It is, however, only those native title rights and interests that I consider can be prima facie established, that will be included in an entry on the Register of Native Title Claims where the application satisfies all of the requirements of the registration test.

In my consideration at this condition of the test, it is my understanding that I am not restricted to the information contained within the application – *Doepel* at [16].

It is my view that the task at s. 190B(6) necessarily requires me to consider the meaning of the term 'prima facie'. The High Court has held that the ordinary meaning of the phrase is 'at first sight; on the face of it; as appears at first sight without investigation' – see *North Ganalanja Aboriginal Corporation v Queensland* (1996) CLR 595 at [615] to [616], [652]. The adoption of this meaning in relation to the test at s. 190B(6) was approved by the Court in *Doepel* – at [134].

Also in *Doepel*, Mansfield J provided guidance regarding the approach to the task by the Registrar's delegate, finding that 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis – at [135]. In this way, I consider that the factual basis material before me must speak to each of the individual rights and interests claimed, in order for me to consider that those rights and interests are, prima facie, established.

Finally, it is my view that the task at s. 190B(6) requires me to turn my mind to the definition of 'native title rights and interests' in s. 223(1), and consider whether each of those rights and interests claimed are truly native title rights and interests. That is, I am to consider whether the rights and interests claimed exist under the traditional laws and customs of the Narungga people, whether the rights and interests are in relation to land or waters, and whether the rights and interests can be recognised by the common law, and have not been extinguished over the whole of the application area.

Exclusive possession

Regarding the type of information necessary in allowing me to consider that a right to exclusive possession is, prima facie, established, the High Court in *Western Australia v Ward* [2002] HCA 28 (*Ward HC*) held 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 possess, occupy, use and enjoy land to the exclusion of all others – at [88].

A right to exclusive possession was also considered in *Sampi v State of Western Australia* [2005] FCA 777 (*Sampi*), where the Court held that:

> ...the right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation – at [1072].

In *Griffiths v Northern Territory* [2007] FCAFC 178 (*Griffiths*), the Full Court provided further guidance regarding what is necessary in order to prove a right to exclusive possession. The Full Court held that the 'question of exclusivity depends upon the ability of the appellants effectively to exclude from their country people not of their community' – at [127]. Similarly, the Full Court found that where the claimants could establish that in accordance with their traditional laws and customs, they acted as 'gatekeepers' for the purpose of preventing harm and avoiding injury to the country, then such a right would be recognised – at [127].

I note that the case law has confirmed that the right to exclusive possession subject of a native title determination application is not to be equated with common law concepts of proprietary

rights, and that the nature of the right depends upon a consideration of its asserted content under traditional law and custom – *Griffiths* at [71].

The factual basis contains certain statements that, in my view, assert that pursuant to their traditional laws and customs, the Narungga were the owners of the Yorke Peninsula, being the area covered by the application. The following statement is an example:

> ...See we're Narungga on the whole Peninsula, same as other people on their territory. This was our country, like, say England's a country, Scotland's a country, Wales, and all that, you know, but they're all Great Britain, with the rest. So, the Peninsula was our country, see. But some groups lived, here, some lived there... – at p. 214.

In addition to this, the material discusses the association of particular Narungga families with particular locations within the application area, such that those families were considered able to exercise some kind of authority over other Narungga persons visiting that place. This is indicated in the following statement:

> I think the feeling was if you lived here you were from here and it was theirs collectively. If people came in it was wasn't sort of pinpointed but you were visitors and exactly that. But you were welcome... if a row erupted they might say 'Well you don't come from here you come from such and such a place.' Yeah that would be brought up. But I think people knew too that if they didn't come from here they didn't push their luck too much because they would be told quickly. No they are pretty territorial *Nungas* – even without realising. This is really their country in accordance with traditions. It was just an in-built natural thing I think – at p. 261.

Aside from these statements, however, I find there is little material before me specifically addressing a right held by the Narungga native title claim group to exclusive possession of the application area. While there is some reference to the interaction of the claimants' predecessors with other tribes, nothing in that material indicates that the Narungga at any stage were able to effectively control access to their country, by requiring that their permission be sought by those persons. In the same way, nothing in the material speaks to the ability of the claimants or their predecessors to exclude or impose sanctions upon unauthorised visitors to Narungga country.

The first of the two statements reproduced from the material above suggests the claimants assert ownership of the application area, however, in my view, the material does not give any further indication as to the content or substance of that right asserted, under Narungga traditional laws and customs. The latter statement, in my view, speaks only to relations between Narungga persons, and Narungga families, and is therefore of little relevance to my consideration regarding exclusive possession.

For these reasons, I do not consider that a right to exclusive possession is, prima facie, established.

Non-exclusive rights

- The right to access and move about the application area

There is a considerable amount of information within the factual basis, that in my view, speaks to a right of this nature. The following statements I consider to be examples of this material:

> We were fishers from a long time past – down at the bottom end of the Peninsula they'd make nets (I've never seen it done), and catch a load of fish. Then they'd send word along with signal fires, from one group to the other, all the same tribe, camped different places, all along, right up to

> Kadina and Wallaroo and all the places. They'd all come down and have a big corroboree (you call it) – probably stay four weeks, or four Moons, two Moons, something like that. And while they were there, they'd go through ceremonies. Tell stories, dance, sing, all that – [NAME REMOVED] at p. 100.

And also:

> I still take a lot of kids down – hunting and gathering and all that in the holidays... Camping... Around Point Pearce, down the 'bottom end' sometimes, top end, Cape Elizabeth, Innes [National Park] and all that... It's important. We go all around the place... – [NAME REMOVED] at p. 275.

In this way, throughout the fishing report, claimants speak in detail of various locations across the Yorke Peninsula (the application area), where they spent time as children with their parents and grandparents, camping, fishing and holidaying, places that they continue to visit.

Claimants also speak of the way in which their predecessors moved about the application area, whether by choice, such as to fish and gather, or by forced removal to Point Pearce Mission. It is my view that these statements clearly indicate that the right was one held by the claimants' predecessors, and that it is understood by the claimants that in accordance with Narungga laws and customs, the Narungga people have always enjoyed the exercise of this right. I note that the Narungga ancestors are accepted by claimants as being persons associated with the area at the time of European settlement – see Attachment F at [2.2].

In this way, it is my understanding that the right is asserted to be one held in accordance with Narungga traditional laws and customs, and, consequently, I consider that the right to access and move about the application area is, prima facie, established.

- The right to live, to camp and to erect shelters and other structures on the application area

There are numerous statements and stories told by the claimants of camping on country. This is asserted as being something that they did with their parents and grandparents growing up, and something that they continue to do, with their kids and grandkids. It is also asserted that claimants' predecessors built shacks at certain spots to facilitate camping at those locations, and that these dwellings have been passed onto younger generations for their use. These statements are examples of this material:

> That's where we used to go to swim most of the time. Some people would set up camps for the night... You didn't just camp in one spot – it was where the best swimming was and for getting the boats out [for fishing]. That's where basically camps were set up if people stayed over night – [NAME REMOVED] at p. 233.

And also:

> So the point of Point Pearce [Peninsula] is better known as Aunty [NAME REMOVED] 's shack! Aunty [NAME REMOVED] used to have a shack there but it is dilapidated now and has gone to ruin. But it is always known as Aunty [NAME REMOVED]'s... – [NAME REMOVED] at p. 265.

In addition to this, the material asserts that a large number of the claimants continue to live on the application area, the Narungga apical ancestors inhabited the application area, and similarly, the descendants of those apical persons continued to inhabit the area.

In light of the material of this nature, I consider that the right asserted is one held in accordance with the traditional laws and customs of the Narungga, and that it is, prima facie, established.

- The right to hunt and fish on the land and waters of the application area without the limitation of what purpose

As noted above, the State has drawn my attention to the decision of the Full Court of the Supreme Court of South Australia in *Dietman*, for the purposes of applying the conditions of the registration test to the application. The facts of that case involved two Narungga men found in possession of 24 undersized abalone, an offence pursuant to the *Fisheries Management Act 2007* (SA). At trial the men argued in their defence that they were exercising their native title rights to fish. The Magistrate dismissed the charges against the men.

In bringing an appeal against the Magistrate's decision, the State argued that 'any right that the Aboriginal group to which the defendants belonged had enjoyed in the past to take undersized abalone had been validly extinguished under State law' – at [13]. The Full Court allowed the appeal, finding that the relevant prohibitive provision in the preceding legislation (the Fisheries Act of 1971) had validly extinguished any native title right to fish that the Narungga people possessed prior to the enactment of that statute.

Since the decision was handed down in May 2012, I am aware that an appeal to the High Court has been made by the Narungga people, and is expected to be heard in June this year.

From the decision in *Dietman*, it is my understanding of the law as it currently stands, that the native title right to fish in South Australia has been validly extinguished. As per the task of the Registrar's delegate at s. 190B(6) set out in my reasons above, it is my view that my consideration of each of the native title rights and interests claimed against this condition of the test necessarily involves me turning my mind to the definition of 'native title rights and interests' at s. 223(1). Subsection (c) of that provision requires that a native title right or interest is one that is 'recognised by the common law of Australia'.

My understanding of the decision in *Dietman* is that the Full Court of the Supreme Court was conclusive in finding that *all* native title rights to fish, across the entirety of the lands and waters of the State of South Australia, were validly extinguished. As stated by Gray J:

> The substantive effect of the legislation [the *Fisheries Act 1971*] was to place all persons, including Aboriginal persons, under the regime of the statute and to treat all persons as subject to the rights and obligations set out in the statute. As a consequence, the native title right to fish was extinguished and was replaced by a statutory right available to all persons in the State – at [35].

It naturally follows from this statement of the law, therefore, that the right to fish claimed by the Narungga is not recognised by the common law, and therefore, that it is not a 'native title right or interest' that I can consider to be, prima facie, established for the purposes of s. 190B(6).

It is important to note, however, that the right to fish claimed at paragraph 2(c), is not stated in isolation, and that the right expressed conjointly encompasses the right to hunt on the land and waters of the application area. The facts in *Dietman* were confined to fishing rights only, and it is my understanding there is no controversy surrounding a native title right possessed by the Narungga people to *hunt* on the application area.

Regarding a right to hunt on the application area, it is my view that the material speaks to the existence of the right, pursuant to Narungga traditional laws and customs. The following statement is an example of this material:

> We used to go rabbiting – that was a big thing for the people. During the war they sent men over from Point Pearce – maybe ten or fifteen men with traps to help clean out the rabbits. Cause the first week dad went over – cause we lived there – the first week he got seventy-five dozen and he skinned them all. And you get a pound a dozen for the skins – so in them days seventy-five pound was big money. The next week he got sixty dozen. Most of them were all trappin' – and they got dogs. They used to go for the scalps, the rabbit scalps – they used to pay me a penny each for the scalps and a pound a dozen for the skin. Cause we lived there – I used to go rabbiting with them. We used to walk for miles! With the waddies too – no rifles, just waddies – at p. 277.

And also:

> So even going back to the 1940s and 1950s I know that a lot of fellas had their little way of getting their income. And they used to have their trapping routes, but their trapping routes for rabbits would range from Moonta right through to [Port] Rickaby. And on their little routes for rabbit traps they also had their spots if it was summertime where they'd pull up for harpooning or fishing... – at p. 278.

In addition to these statements by claimants, I note that there is certain archaeological information included in the fishing report suggesting that the indigenous occupants of the area, prior to sovereignty, caught and ate a variety of animals from the area – see for example fishing report at p. 197. Attachment F further provides that kangaroos or wallabies were speared or netted using a triangular sinew net – at [7.3.7]. In light of this information, it is my understanding that the material speaks to a right to hunt on the application area possessed by the Narungga people, and that this right is one that was exercised by the claimants' predecessors, including prior to sovereignty, and one that continues to be exercised by the claimants today. The way in which animals are hunted and cooked further indicates that the right is one held pursuant to Narungga traditional laws and customs. Consequently, it is my view that the material is of a nature that it allows me to consider that the right to hunt is, prima facie, established.

As stated above, it is only those rights and interests that the delegate considers can be, prima facie, established, that will appear in an entry on the Register of Native Title Claims (the Register) where the claim passes all of the conditions of the registration test. In forming the view that the right to hunt is, prima facie, established, I consider that it is appropriate that the right expressed at paragraph 2(c) appears in an entry for the claimant application on the Register. Importantly, however, I emphasise and acknowledge that consistent with the Full Court of the Supreme Court's finding in *Dietman*, the element of the right comprising the native title right to fish, is of no effect.

Having considered based on the material before me that the right to hunt is, prima facie, established, I consider it necessary that I also address the broad terms with which the right at paragraph 2(c) has been expressed, that is, 'without the limitation of what purpose'. An analysis of the case law reveals that the Court has been willing to recognise a right to hunt and/or fish only where the purpose specified for those associated activities is non-commercial – see for example *Ngadjon-Jii People v State of Queensland* [2007] FCA 1937 at paragraphs [3.2(ii)] and [4]; *Rubibi v State of Western Australia (No. 7)* [2006] FCA 459 at paragraph [5(c)] and [6(b)]; and *Trevor Close on behalf of the Githabul People v Minister for Lands NSW* [2007] FCA 1847 at paragraph [3(ii)]. In light of these authorities, therefore, I am of the view that on the face of it, it would appear that the right cannot be, prima facie, established.

Following the list of rights and interests claimed, however, Schedule E sets out certain qualifications, or limitations, in relation to those rights and interests. In particular, paragraph [3] of Schedule E provides that 'the rights described in paragraphs 2(b), (c), (d) and (e) are traditional rights exercised in order to satisfy personal, domestic, or communal needs'. The right to hunt and fish as stated above, appears within Schedule E at paragraph 2(c).

In *Doepel*, Mansfield J, in discussing the Registrar's task at s. 190B(4) as to whether the rights and interests claimed can be readily identified, held that it was open to the Registrar's delegate to 'read the contents of Schedule E together [including the stated qualifications], so that properly understood there was no inherent or explicit contradiction' in the Schedule – at [123]. Whilst the task at s. 190B(6) differs in some extent to that at s. 190B(4) (see discussion in *Doepel* at [126] and [127]), it is my view that these comments support an approach at s. 190B(6) where the qualifications following the rights and interests described are to be considered in conjunction with, and in operation with, each individual right or interest claimed, in understanding the nature and substance of that individual right or interest.

Noting that the qualification at paragraph [3] refers to paragraph 2(c), it is my understanding that the qualification operates specifically in relation to the right to fish and hunt and, therefore, that the purpose of that right claimed is only 'in order to satisfy personal, domestic or communal needs'. It is my view that needs that are 'personal, domestic or communal', can be understood as being non-commercial in nature. In reading the entire contents of Schedule E together, therefore, it is my view that the qualification limits the operation of the right claimed to being a non-commercial right.

In conclusion, therefore, noting and reiterating my view expressed above that as the law currently stands the right to fish claimed by the Narungga people is of no effect, I consider that a right to hunt and fish on the land and waters of the application area, without the limitation of what purpose, can be, prima facie, established.

- The right to gather and use the natural resources of the application area

There are numerous statements within the material pertaining to the claimants' and their predecessor's use of natural resources found on the application area. The following statements I consider to be examples of this material:

> Other bush foods we collected around the coast include: the gum off the gum trees, the sheoak fruit – granny would collect the fruit and boil it and drink the juice, *muntharies*, prickly pears, wild apples, the sweet root of the sour sob, shag and seagull eggs from Rocky Island – [NAME REMOVED] would take the kids out to Rocky Island to collect the eggs – at p. 290.

And also:

> Yeah there's a little island straight out from Port Victoria you know... They were good [shag] eggs – they had the yellow yoke and it was all jelly the other part was. He [NAME REMOVED] used to fetch them in by the box full... You know when they were plentiful – mmm – at p. 292.

In addition to this, I note that the material speaks of archaeological evidence gathered from sites across the application area, dated as far back as the 1400s, which indicates that the inhabitants of the application area extracted ochre, dug for freshwater, and consumed various marine species and other animals found on the application area. In light of this material, I consider that the indigenous inhabitants of the application area, being the Narungga people, have since prior to

sovereignty, gathered and used the natural resources of the application area. In my view, material of this nature consequently allows me to consider that the right asserted is one that has been held and exercised in accordance with the traditional laws and customs of those persons.

I consider, therefore, that the right to gather and use the natural resources of the application area is, prima facie, established.

- The right to share and exchange the subsistence and other traditional resources of the application area

One of the key aspects of Narungga traditional laws and customs asserted by the material surrounds the practice of sharing and giving away fish. The material includes reference to a historical source indicating that this practice was carried out by the Narungga at the time of European settlement and various statements by claimants show that this practice has been consistently maintained. The following statement is an example:

> The 1920's, 1930's Depression didn't mean anything to us. We never knew there was a Depression. We could go out and get rabbits, or go fishing, as kids. There might have been some days when we would go a bit short – got down to the bread and jam stage, but we never starved. And we always shared with each other. That's why we never starved. If anybody got more fish than they needed, they'd pass it on to somebody else. You'd never have to ask for it – at p. 162.

I note that the material similarly indicates that trading and sharing occurred between tribes, and was not restricted to being as between Narungga persons. The following statement, in my view, is an example of this material:

> ... when another tribe come down for a funeral – they give you notice and you have some fish ready – they bring some kangaroo – trading. It still happens you know... – [NAME REMOVED] at p. 272.

In addition to this, the material indicates that a certain location on the application area was known by claimants, through information passed down to them through the generations, as a specific trading place, and that the name of that place reflects the fact that the Narungga ancestors met there with other tribes for that purpose – see fishing report at p. 184.

It is my view, therefore, that the material is of a nature that allows me to consider that the right to share and exchange subsistence and traditional resources of the application area is, prima facie, established, and a right in accordance with Narungga traditional laws and customs.

- The right to use and take the natural water resources of the application area

The fishing report specifically addresses and explains the way in which claimants and their predecessors are aware of, and have continued to access, freshwater springs across the application area. The material similarly indicates that freshwater spots were considered significant by Narungga people, and subsequently, that those places were given particular Narungga names. Knowledge regarding where freshwater can be readily accessed is part of the cultural information passed down to claimants – see fishing report at p. 295.

The following statement is an example of the material addressing the existence of the right:

> ...[NAME REMOVED] and [NAME REMOVED] and [NAME REMOVED] – they used to live down Hollywood, because they used to camp down Hollywood. I think that land still belongs to them down Hollywood – I don't know what section it is, but it comes out near Reef Point. We used to

> call it Hollywood because all the blackfellas used to go there when they had the permit system and they lived down there and they used to live in tin huts and tents and they used to go about three or four feet away from the house – it might be ten feet from the house – they used to dig a well and they had their own water – freshwater – so they didn't have a problem with that – in the sandy area yeah and go right down to about seven foot or more than that I suppose – then you see the freshwater come up and they get the water out with an old bucket – tin bucket – and fill their kettle up and boil it on the bluebush wood – it tastes nice too! Billy tea – the smell of the smoke you know – because black fellas believe in smoke because smoke is something that is a spiritual thing to Aboriginal people – at p. 294.

In this way, I consider that the material indicates that both the claimants and their predecessors have possessed a right to access freshwater resources on the application area, and that information regarding such access forms part of the knowledge passed down through the generations in accordance with Narungga traditional law and custom. It therefore flows from this, that I consider the right to be, prima facie, established.

- The right to cook on the application area and to light fires for domestic purposes but not for the clearance of vegetation

As discussed above, there is considerable material going to the presence of the claimants and their predecessors on the application area, camping, fishing and living. In discussing the habits and practices engaged in by Narungga persons during these times, this material also contains numerous references to those persons cooking whilst on country, and for that purpose, lighting fires.

The following statement is an example of this material:

> ...Traditional way going back a hundred years or so was to cook butterfish was probably on the coals – not with mud like the Ngarrindjeri mud, not like their style... For me I still like to cook it in its own fat. I still like to cook it on the fire – in the Adelaide area if I'm allowed... Like Uncle [NAME REMOVED] he makes his own little smoking thing. So he probably would have smoked butterfish and tommys. That's a different method... – [NAME REMOVED] at p. 51.

It is my view that the material of this nature addresses the right as exercised by the claimants today, and also addresses the way in which the methods of cooking and using fire to prepare food have been passed down to the claimants by their predecessors, in accordance with Narungga traditional laws and customs. For this reason, I consider that the right is, prima facie, established.

- The right to engage and participate in cultural activities on the application area including those relating to births and deaths

The statement below, in my view, is an example of the material before me in support of the right claimed and, in particular, addresses the claimants' right to engage in cultural activities surrounding funerals and deaths.

> When somebody dies, nobody will move or do anything until that body is buried. Everybody loves everybody else more than ever at the time, you know? Big hearts, they've got. Everybody will go to a funeral. Everybody... For instance, if there's a funeral over at Port Lincoln, someone that we know, those who can go will jump in their cars and travel all night to get around there to that funeral. If it's over at Point McLeay, they'll do the same thing. If it's at Point Pearce, they'll travel there for a funeral... – [NAME REMOVED] at p. 272.

In addition to this, I note that there is also material addressing various other cultural activities which the claimants and their predecessors have engaged in on the lands and waters of the application area. For example, claimants speak to butterfishing competitions undertaken each year, and the way in which this tradition has been passed down to the claimants by their predecessors – see fishing report at pp. 60 to 62. Claimants also explain the way in which they take their grandchildren out for camping and fishing trips, to teach them various aspects of Narungga culture – see fishing report at pp. 179 to 182. This pattern of teaching is asserted as being in accordance with Narungga traditional laws and customs.

Having regard to the material of this nature, I consider that the right to engage and participate in cultural activities on the application area is, prima facie, established, and that it is a right held in accordance with Narungga traditional laws and customs.

- The right to conduct ceremonies and hold meetings on the application area

In light of the material provided in support of the rights and interests claimed, it is my view that there is little distinction to be made between the above right, to engage and participate in cultural activities on the application area, and the right subject of my consideration here.

Notwithstanding this, I consider the following statements within the material to provide prima facie support for a right to conduct ceremonies and hold meetings on the application area:

> We were fishers from a long time past – down at the bottom end of the Peninsula they'd make nets (I've never seen it done), and catch a load of fish. Then they'd send word along with signal fires, from one group to the other, all the same tribe, camped different places, all along, right up to Kadina and Wallaroo and all the places. They'd all come down and have a big corroboree (you call it) – probably stay four weeks, or four Moons, two Moons, something like that. And while they were there, they'd go through ceremonies. Tell stories, dance, sing, all that – at p. 100.

And also:

> We'll get to the traditions but one of the traditions that I'll mention here is – we should revive this as Narungga – is the ritual for boys to pass to manhood was to swim from the point of Point Pearce with a fire on your head in a fire nest – not as much of a fire but the embers. To keep the embers dry you wear a hat that looks like a nest and you breast-stroke out to Rocky [Island]. Our Elders used to do this as a tradition and I was always told this... It was always breast-stroke so that the balance of the embers on the head – wrapped in kangaroo skin in some sort of hat – would be safe – in low wind and low swell and particularly low tide. So if you could walk out to Rocky [Island], which generally you could, then you swim across a deep channel between Rocky [Island] and Wardang Island – that's a shark infested channel and that's where your manhood would be displayed – the ability to swim across a shark infested channel. Then you get onto the Wardang Island spit and then you walk along that right up to the northern aspects. The Wardang Island spit runs east of Wardang Island – from its northern tip back to Port Victoria and it's marked by channels now, but at low tide you can see it and you can still walk on it, but nobody has ever done that since the early 1800s – and I think that's a wonderful tradition for us to do. The tradition was that young boys have to do this ritual in full view – with our people in canoes and swimming alongside them – they would get across the channel and walk up the spit and they had to light a fire on Wardang Island. Then all of the Elders would sit around and they would feast, but the boy had to light the fire. There were many ceremonies that were done there between the boys and the men on Wardang [Island] – at p.199.

These statements, in my view, indicate that claimants understand their ancestors as having possessed a right to conduct ceremonies on the application area, and further statements from claimants involve them reciting their own experiences as children of times when ceremonies were being carried out by their elders. These stories, and the ceremonies referred to, are asserted as having being passed down to the claimants in accordance with Narungga traditional law and custom.

Consequently, I consider that the right is one held pursuant to the traditional laws and customs of the Narungga, and that it is, prima facie, established.

- The right to teach on the application area the physical and spiritual attributes of locations and sites within the application area

The fishing report provided as additional material by the applicant specifically addresses the way in which Narungga laws and customs have been passed down to the claimants in accordance with traditional patterns of teaching. Statements by claimants refer in detail to the time that they have spent on the application area being taught by their grandparents and elders regarding all aspects of Narungga culture. In the same way, claimants' statements speak to the importance they place on ensuring that this knowledge continues to be passed onto their grandchildren and the following generations.

The following statements, in my view, are examples of such material:

> I still go there [to the shack inherited from [NAME REMOVED] and take my grannies [grandchildren] down to pick pennywinkles and go butterfishing. I know it's supposed to be periwinkles, but we call them pennywinkles. I take my grandson over there [NAME REMOVED], he's fifteen, he comes out fishing with me a lot. Now he's taking me to the drops for fishing... – at p. 181.

And also:

> My grandfather told the story about when in the old days some people camped on a little island, Greeny [Green] Island. The old men would go over the [*sic*] Wardang Island, butterfishing. They'd swim across through the shallow water, and be back before the tide came in. One old lady this time was scared. She said, 'Don't go today, the shark might get you.' The man swam. He had a sore on his leg. He never came back – at p. 198.

This material, in my view, asserts that the pattern of teaching consistent with Narungga traditional laws and customs is one where Narungga persons, as children, have been passed knowledge of the habits and practices of their ancestors and predecessors at certain locations on the application area, and that this knowledge has been taught by their grandparents and elders, persons considered as having the requisite authority to pass on this information.

It flows from this, therefore, that I consider the right to teach on the application area the physical and spiritual attributes of locations and sites within the application area, prima facie, established.

- The right to visit, maintain and protect sites and places of cultural and religious significance to the native title holders

Having considered the material before me, I am of the view that it contains information that speaks to a right of this nature. The following statements are examples of this material:

> ...me and [NAME REMOVED] we was in Innes National Park for a ride one day. We went right around to where the massacres took place what the rangers said. I didn't know that at the time – anyway you can pick up all these things – the *gubba* we say... We went in there – I know spiritually that old people are there – I know that I can feel it – at p. 299.

And also:

> This space is supposed to be very important on the basis that it was one of Buthera's nets... parts of this net is interpreted as *Buthera*'s or *Madjitju's* – I'm not sure which – but it's a section part of the net... Yeah it's an escarpment – there's a similar place called Beatrice [Rock]... So both of them are significant for *Buthera* and *Ngarna* and *Madjitju*... The cave has also been said that it was a hiding spot for *Madjitju* the bat. Ngarna turns into *Madjitju* and *Madjitju* turns into *Ngarna*. At certain times – it's a complex story – at certain spots when people talk about Ngarna they are talking about *Madjitju*. And I'm clear in my cultural understanding that the cave on the Western side of Wardang Island is where *Madjitju* resides from time to time. Whether the actual bat lived there or not, but it was a site to be protected that was handed down to our community from men to boys. So I would say there that you can go down and get a feed of lobster and crayfish there because there's deep – but you had to swim from the beach – there's a beach and the headland... I've circumnavigated Wardang Island in a kayak and I've actually gone into that cave with snorkel and goggles and everything that our elders describe it as is exactly... – at p. 195.

Both of these statements refer to places which the claimants understand as having particular significance or importance for the Narungga, in accordance with either their Dreaming stories, or certain events involving their ancestors. Due to the spiritual associations of the claimants with these places, it is my understanding of the material that they continue to visit these places, and seek to protect them from harm or desecration by visitors. The importance of these locations appears to be something that has been passed down to the claimants today through a number of generations of their predecessors, and in this way, the knowledge of these places and the right to protect them, I understand to be asserted as in accordance with Narungga traditional laws and customs.

For this reason, having regard to the information of this nature, I consider that the right to visit, maintain and protect sites and places of cultural and religious significance to the native title holders is, prima facie, established.

- The right to be accompanied on the application area by people other than native title holders

The material before me, I am of the view, indicates that at various stages throughout history, including back to European settlement of the area, the Narungga people have allowed persons other than Narungga persons, to accompany them on the application area. Examples of this include information pertaining to the apical ancestors, which provides that certain apical ancestors and their descendants married persons of other non-indigenous backgrounds (such as the 'full-blooded Narungga woman of the Wallaroo area' who married Chinese man Charlie Angie).

In addition to this, one claimant interviewed within the fishing report expressly commented that she was a Ngarrindjeri woman who had moved to Point Pearce as a teenager and who later married a Point Pearce (Narungga) man – fishing report at p. 29.

There is also information within the fishing report suggesting that at various times, due to certain historical events or government policies, indigenous persons of other tribes were moved to the

application area, such as to the Point Pearce Mission. Historical and geneaological information included within the report provides that many families were moved to Point Pearce, including Poonindie People, and people from the Murray areas of South Australia. Consequently, the information provides that these families with long-term historic links to Point Pearce are now accepted as persons who claim tribal affiliations with the Narrungga – fishing report at p. 28.

Information within the fishing report also speaks to other tribes coming onto Narungga country for the purpose of funerals, trading, and other meetings – fishing report at pp. 184, 272 to 273.

Further to this, statements made by claimants indicate that they have been accompanied on the application area at various times by rangers, archaeologists and other researchers, for the purposes of surveys and conservation activities – see fishing report at pp. 218 to 219, 299.

In light of this information, I consider that the right to be accompanied onto the application area by persons other than the native title holders is, prima facie, established, and that the material asserts this to be a right held in accordance with the traditional laws and customs of the Narungga, being a right possessed by the claimants' ancestors, and their descendants.

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).

It is my view of the task at s. 190B(7) that the use of the word 'traditional' can be understood as it was defined by the High Court in the case of *Yorta Yorta*. In that way, I consider that the factual basis must speak to at least one claim group member having a connection with the application area that is in accordance with the traditional laws and customs of the Narungga society at sovereignty – see *Yorta Yorta* at [46] and [79]. This approach to this condition of the registration test appears to be supported by Dowsett J in *Gudjala 2007* – at [89].

Regarding what amounts to a 'traditional physical connection', the explanatory memorandum to the Native Title Amendment Bill 1997 explained 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]. The High Court in *Yorta Yorta* commented that a traditional physical connection 'strongly suggests the need for an actual presence on land' – at [184].

In discussing the task of the Registrar's delegate at s. 190B(7) Mansfield J, in *Doepel*, held the following:

> Section 190B(7) imposes a different task upon the Registrar. It does require the Registrar to be satisfied of a particular fact or particular facts. It therefore requires evidentiary material to be presented to the Registrar. The focus is, however, a confined one. It is not the same focus as that of the Court when it comes to hear and determine the application for determination of native title rights and interests. The focus is upon the relationship of at least one member of the native title claim group with some part of the claim area. It can be seen, as with s. 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration – at [18].

I consider, therefore, that the application must contain material that specifically addresses the traditional physical connection described in s. 190B(7). In my view, Mansfield J's comments above also confirm that it is not my role to be satisfied regarding whether the asserted traditional laws and customs in fact exist, or that by those laws and customs the group have the requisite connection referred to in s. 223(1)(b).

Noting the requirement at s. 190B(7) that 'at least one member' of the native title claim group currently has or previously had, a traditional physical connection, I have considered that it is appropriate to focus my attention on the factual basis material pertaining to one particular member of the claim group, namely [NAME REMOVED].

The fishing report includes a considerable number of statements by [NAME REMOVED], in which he expresses his thorough and detailed knowledge of the application area, and the way in which he and his predecessors, in accordance with Narungga traditional laws and customs, have engaged with and related to the land and waters of the area in their everyday lives.

While the material does not contain any personal information regarding [NAME REMOVED], I note that Attachment A states that the [NAME REMOVED] family is one of the key Narungga families associated with the apical ancestors King Tommy and the 'full-blooded Narungga woman of the Wallaroo area' (at [2.3] and [3.5]), and Attachment F states that the [NAME REMOVED] family is considered to be a Narungga family with long-term historic links to Point Pearce and the Yorke Peninsula (at [3.5]). Additionally, [NAME REMOVED] was chosen as an appropriate person to be interviewed for the fishing report, and to accompany the author of the report on an excursion to various parts of the application area, in order to share his knowledge regarding Narungga fishing culture and practices – see fishing report at pp. 24 and 26. On this basis, I am satisfied that [NAME REMOVED] is a member of the native title claim group.

The following statement I consider to speak to the current physical connection [NAME REMOVED] shares with a particular location within the application area:

> I still go there [to the shack inherited from [NAME REMOVED]] and take my grannies [grandchildren] down to pick pennywinkles and go butterfishing. I know it's supposed to be periwinkles, but we call them pennywinkles. I take my grandson over there [NAME REMOVED], he's fifteen, he comes out fishing with me a lot. Now he's taking me to the drops for fishing... Last night he asked me 'Papa, I'm thinking about the drop out from the jetty over Wardang [Island] – what do you call it?' I go over weekends – I was laying in bed one morning and got up and looked around for him and couldn't see him, he was out on the reef himself with the harpoon... – fishing report at p. 181.

From this statement, I understand that [NAME REMOVED] continues to visit and spend time on the application area at regular intervals. I have set out above, in my reasons at s. 190B(5)(b), the way in which I considered the factual basis material to support an assertion regarding the pattern

of teaching younger generations and one's grandchildren whilst on country as forming a key aspect of Narungga traditional laws and customs. In my view, therefore, the above statement demonstrates that [NAME REMOVED] continues to acknowledge and observe this aspect of Narungga law and custom, in the same way that his predecessors did.

Subsequently, the following statement below points to the way in which [NAME REMOVED] has been passed the knowledge of Narungga traditional laws and customs by his predecessors as a young person.

> No – I won't swim I told you that! People like King Tommy have swum – and they said that people used to swim from Greenie [Green Island] too! But that's all deep water right across... I heard them [the stories] once in an old yarn somewhere – from someone when I was younger. But this one [the King Tommy story] – you can read this one *anna* – and you haven't got far to swim. But on top of that I heard he [King Tommy] carried a firestick in his hair too – lit all the way. It's documented – you can read about it... – at p. 199.

The matters that he speaks to indicates that this knowledge has been passed down through a number of generations, dating back to the time of the Narungga apical ancestors, discussed in my reasons above at s. 190B(5), as being roughly the time of European settlement in the area. Similarly, I note that the above statement refers to a certain initiation practice discussed elsewhere in the fishing report as being carried out prior to the 1800s by the claimants' predecessors in accordance with their laws and customs – see fishing report at p. 199.

In addition to this, the fishing report includes an assertion by [NAME REMOVED] that he was about 12 years old when his father first took him out in the boat to fish for whiting at the 'Moonta Hole' – at p. 179.

[NAME REMOVED]'s knowledge and understanding of the application area is further shown to be in accordance with Narungga traditional laws and customs, in my view, in the statements regarding the Dreamtime stories associated with the application area and its formation. [NAME REMOVED] speaks to a certain location on the application area in the following way:

> *Buthera*'s Rock – you see a big rock sticking out of the water there. It was supposed to be a waddy that was thrown from here, from *Guggathie*. It went over and over and over and the tail fell off here by Redbank – you can see some of the rocks there, nothing anywhere else. It's called Redbank because it looks red I guess. The tail of the waddy fell off there – at p. 200.

It is my understanding of the material pertaining to the Dreamtime stories of the application area, that claimants see these stories as underpinning the Narungga way of life and Narungga culture – see fishing report at p. 35. The material also indicates that claimants believe their ancestors to have played an active role in these stories and in the creation of the landscape of the application area – see fishing report, statement at p. 299.

In light of the information of this nature before me, therefore, I am satisfied that at least one member of the native title claim group currently has, or previously had, a traditional physical connection with the land and waters of the application area. In my view, it is clear that [NAME REMOVED] currently has a physical connection with the claim area amounting to an actual physical presence on the land, noting that he continues to visit various locations on the claim area at regular intervals. In the same way, I consider that [NAME REMOVED] previously had this physical connection, indicated in statements about the way in which he was taught Narungga laws and customs pertaining to the claim area whilst on country as a child.

I am also satisfied that the connection held by [NAME REMOVED] with the area is traditional in nature. I consider that this is evidenced in the way [NAME REMOVED] continues to acknowledge and observe traditional laws and customs surrounding the passing on of knowledge to younger generations whilst on country, and in the way [NAME REMOVED]'s understanding of the application area is underpinned by a spiritual knowledge of the Dreamings associated with his country, including the presence of his ancestors within that country.

For these reasons, I am satisfied that the application meets the requirements of s. 190B(7).

Subsection 190B(8)
No failure to comply with s. 61A

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s.61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

Section 61A provides:

(1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.

(2) If :

(a) a previous exclusive possession act (see s. 23B) was done, 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 provisions 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, 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 provisions 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 confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.

(4) However, subsection(2) and (3) does not apply if:

(a) the only previous non-exclusive possession act 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 ss. 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).

The geospatial assessment prepared by the Tribunal's Geospatial Services division provides that there are no determinations of native title falling within the external boundary of 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, unless the circumstances described in subparagraph (4) apply.

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

Schedule B of the application contains a number of general exclusion clauses, that is, areas falling within the external boundary of the application area that are not covered by the application. Paragraph a) of Schedule B provides that the application area does not include any area subject to a previous exclusive possession act.

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 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).

A description of the native title rights and interests claimed by the native title claim group appears at Schedule E. Paragraph [1] of Schedule E specifies that it is only over those areas where a claim to exclusive possession can be recognised that such a claim is made, that is, over areas where there has been no prior extinguishment of native title.

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 of the application provides that the native title claim group does not claim ownership of any 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 of the application provides that the native title claim group does not claim exclusive possession over all or part of the waters in an offshore place within the application area.

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

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

There is nothing within the information before me which indicates that the native title rights and interests claimed have been otherwise extinguished.

[*End of reasons*]

Attachment A
Summary of registration test result

Application name	**Narungga Nation**
NNTT file no.	**SC2013/002**
Federal Court of Australia file no.	**SAD62/2013**
Date of registration test decision	**6 May 2013**

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**
		s. 62(2)(ga)	**Met**

Test condition	Subcondition/requirement		Result
		s. 62(2)(h)	Met
s. 190C(3)			Met
s. 190C(4)			Overall result: Met
	s. 190C(4)(a)		Met
	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
	re ss. 61A(2) and (4)	Met

Test condition	Subcondition/requirement	Result
	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*]